

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant - Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOINT APPENDIX

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APPEAL,CLOSED,TYPE I-FOIA

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:17-cv-00432-TNM**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN
WASHINGTON v. UNITED STATES DEPARTMENT OF
JUSTICE

Assigned to: Judge Trevor N. McFadden
Case in other court: 18-05116
Cause: 05:552 Freedom of Information Act

Date Filed: 03/10/2017

Date Terminated: 03/27/2018

Jury Demand: None

Nature of Suit: 895 Freedom of Information
Act

Jurisdiction: U.S. Government Defendant

Plaintiff

**CITIZENS FOR RESPONSIBILITY
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Date Filed	#	Docket Text
03/10/2017	<u>1</u>	COMPLAINT against UNITED STATES DEPARTMENT OF JUSTICE (Filing fee \$ 400 receipt number 0090-4872127) filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summons to AG, # <u>3</u> Summons to DOJ, # <u>4</u> Summons to USAO, # <u>5</u> Notice to Counsel/Party)(McPhail, Stuart) (Entered: 03/10/2017)
03/10/2017	<u>2</u>	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (McPhail, Stuart) (Entered: 03/10/2017)
03/10/2017		Case Assigned to Judge James E. Boasberg. (sth) (Entered: 03/13/2017)
03/13/2017	<u>3</u>	SUMMONS (3) Issued Electronically as to UNITED STATES DEPARTMENT OF JUSTICE, U.S. Attorney and U.S. Attorney General (Attachments: # <u>1</u> Summons, # <u>2</u> Summons, # <u>3</u> Summons)(sth) (Entered: 03/13/2017)
04/24/2017	<u>4</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 3/24/2015. Answer due for ALL FEDERAL DEFENDANTS by 4/23/2015. (Attachments: # <u>1</u> Exhibit postage receipts)(Weismann, Anne) (Entered: 04/24/2017)
04/24/2017	<u>5</u>	NOTICE of Appearance by Andrew Marshall Bernie on behalf of UNITED STATES DEPARTMENT OF JUSTICE (Bernie, Andrew) (Entered: 04/24/2017)
04/24/2017	<u>6</u>	Consent MOTION for Extension of Time to File Answer re <u>1</u> Complaint, <i>or Otherwise Respond to the Complaint</i> by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <u>1</u> Text of Proposed Order)(Bernie, Andrew) (Entered: 04/24/2017)
04/24/2017		MINUTE ORDER granting <u>6</u> Consent Motion for Extension of Time to File. The Court ORDERS that Defendant shall answer or otherwise respond to the Complaint by May 3, 2017. Signed by Judge James E. Boasberg on 4/24/2017. (lcjeb3) (Entered: 04/24/2017)
04/24/2017		Set/Reset Deadlines: Response due by 5/3/2017. (nbn) (Entered: 04/24/2017)
04/24/2017	<u>7</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 3/24/17., RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF JUSTICE served on 3/24/2017. (See Docket Entry <u>4</u> to view document). (znmw) (Entered: 04/25/2017)
05/03/2017	<u>8</u>	MOTION to Dismiss by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Exhibit 1, # <u>3</u> Exhibit 2, # <u>4</u> Text of Proposed Order) (Bernie, Andrew) (Entered: 05/03/2017)
05/05/2017	<u>9</u>	Consent MOTION for Extension of Time to File Response/Reply as to <u>8</u> MOTION to Dismiss by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (McPhail, Stuart) (Entered: 05/05/2017)
05/05/2017		MINUTE ORDER granting <u>9</u> Consent Motion for Extension of Time to File. The Court ORDERS that (1) Plaintiff's opposition to the Motion to Dismiss, if any, shall be filed on or before June 19, 2017; and (2) Defendant's reply in support of the Motion to Dismiss, if any, shall be filed on or before July 17, 2017. Signed by Judge James E. Boasberg on 5/5/2017. (lcjeb3) (Entered: 05/05/2017)
05/05/2017		Set/Reset Deadlines: Opposition due by 6/19/2017. Reply due by 7/17/2017. (nbn) (Entered: 05/08/2017)

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05/16/2017	<u>10</u>	NOTICE of Appearance by Anne L. Weismann on behalf of CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Weismann, Anne) (Entered: 05/16/2017)
06/01/2017	<u>11</u>	ENTERED IN ERROR.....MOTION for Preliminary Injunction by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Exhibit A-C, # <u>3</u> Text of Proposed Order)(Weismann, Anne) Modified on 6/1/2017 (jf). (Entered: 06/01/2017)
06/01/2017		NOTICE OF CORRECTED DOCKET ENTRY: Document No. re <u>11</u> MOTION for Preliminary Injunction was entered in error at the request of counsel and will be re-captioned with the correct case number.(jf) (Entered: 06/01/2017)
06/19/2017	<u>12</u>	Memorandum in opposition to re <u>8</u> MOTION to Dismiss filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (Attachments: # <u>1</u> Exhibit A and B, # <u>2</u> Text of Proposed Order)(Weismann, Anne) (Entered: 06/19/2017)
07/11/2017	<u>13</u>	Consent MOTION for Extension of Time to File Response/Reply as to <u>8</u> MOTION to Dismiss by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <u>1</u> Text of Proposed Order)(Bernie, Andrew) (Entered: 07/11/2017)
07/11/2017		MINUTE ORDER granting <u>13</u> Consent Motion for Extension of Time to File. The Court ORDERS that Defendant shall file its Reply on or before July 26, 2017. Signed by Judge James E. Boasberg on 7/11/2017. (lcjeb3) (Entered: 07/11/2017)
07/11/2017		Set/Reset Deadlines: Replies due by 7/26/2017. (znbn) (Entered: 07/11/2017)
07/26/2017	<u>14</u>	REPLY to opposition to motion re <u>8</u> MOTION to Dismiss filed by UNITED STATES DEPARTMENT OF JUSTICE. (Bernie, Andrew) (Entered: 07/26/2017)
08/07/2017	<u>15</u>	MOTION for Leave to File <i>Sur-Reply</i> by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Text of Proposed Order) (Weismann, Anne) (Entered: 08/07/2017)
08/17/2017	<u>16</u>	Memorandum in opposition to re <u>15</u> MOTION for Leave to File <i>Sur-Reply</i> filed by UNITED STATES DEPARTMENT OF JUSTICE. (Attachments: # <u>1</u> Text of Proposed Order)(Bernie, Andrew) (Entered: 08/17/2017)
08/17/2017	<u>17</u>	REPLY to opposition to motion re <u>15</u> MOTION for Leave to File <i>Sur-Reply</i> filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (Weismann, Anne) (Entered: 08/17/2017)
08/25/2017		MINUTE ORDER: The Court ORDERS that Plaintiff's <u>15</u> Motion for Leave to File <i>Sur-Reply</i> is GRANTED. The <i>Sur-Reply</i> is hereby deemed FILED. Signed by Judge James E. Boasberg on 8/25/2017. (lcjeb3) (Entered: 08/25/2017)
08/28/2017	<u>18</u>	SURREPLY to re <u>8</u> MOTION to Dismiss filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (znmw) (Entered: 08/28/2017)
10/12/2017	<u>19</u>	NOTICE OF SUPPLEMENTAL AUTHORITY by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <u>1</u> Exhibit)(Bernie, Andrew) (Entered: 10/12/2017)
10/13/2017	<u>20</u>	RESPONSE re <u>19</u> NOTICE OF SUPPLEMENTAL AUTHORITY filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (Weismann, Anne) (Entered: 10/13/2017)
10/31/2017	<u>21</u>	Supplemental RESPONSE by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON re <u>20</u> Response to Document, <u>19</u> NOTICE OF SUPPLEMENTAL AUTHORITY (Weismann, Anne) Modified event title on 11/1/2017 (znmw). (Entered: 10/31/2017)

