IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil No.17-0432 (JEB)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Following the course set by the D.C. Circuit in a previous case between these parties on this issue, Citizens for Responsibility and Ethics in Washington ("CREW") filed a request with the Department of Justice's ("DOJ") Office of Legal Counsel ("OLC") seeking its compliance with its mandatory obligation under the "reading room" provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(2), to provide CREW with copies of a specified category of OLC opinions and indices of those opinions. When CREW received no response, it filed the instant lawsuit. DOJ has now moved to dismiss the complaint under Rule 12(b)(1) based on a contorted jurisdictional argument that pertains to a claim CREW has not even made, and a merits argument under Rule 12(b)(6), rooted in the extraordinary and unsupported assertion that no opinion OLC has ever issued, or will ever issue, falls within the ambit of § 552(a)(2) as either "final opinions . . . made in the adjudication of cases [or] interpretations which have been adopted by the agency."

OLC serves a critical and unique function within the executive branch. Exercising delegated statutory authority afforded the Attorney General, OLC provides definitive interpretations of laws and other legal obligations that bind federal agencies, officers, and employees until overturned. Just consider the impact the OLC opinions authorizing the use of torture on enemy combatants had on federal employees and contractors and on the public discourse about the moorings of our democracy. Most recently, in defending the legality of the President's acceptance of emoluments, the government cited to six separate OLC opinions as support for its interpretation of the Constitution's Emoluments Clauses.[1] Within the executive branch, there is no other equivalent to OLC save the Attorney General and President of the United States, each of whom may reject OLC's conclusions. But unless and until that happens, OLC's opinions stand as the conclusive views of the executive branch. Indeed, federal employees who rely on OLC opinions enjoy immunity from prosecution.

OLC disputes none of this. Nor does OLC dispute that it issues a category of formal opinions its own directive describes as "controlling." *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* (July 16, 2010), *available at* https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf ("Best Practices Memo") (attached as Exhibit A). Instead, relying primarily on a single D.C. Circuit opinion holding that specific OLC advice given

[1] *Citizens for Responsibility and Ethics in Washington v. Trump*, No. 17-458 (RA) (S.D.N.Y.), Memorandum of Law in Support of Defendant's Motion to Dismiss (Dkt. 35), pp. 42, 43, 46, *available at* https://www.scribd.com/document/350859705/DOJ-Brief-in-Crew-v-Trump.

there was privileged based on the specific factual record relating only to the requested documents before the court, OLC insists *all* its opinions are privileged, including those it designates as "controlling," and not subject to compelled public disclosure. Further, OLC insists CREW has no remedy under 5 U.S.C. § 552(a)(2) and must, instead, litigate its claims on an individual, document-by-document basis after filing specific document requests.

If accepted, OLC's approach would render 5 U.S.C. § 552(a)(2) a nullity. DOJ, not CREW, bears the statutorily imposed burden to determine which of its opinions fall within that provision and must be publicly disclosed along with indices of those opinions. Its repeated failure to do so underscores the need for judicial relief, including prospective injunctive relief. Ultimately, however, the important legal issues this suit raises cannot be resolved until CREW has obtained limited discovery and the Court has a fuller factual record that explains more specifically the nature and scope of the opinions OLC issues and their role within OLC and the executive branch.

STATUTORY AND REGULATORY BACKGROUND

Since 1946 and the enactment of the Administrative Procedure Act ("APA"), Congress has required all federal agencies to publish in the Federal Register or otherwise make publicly available specified categories of records even without a request to do so. Section 3(a) of the APA directed every agency to make publicly available "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." *See* Attorney General's Manual on the Administrative Procedure Act, Section 3 – Public Information (1947) (1947 AG Manual), citing 92 Cong. Rec. 56750 (Sen. Doc. P. 357), *available at*

http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3869&context=ilj (last accessed May 31, 2017). Most relevant here, section 3(b) directed agencies to make publicly available "all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents)." *Id.* The Senate Report described these requirements, known then as the "public information section," as:

> among the most important, far-reaching, and useful provisions of the bill . . . drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance.