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11/02/2017		Case directly reassigned to Judge Trevor N. McFadden. Judge James E. Boasberg is no longer assigned to the case. (ztnr) (Entered: 11/02/2017)
02/02/2018		MINUTE ORDER. In light of the <u>19</u> Notice of Supplemental Authority filed by the Defendant, and the <u>20</u> Response and <u>21</u> Supplemental Response filed by the Plaintiff, the parties are hereby ORDERED to file a statement of the parties' views regarding whether this case is related to case no. 1:16-cv-01068-KBJ under the terms of Local Civil Rule 40.5. This filing may be made jointly or separately, but each party must make its views clear no later than February 16, 2018. SO ORDERED. Signed by Judge Trevor N. McFadden on 2/2/2018. (lctnm2) (Entered: 02/02/2018)
02/05/2018		Set/Reset Deadlines: Parties' statements due by 2/16/2018. (hmc) (Entered: 02/05/2018)
02/09/2018	<u>22</u>	NOTICE <i>as to Whether This Case is Related to Campaign for Accountability v. Dep't of Justice</i> by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON re Order,, (Weismann, Anne) (Entered: 02/09/2018)
02/16/2018	<u>23</u>	NOTICE <i>NOTICE as to Whether This Case is Related to Campaign for Accountability v. Dep't of Justice</i> by UNITED STATES DEPARTMENT OF JUSTICE (Bernie, Andrew) (Entered: 02/16/2018)
02/28/2018	<u>24</u>	MEMORANDUM OPINION re the Defendant's <u>8</u> Motion to Dismiss. Signed by Judge Trevor N. McFadden on 2/28/2018. (lctnm2) (Entered: 02/28/2018)
02/28/2018	<u>25</u>	ORDER. For the reasons stated in the <u>24</u> Memorandum Opinion, the Defendant's <u>8</u> Motion to Dismiss is GRANTED, and the Plaintiff's request for limited discovery is DENIED. If the Plaintiff wishes to file an amended complaint, it must do so on or before March 30, 2018. If the Plaintiff does not file an amended complaint on or before March 30, 2018, then on that date the case will stand dismissed without further order. SO ORDERED. Signed by Judge Trevor N. McFadden on 2/28/2018. (lctnm2) (Entered: 02/28/2018)
02/28/2018		Set/Reset Deadlines: Plaintiff's amended complaint due by 3/30/2018. (hmc) (Entered: 02/28/2018)
03/26/2018	<u>26</u>	MOTION for Judgment by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Attachments: # <u>1</u> Text of Proposed Order)(Weismann, Anne) (Entered: 03/26/2018)
03/27/2018	<u>27</u>	ORDER granting the Plaintiff's <u>26</u> Motion for Judgment. This case is DISMISSED for the reasons stated in the <u>24</u> Memorandum Opinion. See the attached Order for details. This is a final, appealable order. Signed by Judge Trevor N. McFadden on 3/27/2018. (lctnm2) (Entered: 03/27/2018)
04/19/2018	<u>28</u>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <u>27</u> Order on Motion for Judgment, by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. Filing fee \$ 505, receipt number 0090-5430876. Fee Status: Fee Paid. Parties have been notified. (Weismann, Anne) (Entered: 04/19/2018)
04/20/2018	<u>29</u>	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date 4/19/18 re <u>28</u> Notice of Appeal to DC Circuit Court,. (td) (Entered: 04/20/2018)
04/24/2018		USCA Case Number 18-5116 for <u>28</u> Notice of Appeal to DC Circuit Court filed by CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON. (zvt) (Entered: 04/24/2018)

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

CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)
455 Massachusetts Ave., N.W., Sixth Floor)
Washington, D.C. 20001)

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)
950 Pennsylvania Ave., N.W.)
Washington, D.C. 20530)

Defendant.)

Civil Action No.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”) challenging the failure of the U.S. Department of Justice (“DOJ”) to comply with its mandatory, non-discretionary duty under the FOIA’s “reading room provision,” 5 U.S.C. § 552(a)(2), to make available to the plaintiff on an ongoing basis formal written opinions issued by DOJ’s Office of Legal Counsel (“OLC”) and indices of such opinions.

2. OLC’s core function, as it has acknowledged in an internal memorandum delineating OLC best practices, is to provide controlling legal interpretations to executive branch officials on questions of law that are centrally important to the functioning of the federal government. As such, these interpretations fit squarely within the categories covered by the FOIA’s reading room provision. Nevertheless, OLC has refused to produce to the plaintiff its formal written opinions setting forth controlling legal interpretations and indices it maintains of those opinions.

JURISDICTION AND VENUE

3. The Court has personal and subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202.

4. Venue lies in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

5. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) is a non-profit, non-partisan corporation organized under § 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the actions of government officials, determining for the public what the executive branch considers to be binding law, ensuring the integrity of government officials and their actions, and protecting our democracy from corruption and deceit.

6. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about government officials and their actions. As part of its research, CREW uses government records agencies make publicly available for inspection and copying.

7. CREW repeatedly and unsuccessfully has sought access to OLC opinions through individual FOIA requests for specific categories of OLC opinions and broader requests for all formal written opinions and indices of those opinions.

8. The refusal of DOJ and OLC to comply with their statutory obligations to provide CREW with OLC formal written opinions and an index of such opinions on an ongoing basis has harmed, and continues to harm, CREW in carrying out its core programmatic activities. CREW has suffered an informational injury by being deprived of information to which it is lawfully entitled.

9. Defendant DOJ is an agency within the meaning of 5 U.S.C. § 551. DOJ and its component OLC have possession and control of formal written opinions issued by OLC and indices of those opinions and are responsible for making those records available to CREW.

BACKGROUND

Statutory Background

10. Section 552(a)(2) of Title 5, enacted in 1946, is known as the “reading room” requirement of the FOIA. It imposes a number of independent, affirmative obligations on all executive branch agencies, including the obligation to “make available for public inspection and copying” designated categories of records. Those categories include, *inter alia*,

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those 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)(2)(A) and (B).

11. Section 552(a)(2)(E) of the FOIA imposes on agencies an additional requirement to make publicly available:

current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and requested by this paragraph [which includes the reading room requirements] to be made available or published.

12. As recently confirmed by the D.C. Circuit in *CREW v. Dep’t of Justice*, 2017 U.S. App. LEXIS 1690 (D.C. Cir. Jan. 31, 2017), the FOIA’s remedial provision, 5 U.S.C. § 552(a)(4)(B), which empowers courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,” governs actions like this one brought to enforce the FOIA’s reading room provision. A plaintiff

may sue under the FOIA to enforce its reading room requirements without first requesting specific records under § 552(a)(3) of the FOIA. *Id.*

Office of Legal Counsel

13. OLC has for decades “‘been the most significant centralized source of legal advice within the Executive Branch.’” *CREW v. Dep’t of Justice, supra*, at *1-2 (quoting Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1451 (2010)). OLC’s authority to render its definitive legal views dates back to the Judiciary Act of 1789, which charged the attorney general with, *inter alia*,

giv[ing] his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.

Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

14. In its current form the Judiciary Act directs the attorney general to render opinions when requested by heads of executive departments “on questions of law arising in the administration of his department.” 28 U.S.C. § 512. Pursuant to 28 U.S.C. § 510, the attorney general has delegated this responsibility to OLC.

15. By executive order the president has directed agency heads to submit inter-agency disputes to the attorney general “[w]henever two or more Executive agencies are unable to resolve a legal dispute between them[.]” Exec. Order No. 12,146, § 1-501, 3 C.F.R. § 409 (1979), reprinted as amended in 28 U.S.C. § 509 (1988).

16. Over the years various DOJ components have exercised this authority. In 1933, the Independent Offices Appropriations Act, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307 (June 16, 1933), created within DOJ a new office of the assistant solicitor general to which was delegated the responsibility of drafting legal opinions and providing legal advice to other executive branch

agencies. The Reorganization Plan No. 2 of 1950, 64 Stat. 1261, abolished this office and replaced it with the Executive Adjudications Division. In 1953, the attorney general renamed this office as the Office of Legal Counsel. Att’y Gen. Order No. 9-53 (Apr. 3, 1953).

17. Current DOJ regulations define OLC’s functions as including the preparation of “the formal opinions of the Attorney General,” 28 C.F.R. § 0.25(a), 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.” *Id.*, at § 0.25(c).

18. OLC also has described its “core function” as “provid[ing] controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.” Memorandum from then-Acting Assistant Attorney General David J. Barron to OLC Attorneys, “Best Practices for OLC Legal Advice and written Opinions,” July 16, 2010 (“Best Practices Memo”). Further, the opinions OLC renders in furtherance of this core function “may effectively be the final word on controlling law.” *Id.*

19. DOJ’s own website confirms OLC’s role as providing “authoritative advice to the President and all the Executive Branch agencies.” <https://www.justice.gov/olc>. Former OLC head Karl R. Thompson publicly characterized OLC’s advice – both written and oral – as “authoritative” and “binding by custom and practice in the executive branch. It’s the official view of the office. People are supposed to and do follow it.”

20. Similarly, records schedules DOJ submits to the National Archives and Records Administration describe OLC’s controlling legal advice as including, *inter alia*, “formal legal opinions” OLC issues to the president, federal agencies and executive departments, and heads of DOJ components.

21. Over the years, executive branch officials have sought “OLC’s opinion on some of the weightiest matters in our public life: from the president’s authority to direct the use of military force without congressional approval, to the standards governing military interrogation of ‘alien unlawful combatants,’ to the president’s power to institute a blockade of Cuba.” *CREW v. Dep’t of Justice*, 2017 U.S. App. LEXIS 1690, at *2 (citations omitted). The opinions OLC issues have profound effects on members of the public by determining the lawfulness of a range of conduct. Moreover, they confer the functional equivalent of immunity from criminal prosecution as DOJ generally does not prosecute individuals who acted in reliance on OLC opinions, even if their actions are later believed or determined to be illegal.

22. On February 3, 2017, following the January 31, 2017 opinion of the D.C. Circuit in *CREW v. Dep’t of Justice*, Anne Weismann, chief FOIA counsel for plaintiff CREW, sent a letter to Acting Assistant Attorney General Curtis E. Gannon. Her letter renewed CREW’s request of July 3, 2013, for all OLC formal written opinions and indices of those opinions.

23. To date, OLC has not responded to this request.

24. OLC’s ongoing refusal to comply with its non-discretionary obligations under 5 U.S.C. § 552(a) has deprived the public and CREW of valuable information and resulted in the creation of a body of authoritative controlling secret law.

PLAINTIFF’S CLAIMS FOR RELIEF

COUNT ONE

25. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

26. Section 552(a)(2) of Title 5 requires all agencies, including DOJ and its component OLC, to make publicly available on an ongoing basis all final opinions made in the adjudication

of cases and statements of policy and interpretations that have been adopted by the agency and not published in the Federal Register.

27. OLC's formal written opinions, described in the Best Practice Memo, fall within the categories of records that 5 U.S.C. § 552(a)(2) requires be made publicly and prospectively available without the need to file a specific request under § 552(a)(3).

28. Notwithstanding the clear, non-discretionary mandate set forth in 5 U.S.C. § 552(a)(2), which requires DOJ to act regardless of whether there has been a request for specific OLC formal written opinions, DOJ has for years refused to make the full complement of its formal written opinions available to either CREW or the public.

29. As a result, CREW and the public have been deprived of information to which the FOIA guarantees them a right of access. This has led to the creation of secret law within OLC and DOJ, the precise danger Congress sought to avoid through the enactment of 5 U.S.C. § 552(a)(2).

30. Plaintiff therefore is entitled to relief in the form of a declaratory judgment that defendant has failed to comply with the ongoing disclosure obligations of 5 U.S.C. § 552(a)(2).

31. Plaintiff also is entitled to an injunction directing DOJ and its component, OLC, to comply with the disclosure obligations mandated by 5 U.S.C. § 552(a)(2) by making available to CREW on an ongoing basis, and without any further requests, all formal written opinions OLC has created and will create in the future.