S. Rep. No. 79-752, at 198 (1945).

In 1965, frustrated with the various loopholes of section 3 of the APA on which agencies were relying to "deny legitimate information to the public," and "as an excuse for secrecy," S. Rep. No. 89-913, at 38 (1965), Congress proposed legislation to clarify that "section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute[.]" *Id.* at 40. The vast post-World War II expansion of the federal government highlighted for Congress "the great importance of having an information policy of full disclosure." *Id.* at 38. Echoing the words of James Madison, supporters of the proposal noted, "[a] popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both." *Id.*

Congress addressed these concerns in 1966 by amending section 3, and including the amended provision in the newly enacted FOIA. The new language required all agencies to make publicly available, *inter alia*, "all final opinions . . . and all orders made in the adjudication of cases" and "those statements of policy and interpretations which

have been adopted by the agency." Pub. L. 89-487, Section 3(b). The legislative history to this provision explains these changes were designed to satisfy the public's need to know agencies' secret law. Specifically, the changes

> would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.
>
> As the Federal government has extended its activities to solve the Nation's expanding problems – and particularly in the 20 years since the Administrative Procedure Act was established – the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under [the proposed bill].

H. Rep. No. 89-1497, at 28 (1966).

The current codification of this provision continues to require every agency to make publicly available "(A) final opinions . . . as well as orders, made in the adjudication of cases" and (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), (B). Current DOJ guidance for all federal agencies explains that subsection (a)(2) requires agencies to "proactively identify" records falling within its scope "and to make those records "available for public inspection and copying" "automatically . . . without waiting for a FOIA request." Department of Justice Guide to the Freedom of Information Act 10 (2014) citation omitted), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf (last accessed May 31,2017). Further, this provision "requires agencies to not only maintain, but also to

continuously update, the records in each of the four categories designated by subsection (a)(2) of the FOIA." *Id.* at 12.

This obligation is separate and distinct from the obligation to respond to a specific FOIA request under § 552(a)(3)(A). *See CREW v. Dep't of Justice*, 846 F.3d 1235, 1240 (D.C. Cir. 2017). The legislative history to this provision confirms § 552(a)(3)(A) was initially added to the FOIA "to emphasize the agency records made available by (paragraphs (1) and (2)) are not covered by paragraph (3) which deals with other agency records." S. Rep. No. 89-813, at 2.

The FOIA also imposes on agencies 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 required by this paragraph to be made available or published[.]" 5 U.S.C. § 552(a)(2) (final paragraph E). Like the other proactive disclosure provision discussed above, the indexing requirement is not tied to whether a record has been requested or released. By contrast, in 1996, when Congress again amended § 552(a)(2) of the FOIA through the Electronic Freedom of Information Amendments to require agencies affirmatively to make a new category of information publicly available through agency reading rooms, it did so only for records already disclosed in response to a FOIA request that likely will be subject to subsequent requests. *See* 5 U.S.C. § 552(a)(2)(D); DOJ Freedom of Information Act Guide, 2014, *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-192013.pdf#p5 (last accessed May 31, 2017).

The Office of Legal Counsel

The Judiciary Act of 1789 charged the Attorney General with, *inter alia*,

> giving 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. The current codification of this law, found at 28 U.S.C. § 523, directs the Attorney General to render opinions when requested by the President or heads of executive departments "on questions of law arising in the administration of his department."

Various DOJ components have exercised this authority over the years. In 1933, the Independent Offices Appropriation 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 the Attorney General delegated the responsibility of drafting legal opinions and providing legal advice to other executive branch agencies. This office was abolished through the Reorganization Plan No. 2 of 1950, 64 Stat. 1261, and replaced with the Executive Adjudications Division. In 1953, the Attorney General renamed it the Office of Legal Counsel. Att'y Gen. Order No. 9-53 (Apr. 3, 1953). Pursuant to 28 U.S.C. § 510, the Attorney General has delegated the responsibility to render opinions on "questions of law arising in the administration or his department" to OLC.