COUNT TWO

32. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully set forth herein.

33. Section 552(a)(2)(E) of Title 5 imposes on agencies, including DOJ and its component, OLC, the additional requirement to make publicly available current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and requested by this paragraph, which includes the reading room requirements, to be made available on an ongoing basis or published.

34. Notwithstanding the clear, non-discretionary mandate set forth in 5 U.S.C. § 552(a)(2)(E), which requires DOJ to act regardless of whether there has been a specific request for an index, DOJ has failed for years to make available for public inspection and copying or to individual requesters indices of all of its formal written opinions.

35. As a result, CREW and the public have been deprived of information to which the FOIA guarantees them a right to access. This has deprived CREW and the public of information that would facilitate requests for OLC opinions of particular interest.

36. Plaintiff therefore is entitled to relief in the form of a declaratory judgment that defendant has failed to comply with the indexing and disclosure obligations of 5 U.S.C. § 552(a)(2)(E).

37. Plaintiff also is entitled to an injunction directing DOJ and its component, OLC, to comply with 5 U.S.C. § 552(a)(2)(E) by making available to plaintiff on an ongoing basis all past and future indices of all formal written opinions.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court:

(1) Declare that defendant has failed to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2) by refusing to make available for public inspection and copying formal written opinions issued by OLC;

(2) Order defendant to make available to CREW for public inspection and copying on an ongoing basis all existing and future OLC formal written opinions;

(3) Declare that defendant has failed to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2) by refusing to make available for public inspection and copying indices of formal written opinions issued by OLC;

(4) Order defendant to make available to CREW for public inspection and copying on an ongoing basis all existing and future indices of OLC formal written opinions;

(5) Grant plaintiff its attorneys' fees and costs; and

(6) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Anne L. Weismann
(D.C. Bar No. 298190)
Adam J. Rappaport
(D.C. Bar No. 479866)
Stuart C. McPhail
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Citizens for Responsibility and
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Dated: March 10, 2017

Counsel for Plaintiff

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CREW

**citizens for responsibility
and ethics in washington**

February 3, 2017

By Facsimile: (202) 514-0563

Curtis E. Gannon
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Gannon:

Citizens for Responsibility and Ethics in Washington ("CREW") hereby requests that the Office of Legal Counsel ("OLC") comply immediately with its obligations under 5 U.S.C. § 552(a)(2) by providing CREW with copies of all formal written opinions issued by OLC, all additional formal written opinions formalized in the future, and all existing indices of OLC's formal written opinions.

As you know, CREW submitted a prior request for these and any additional OLC binding opinions on July 3, 2013. For your convenience I have enclosed a copy of that letter. When OLC refused to comply with CREW's request, CREW filed a lawsuit that was litigated through the U.S. Court of Appeals for the D.C. Circuit. On January 31, 2017, the D.C. Circuit found that the district court properly had dismissed CREW's complaint for lack of jurisdiction. Of significance here, the D.C. Circuit held that the Freedom of Information Act ("FOIA"), not the Administrative Procedure Act – the statute under which CREW had sued – "is the proper vehicle for CREW's claim." *CREW v. U.S. Dep't of Justice*, No. 16-5110, 2017 U.S. App. LEXIS 1690, at *23 (D.C. Cir. Jan. 31, 2017). The Court also explained that while the FOIA's jurisdictional review provisions authorize judicial review of an action to enforce the FOIA's reading-room provision, 5 U.S.C. § 552(a)(2), "a plaintiff . . . may do so without first making a request for specific records under section 552(a)(3) [of the FOIA]." *Id.*, at *9. Further, the Court described the scope of available remedies as including a prospective injunction imposing on OLC "an affirmative duty to disclose[.]" *Id.*, at *18.

Accordingly, CREW hereby renews its requests for all OLC formal written opinions. Please respond to this request by March 6, 2017. If OLC continues its refusal to comply with its legal obligations, we will seek relief from the courts under the FOIA to ensure public access to this body of critical law.

Sincerely



Anne L. Weismann
Chief FOIA Counsel



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U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 20, 2013

Anne L. Weismann
Citizens for Responsibility and Ethics in Washington
1400 Eye Street N.W., Suite 450
Washington, D.C. 20005

Dear Ms. Weismann:

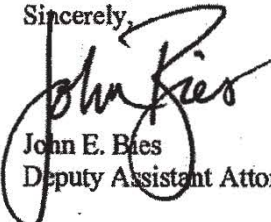
This responds to your letter to the Assistant Attorney General for the Office of Legal Counsel ("OLC") dated July 3, 2013, in which you express the view that OLC is required by 5 U.S.C. § 552(a)(2) to "make available for public inspection and copying all OLC opinions that are binding on the executive branch."

We are committed to complying with our obligations under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). OLC provides confidential legal advice within the Executive Branch. As such, OLC's advice is ordinarily covered by the attorney-client and deliberative process privileges, and is therefore exempt from mandatory disclosure under the FOIA, *see id.* § 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). In addition, as confidential and pre-decisional legal advice, our opinions generally constitute neither "final opinions...made in the adjudication of cases" nor "statements of policy and interpretations which have been adopted by the agency." 5 U.S.C. §§ 552(a)(2)(A) & (B).

Nevertheless, we make an individualized, case-by-case determination with respect to whether each opinion of our Office is appropriate for publication. *See* Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* 5-6 (July 16, 2010) ("Best Practices Memo"), available at www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf. This individualized publication decision process includes consultation with interested Executive Branch agencies and consideration of a number of factors, which are set out in the Best Practices Memo. *See id.* Similarly, when we receive a FOIA request seeking OLC records and an opinion is responsive to that request, we consider whether to waive applicable privileges and release the opinion as a matter of administrative discretion. *See id.* at 6.

I hope that this information is helpful.

Sincerely,



John E. Bies
Deputy Assistant Attorney General

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**U.S. Department of Justice****Office of Legal Counsel**

Office of the Assistant Attorney General

Washington, D.C. 20530

July 16, 2010

MEMORANDUM FOR ATTORNEYS OF THE OFFICE*Re: Best Practices for OLC Legal Advice and Written Opinions**

By delegation, the Office of Legal Counsel (OLC) exercises the Attorney General's authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law. OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government. In performing this function, OLC helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." It is thus imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned. The value of OLC advice depends upon the strength of its analysis. OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in all of their work, and then addresses the best practices OLC attorneys should follow in providing one particularly important form of controlling legal advice the Office conveys: formal written opinions.

I. Guiding Principles

Certain fundamental principles guide all aspects of the Office's work. As noted above, OLC's central function is to provide, pursuant to the Attorney General's delegation, controlling legal advice to Executive Branch officials in furtherance of the President's constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." To fulfill this function, OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives. This practice is critically important to the Office's effective performance of its assigned role, particularly because it is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on the controlling law.

* This memorandum updates a prior memorandum, "Best Practices for OLC Opinions," issued May 16, 2005.

In providing advice, the Office should focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it. As much as possible, the Office should be attentive to the particular facts and circumstances at issue in the request, and should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis. And regardless of the Office's ultimate legal conclusions, it should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question. To be sure, the Office often operates under severe time constraints in providing advice. In such instances, the Office should make clear when it needs additional time to permit proper and thorough review of the relevant issues. If additional time is not available, the Office should make clear that its advice has been given with only limited time for review, and thus that more thorough consideration of the issue has not been possible.

On any issue involving a constitutional question, OLC's analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions. Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance. On other questions of interpretation, OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts. Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government. For example, OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.

Finally, OLC's analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law. As a result, unlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful. Notwithstanding this aspect of OLC's mission, however, its legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials.

II. Opinion Preparation

While the Office frequently conveys its controlling legal advice in less formal ways, including through oral presentations and by e-mail, the best practices for preparing the Office's formal written opinions merit particular attention. These opinions take the form of signed memoranda, issued to an Executive Branch official who has requested the Office's opinion.

A. Evaluating opinion requests. Each opinion request is assigned initially to at least one Deputy Assistant Attorney General and one Attorney-Adviser, who will review the question

presented and any relevant primary materials, prior OLC opinions, and leading cases to determine preliminarily whether the question is appropriate for OLC advice and whether it appears to merit a signed written opinion. The legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions. There should also be a practical need for the written opinion; OLC should avoid giving unnecessary advice, such as where it appears that policymakers are likely to move in a different direction. A written opinion is most likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies. If we are asked to provide an opinion to an executive agency the head of which does not serve at the pleasure of the President (*e.g.*, an agency head subject to a "for cause" removal restriction), our practice is to issue our opinion only if we have received in writing from that agency an agreement that it will conform its conduct to our conclusion. As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party (although the Office may provide assistance to Justice Department divisions engaged in ongoing litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct in addressing an ongoing legal issue).

B. *Soliciting the views of interested agencies.* Before we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question; in many cases, we will have preliminary discussions with the requesting agency before it submits a formal opinion request to OLC, and the agency will be able to provide its analysis along with the opinion request. (A detailed analysis is not required when the request comes from the Counsel to the President, the Attorney General, or one of the other senior management offices of the Department of Justice.) In the case of an interagency dispute, we will ask each side to submit such a memorandum. We expect the agencies on each side of a dispute to share their memoranda with the other side, or permit us to share them, so that we may have the benefit of reply comments, when necessary. When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. We will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.

C. *Researching, outlining, and drafting.* A written OLC opinion is the product of a careful and deliberate process. After reviewing agency submissions and relevant primary materials, including prior OLC opinions and leading judicial decisions, the Deputy and Attorney-Adviser should meet to map out a plan for researching the issues and preparing an outline and first draft of the opinion. The Deputy and Attorney-Adviser should set target deadlines for each step in the process and should meet regularly to review progress on the opinion. Consultation with others in the Office is encouraged, as are meetings, as needed, with other Deputies and the Assistant Attorney General (AAG). An early first draft often will help identify weaknesses or holes in the analysis requiring greater attention than initially anticipated. As work on the opinion progresses, it will generally be useful for the Deputy and the Attorney-Adviser to meet from time to time with the AAG to discuss the status and direction of the draft opinion.

The Office must strive in our opinions for clear and concise analysis and a balanced presentation of arguments on each side of an issue. If the opinion resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides. In doing so, we generally avoid characterizing agencies with differing views as the “prevailing” and “losing” parties. OLC’s obligation is to provide its view of the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.

D. Review of draft opinions. Before an OLC opinion is signed it undergoes rigorous review within OLC. When the primary Deputy and the Attorney-Adviser responsible for the opinion are satisfied that the draft opinion is ready for secondary review, they should provide the draft opinion to a second Deputy for review. Along with the draft opinion, the Attorney-Adviser should provide to the second Deputy copies of any key materials, including statutes, regulations, important cases, relevant prior OLC opinions, and the views memoranda received from interested agencies. Once the second Deputy review is complete and the second Deputy’s comments and proposed edits have been addressed, the primary Deputy should circulate the draft opinion for final review by the AAG, the remaining Deputies (though it is not necessary in each case for each of them to review an opinion), and any other attorneys within the Office with relevant expertise.

Because OLC issues opinions pursuant to the Attorney General’s delegated authority, the Office keeps the Office of the Attorney General and the Office of the Deputy Attorney General apprised of its work through regular meetings and other communications. This practice ensures that the leadership offices are kept informed about OLC’s work, and also permits OLC to benefit from suggestions about additional interests OLC should consider or views OLC should solicit before finalizing its opinions, which are nevertheless based on its own independent analysis and judgment. The Office also keeps the Office of the Counsel to the President appropriately apprised of its work.

Consistent with its tradition of providing advice that reflects its own independent judgment, OLC does not ordinarily circulate draft opinions outside the Office. However, as part of our process, we may share an aspect of a draft opinion’s analysis with the requestor or others who will be affected by the opinion, particularly when their submissions have not addressed issues that arise in the draft. In some other cases, OLC may share the substance of an entire draft opinion or the opinion itself within the Department of Justice or with others, primarily to ensure that the opinion does not misstate any facts or legal points of interest.

E. Finalizing opinions. Once all substantive work on an opinion is complete, it must undergo a thorough cite-check by our paralegal staff to ensure that all citations are accurate and that the opinion is consistent with the Office’s rules of style. After all cite-checking changes have been approved and implemented, the final opinion should be printed on bond paper for signature. Each opinion ready for signature should include a completed opinion control sheet signed by the primary and secondary Deputies and the Attorney-Adviser. If the opinion is unclassified, after it is signed and issued to the requesting agency it must be loaded into our ISYS database and included in the Office’s unclassified Day Books. A separate file containing a copy of the signed opinion, the opinion control sheet, and copies of key materials not readily

available, such as the original opinion request, the views memoranda of interested agencies, and obscure sources cited in the opinion, should also be retained in our files for future reference.

III. Opinion Publication and Other Public Disclosure

Pursuant to Executive Order 12146 and directives from the Attorney General, OLC has a longstanding internal process in place for regular consideration and selection of significant opinions for official publication. At the first stage of the process, the attorneys who have worked on an opinion and the front-office personnel who have reviewed it are asked for a recommendation about whether the opinion should be published. After these recommendations are collected, the opinion is forwarded to an internal publication review committee, made up of attorneys from the front office, as well as at least one career attorney. If the committee makes a preliminary judgment that the opinion should be published, the opinion is circulated to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication, to solicit their views on whether there are reasons why the opinion should not be published. Taking this input into account, the publication committee then makes a final judgment about whether the Office should publish the opinion. After the Office makes a final decision to publish an opinion, the opinion is rechecked and reformatted for online publication; a headnote is prepared and added to the opinion; and the opinion is posted to the Department of Justice Web site at www.usdoj.gov/olc/opinions.htm. All opinions posted on the Web site as published opinions of the Office are eventually published in OLC's hardcover bound volumes.

In deciding whether an opinion is significant enough to merit publication, the Office considers such factors as the potential importance of the opinion to other agencies or officials in the Executive Branch; the likelihood that similar questions may arise in the future; the historical importance of the opinion or the context in which it arose; and the potential significance of the opinion to the Office's overall jurisprudence. In applying these factors, the Office operates from the presumption that it should make its significant opinions fully and promptly available to the public. This presumption furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action. Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.

At the same time, countervailing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication. For example, OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security. (Declassification decisions are made by the classifying agency, not OLC.) Similarly, OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts or is prohibited by law. OLC will also

decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices. The President and other Executive Branch officials, like other public- and private-sector clients, sometimes depend upon the confidentiality of legal advice in order to fulfill their duties effectively. An example is when an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken. If OLC routinely published its advice concerning all contemplated actions of uncertain legality, Executive Branch officials would be reluctant to seek OLC advice in the early stages of policy formulation—a result that would undermine rule-of-law interests. Some OLC opinions also may concern issues that are of little interest to the public or others besides the requesting agency. OLC's practice of circulating opinions selected for publication to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication helps ensure that the Office is aware of these competing considerations. In cases where delaying publication may be sufficient to address any of these concerns, OLC will reconsider the publication decision at an appropriate time.

OLC also receives a large number of Freedom of Information Act (FOIA) requests for its unpublished legal opinions. The volume of such requests has increased substantially in recent years, particularly with respect to opinions concerning national security matters. By definition, these requests seek disclosure of documents that the Office has not yet chosen to release pursuant to its own internal publication procedures. In responding to these requests, OLC is guided by President Obama's January 21, 2009 FOIA Memorandum and Attorney General Holder's March 19, 2009 FOIA memorandum. As the Attorney General's memorandum observes, various FOIA exemptions protect "national security, . . . privileged records, and law enforcement interests." OLC will consult with relevant agencies in determining whether particular requested documents fall within and should be withheld under any applicable FOIA exemptions. If a requested document does not fall within an exemption, OLC will disclose it promptly. In addition, OLC will consider disclosing documents even if they technically fall within the scope of a FOIA exemption. As the Attorney General also stated in his March 19, 2009 memorandum, "an agency should not withhold information simply because it may do so legally." In particular, consistent with President Obama's directions, the Office will not withhold an opinion merely to avoid embarrassment to the Office or to individual officials, to hide possible errors in legal reasoning, or "because of speculative or abstract fears."

OLC has a unique mission, and a long-established tradition—sustained across many administrations—as to how its work should be carried out. The Office depends not only upon its leadership but also upon each of its attorneys to ensure that this tradition continues.



David J. Barron
Acting Assistant Attorney General

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

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,**

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
JUSTICE,**

Defendant.

Case No. 1:17-cv-00432-TNM

MEMORANDUM OPINION

In this suit, the Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) seeks a court order requiring the publication of “all existing and future . . . formal written opinions” issued by the Office of Legal Counsel (“OLC”), Compl. 8-9, a component of the U.S. Department of Justice that provides “the opinion of the Attorney General on questions of law” arising within the executive branch. 28 U.S.C. § 512. CREW contends that these documents are subject to the Freedom of Information Act’s “reading room” provision, which requires that specific categories of records be affirmatively made “available for public inspection in an electronic format.” 5 U.S.C. § 552(a)(2). But this claim fails as a matter of law, since at least some of the documents sought are subject to FOIA Exemption 5, which protects both the deliberative process privilege and the attorney-client privilege. *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 4 (D.C. Cir. 2014) (“EFF”). This well-settled law presents an obvious and insurmountable barrier to ordering the universal publication of OLC’s formal written opinions. Accordingly, I will dismiss CREW’s complaint for failure to state a claim upon which relief can be granted.

I. Background

In 2013, CREW requested the same relief under the auspices of the Administrative Procedure Act (APA), but the District Court dismissed the claim for lack of jurisdiction, and the D.C. Circuit affirmed. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 164 F. Supp. 3d 145, 147 (D.D.C. 2016) (“*CREW I*”); *Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, 846 F.3d 1235 (D.C. Cir. 2017) (“*CREW II*”). Both decisions concluded that “Plaintiff . . . filed its suit under the wrong statute,” *CREW I*, 164 F. Supp. 3d at 147, because the APA provides jurisdiction only when “there is no other adequate remedy in a court,” 5 U.S.C. § 704, and “precedent establishes that a plaintiff in CREW's position may bring a FOIA claim to enforce the reading-room provision.” *CREW II*, 846 F.3d at 1245.

CREW filed the instant suit in 2017, this time under FOIA.¹ The complaint contends that the DOJ has a “mandatory, non-discretionary duty” under 5 U.S.C. § 552(a)(2) “to make available to the plaintiff on an ongoing basis formal written opinions issued by the DOJ’s Office of Legal Counsel . . . and indices of such opinions.” Compl. ¶ 1. CREW alleges that it has “repeatedly and unsuccessfully sought access to OLC opinions through individual FOIA requests

¹ While the appeal of *CREW I* was pending, the plaintiff’s attorney in that case (Ms. Anne Weismann) filed a substantially similar suit under FOIA, on behalf of the Campaign for Accountability. *Campaign for Accountability v. U.S. Dep’t of Justice*, 2017 WL 4480828 at *5 (D.D.C. 2017). The District Court dismissed that claim in a thorough opinion, presaging the logic of this one. *Id.* at *2 (“CfA has not identified an ascertainable set of OLC opinions that OLC has withheld from the public and that is also plausibly subject to the FOIA’s reading-room requirement”). An amended complaint is currently pending in that case, alleging that five specific categories of OLC’s opinions must be disclosed under FOIA’s reading room provision. Am. Compl., *Campaign for Accountability v. U.S. Dep’t of Justice*, No. 16-cv-1068 (D.D.C. Oct. 27, 2017), ECF No. 22. Pursuant to briefing submitted by the parties in this case, and after considering Local Civil Rule 40.5, I conclude that interests of judicial economy currently weigh in favor of keeping these cases separate, given the different claims at issue and the fully-briefed status of the instant motion to dismiss.

for specific categories of OLC opinions and broader requests,” including a request on February 3, 2017 “for all OLC formal written opinions and indices of those opinions.” *Id.* ¶¶ 7, 22. In addition, the complaint provides an overview of OLC’s function and history, alleging that the Government has itself described OLC opinions as “controlling advice,” “authoritative,” and “binding by custom and practice in the executive branch.” *Id.* ¶¶ 13-21 (quoting, *inter alia*, Memorandum from David J. Barron, Acting Assistant Attorney General, to Attorneys of the Office, Best Practices for OLC Legal Advice and Written Opinions, (July 16, 2010) *available at* <https://www.justice.gov/olc/best-practices-olc-legal-advice-and-written-opinions> (last accessed February 22, 2018) (“Best Practices Memo”). As Count I, the complaint contends that “OLC’s formal written opinions, described in the Best Practices Memo,” are subject to mandatory publication under 5 U.S.C. § 552(a)(2). Compl. ¶ 27. As Count II, the complaint claims that indexes of these opinions must also be made available under 5 U.S.C. § 552(a)(2)(E). *Id.* at ¶¶ 33-34.

As relief, CREW seeks a declaration that the DOJ has violated FOIA, orders requiring the DOJ to “make available to CREW for public inspection and copying on an ongoing basis all existing and future OLC formal written opinions” and indices thereof, and an award of attorneys’ fees and costs. Compl. 8-9. The Government filed a motion to dismiss, contending that the complaint’s request for all of OLC’s formal, written opinions failed to state a claim under Fed. R. Civ. P. 12(b)(6), and that to the extent CREW “seeks to advance a different claim” for a sub-category of those opinions, that claim was “neither ripe nor adequately plead.” Mem. In Support of Mot. Dismiss 8 (hereinafter “Mot. Dismiss”).

II. Legal Standards

“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would ‘allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (alteration omitted) (quoting *Iqbal*, 556 U.S. at 678). A court must “draw all reasonable inferences from those allegations in the plaintiff’s favor,” but will not “assume the truth of legal conclusions.” *Id.*²

III. Analysis

CREW invokes FOIA’s “reading room” provision, which provides as follows:

Each agency . . . shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . . and

(E) . . . current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph [subsection (a), paragraph (2)] to be made available or published. . . .

5 U.S.C. § 552(a)(2). By its terms, the entire Act—including the reading room provision—“does not apply” to nine specific exemption categories. 5 U.S.C. § 552(b)(1)-(9); *NLRB v. Sears*,

² Because I conclude that Rule 12(b)(6) requires dismissal, I will not address the standards applicable to a Rule 12(b)(1) motion.

Roebuck & Co., 421 U.S. 132, 147–48 (1975) (“if the memoranda . . . fall within one of the Act’s exempt categories, our inquiry is at an end, for the Act ‘does not apply’ to such documents.”).

CREW’s suit is premised on a universal claim: “all existing and future OLC formal written opinions” and indices thereof are subject to mandatory disclosure under 5 U.S.C. § 552(a)(2)). Compl. 8-9; *id.* ¶¶ 1, 27-28, 34.³ Accordingly, if the DOJ can identify any formal written opinions that are *not* subject to FOIA disclosure, CREW’s universal claim fails, and the suit cannot survive the motion to dismiss. However, the D.C. Circuit has already made it clear that even when a formal, written OLC opinion is “controlling (insofar as agencies customarily follow OLC advice that they request)” and “precedential,” that opinion can *still* be exempt from disclosure. *EFF*, 739 F.3d at 9; *see also Campaign for Accountability*, 2017 WL 4480828 at *15 (D.D.C. 2017). This decision squarely forecloses CREW’s all-inclusive claim.

In *EFF*, the D.C. Circuit confronted a FOIA request for a formal, written OLC opinion regarding certain FBI investigative techniques. *EFF*, 739 F.3d at 5.⁴ The District Court had found that the entire OLC opinion was “covered by the ‘deliberative process privilege’ in FOIA

³ The complaint identifies no sub-categories for individual resolution; the request is for all or nothing. *Id.* Although CREW’s Opposition memorandum suggests that “OLC insists *all* its opinions are privileged,” Opp. 3 (emphasis in original), it is CREW—not the Government—that has made the sweeping claim regarding the body of OLC’s work. In short, CREW appears to misread the Government’s Motion to Dismiss and its own Complaint, rendering most of its counter-arguments irrelevant. *See, e.g.* Opp. 22 (“the government has provided the Court with no facts supporting its central premise that OLC has an attorney-client relationship with all agencies in all situations in which they seek OLC’s advice.”). It is CREW, not the Government, which must defend a claim regarding “all” of OLC’s formal, written opinions. Compl. 9.

⁴ There is every indication that the OLC opinion was both formal and written. *Id.* at 9 (describing the OLC opinion as “controlling” and “precedential,” and thus “bear[ing] these indicia of a binding legal decision.”). Although CREW points out that “[a]t no point did [*EFF*] reference the category of formal, written opinions addressed in OLC’s Best Practices Memo,” Opp. 14, that memo states that “formal written opinions . . . take the form of signed memoranda, issued to an Executive Branch official who has requested the Office’s position.” Best Practices Memo 2. That appears to be exactly the type of document discussed in *EFF*.

Exemption 5, which covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *EFF*, 739 F.3d at 3 (internal quotation marks and citations omitted). The D.C. Circuit affirmed on the same basis. *Id.* at 4. Although the deliberative process privilege “calls for disclosure of all opinions and interpretations which embody the agency’s effective law and policy, and the withholding of all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be,” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (articulating the “working law” doctrine), *EFF* rejected any claim that the OLC opinion constituted the FBI’s effective or working law. *EFF*, 739 F.3d at 8-9.

“Because OLC cannot speak authoritatively on the FBI’s policy,” the D.C. Circuit concluded that the OLC’s opinion constituted mere legal advice, thus fitting squarely within the deliberative process exemption. *Id.* at 9. In short, “OLC is not authorized to make decisions about the FBI’s investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency’s policy.” *Id.* This holding dooms CREW’s complaint as currently articulated, because it establishes that at least one of OLC’s formal written opinions—the opinion in *EFF*—is exempt from FOIA disclosure pursuant to Exemption 5. Even more broadly, the opinion suggests that many of OLC’s formal written opinions would be subject to the same deliberative process privilege. *Id.* at 10 (explaining that the privilege can only be waived if an agency adopts the OLC’s reasoning as its own).

Even if the deliberative process privilege did not apply, the attorney-client privilege would also preclude CREW’s carte blanche access to OLC’s formal written opinions. FOIA Exemption 5, which allows the Government to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in

litigation with the agency,” 5 U.S.C. § 552(b)(5), also protects documents subject to attorney-client privilege. *EFF*, 739 F.3d at 4; *New York Times Co. v. U.S. Dep’t of Justice*, 806 F.3d 682, 684 n. 1 (2d Cir. 2015). Attorney-client privilege applies equally to “confidential communications between Government officials and Government attorneys,” just as it does outside the government context. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011). Accordingly, several courts have held that OLC opinions are protected by attorney-client privilege, since they embody confidential legal advice given by OLC to other components of the Executive Branch. *Nat’l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 196 (D.D.C. 2013); *Am. Civil Liberties Union v. Dep’t of Justice*, 2011 WL 10657342 at *9 (D.D.C. Feb. 14, 2011), *Citizens for Responsibility & Ethics in Washington v. Nat’l Archives & Records Admin.*, 583 F. Supp. 2d 146, 165 (D.D.C. 2008). Given OLC’s role as “the most significant centralized source of legal advice within the Executive Branch,” *CREW II*, 846 F.3d at 1238 (quoting Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1451 (2010)), I cannot reasonably infer that none of OLC’s formal written opinions are protected by attorney-client privilege.

If CREW amends its complaint to allege that some specific subset of OLC’s formal, written opinions are being unlawfully withheld, it could theoretically allege in adequate detail that certain OLC opinions are “final opinions . . . made in the adjudication of cases” or are “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.” See 5 U.S.C. § 552(a)(2)(A)-(B); see also *Campaign for Accountability*, 2017 WL 4480828 at *33 (“in order to state a claim that OLC is violating the FOIA, CFA’s complaint needs to identify an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed”) (emphasis in

original). If that day ever comes, CREW may be entitled to those opinions, as well as an index thereof. *See* 5 U.S.C. § 552(a)(2)(E). But since both the deliberative process privilege and the attorney-client privilege preclude CREW's requested relief under FOIA Exemption 5, I see no need to rule on other potential counter-arguments, including the statutory contention that OLC opinions are not subject to the terms of 5 U.S.C. § 552(a)(2), Mot. Dismiss 13-17, the potential applicability of FOIA's other eight exemptions, *see* 5 U.S.C. § 552(b)(1)-(9), and constitutional concerns that requiring OLC to publish its formal, written opinions would undermine the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and "require the Opinion, in writing, of the principal Officer in each of the executive Departments," *id.* art. II, §2, cl. 1. Mot. Dismiss 24-27. The complaint, as currently drafted, fails to state a claim upon which relief can be granted.

Implicitly conceding that only some of OLC's formal written opinions are subject to disclosure, CREW seeks discovery to provide "a full record to evaluate the scope of DOJ's obligations under § 552(a)(2)," Opp. 10, arguing that "the important legal issues this suit raises cannot be resolved until CREW has obtained limited discovery." Opp. 3. But the possibility that *some* formal written OLC opinions are subject to disclosure cannot rescue a complaint that by its own terms seeks *all* such opinions. To avoid dismissal under Rule 12(b)(6), CREW must file a complaint—not proposed discovery—stating a plausible claim to relief. *Iqbal*, 556 U.S. at 678; *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("In determining whether a complaint fails to state a claim, we may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice."). Accordingly, CREW's request for limited discovery will be denied.

IV. Conclusion

Because CREW has failed to state a claim upon which relief can be granted, I will grant the Government's motion to dismiss and deny CREW's request for limited discovery. In the order that follows, CREW will be given leave to file an amended complaint, if it so desires.

Dated: February 28, 2018


TREVOR N. MCFADDEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

Case No. 1:17-cv-00432-TNM

ORDER

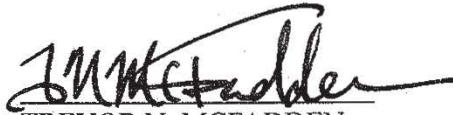
Upon consideration of the Government's Motion to Dismiss, the pleadings, relevant law, and related legal memoranda and oral arguments in opposition and in support, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendant's Motion to Dismiss is GRANTED, and the Plaintiff's request for limited discovery is DENIED. It is

FURTHER ORDERED that, if the Plaintiff wishes to file an amended complaint, it must do so on or before March 30, 2018. If the Plaintiff does not file an amended complaint on or before March 30, 2018, then on that date, the case will stand dismissed without further order. *See Ciralsky v. CIA*, 355 F.3d 661, 666 n.1 (D.C. Cir. 2004) ("If the plaintiff . . . elects to stand on the dismissed complaint . . . the order of dismissal is final and appealable.") (citation omitted).

SO ORDERED.

Dated: February 28, 2018


TREVOR N. MCFADDEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

Case No. 1:17-cv-00432-TNM

ORDER

In my Order of February 28, 2018, I granted the Defendant's motion to dismiss and gave the Plaintiff until March 30, 2018 to file an amended complaint, or else "the case will stand dismissed without further order." ECF No. 25. But yesterday the Plaintiff "advise[d] the Court it will not be filing an amended complaint," and asked for a final order of dismissal "to eliminate any question about [] appealability." Pl.'s Mot. for a Final, Appealable Order, ECF No. 26. Accordingly, it is hereby

ORDERED that the Plaintiff's Motion for a Final, Appealable Order is GRANTED, and this case is DISMISSED for the reasons stated in the Memorandum Opinion, ECF No. 24.

This is a final, appealable order.

Dated: March 27, 2018

TREVOR N. MCFADDEN
United States District Judge

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

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)

Defendant.)

Civil No.17-0432 (TNM)

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that plaintiff in the above-captioned action, Citizens for Responsibility and Ethics in Washington, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the District Court's Order of March 27, 2018 (Dkt. No. 27) granting the defendant United States Department of Justice's motion to dismiss for the reasons stated in its memorandum opinion of February 28, 2018 (Dkt. No. 24).

Respectfully submitted,

/s/ Anne L. Weismann

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April 19, 2018

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of August, 2018, I caused this Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Bradley Hinshelwood
Michael S. Raab
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW, Room 1264
Washington, DC 20530
(202) 514-7823

Counsel for Appellee

I further certify that on this 8th day of August, 2018, I caused the required copies of the Joint Appendix to be hand filed with the Clerk of the Court.

/s/ Anne L. Weismann

Counsel for Appellant