Current DOJ regulations define the function of OLC as including the preparation of "the formal opinions of the Attorney General," 28 C.F.R. § 0.25(a), and "rendering 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). Further, the President by executive order has directed agencies 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. § 508 (1988). It is the opinions in both categories that OLC designates as "formal," and their accompanying indices that CREW seeks in this case pursuant to 5 U.S.C. § 552(a)(2).

FACTUAL BACKGROUND

CREW is a non-profit, non-partisan corporation organized under § 501(c)(3) of the Internal Revenue Code. Complaint ("Compl."), ¶ 5. CREW uses research, litigation, advocacy, and public education to disseminate information to the public about government officials and their actions. *Id.*, ¶ 6. As part of its research, CREW uses government records made available to it under public information laws as well as public records agencies have made publicly available. *Id.* To fulfill its mission, CREW seeks access to formal OLC opinions. *Id.*, ¶ 7.

Toward that end, on February 3, 2017, CREW sent a letter to OLC Acting Assistant Attorney General Curtis E. Gannon. Compl., ¶ 22; Exhibit 1 to Memorandum in Support of Defendant's Motion to Dismiss (Dkt. 8-1) ("D's Mem."). CREW requested that OLC provide it with copies of all formal OLC written opinions and indices of those opinions. *Id.* CREW's letter explained it was renewing a prior request it had made of OLC on July 3, 2013, for these and additional OLC binding opinions. *Id.* OLC never responded to CREW's request, and on March 10, 2017, CREW filed this lawsuit. In support of its motion to dismiss, OLC relies in part on an August 20, 2013 letter from then-Deputy Assistant Attorney General John E. Bies responding to CREW's original 2013 letter request (attached as Exhibit 2 to D's Mem.). The thrust of that denial is that no OLC opinions come within § 552(a)(2) and OLC has unbridled discretion to disclose or withhold any and all opinions it has ever issued.

OLC's refusal to comply with the statutory mandate in 5 U.S.C. § 552(a)(2) has harmed and continues to harm CREW in carrying out its core programmatic activities. Specifically, CREW has suffered an informational harm by being deprived of information the law requires DOJ to affirmatively make publicly available. Compl., ¶ 8.

ARGUMENT

STANDARD OF REVIEW

In responding to a motion brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure (Point II, *infra*), a plaintiff bears the burden of establishing the court's jurisdiction. *See, e.g.*, *A.N.S.W.E.R. Coalition v. Salazar*, 915 F. Supp. 2d 93, 100 (D.D.C. 2013), and cases cited therein. This burden at the pleading stage "'is not onerous,'" *id.* (quoting *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011)), and a plaintiff need allege only "general factual allegations of injury resulting from the defendant's conduct." *A.N.S.W.E.R.*, 915 F. Supp. 2d. at 100 (quotation omitted).

The Court must accept all factual allegations in the complaint as true, giving the plaintiff "the benefit of all favorable inferences that can be drawn from the alleged facts." *CREW v. Cheney*, 593 F. Supp. 2d 194, 209-10 (D.D.C. 2009) (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993)). Further, in resolving a motion to dismiss for lack of subject matter jurisdiction, a court may properly consider "the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (quotation omitted).

A court ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6) (Point III, *infra*) also must construe the complaint "in a light favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *CREW v. Cheney*, 593 F. Supp. 2d at 210. Further, to survive a motion to dismiss under Rule 12(b)(6), a complaint "does not need detailed factual allegations," but rather "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court may consider only those facts alleged in the complaint, including documents attached or incorporated in the complaint, as well as matters of public record and those of which the court may take judicial notice. *See, e.g.*, *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

Evaluating defendant's motion to dismiss under these standards, it is clear not only that the government has failed to carry its burden, but also that there are holes in the factual record that limited discovery could fill in and provide this Court and any subsequent reviewing court a full record to evaluate the scope of DOJ's obligations under § 552(a)(2) of the FOIA.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

For years, the Department of Justice has resisted its legal obligations under § 552(a)(2) of the FOIA based on the claim that no court has jurisdiction to hear a § 552(a)(2) claim outside the context of a specific request for a specific OLC opinion. The D.C. Circuit has rejected this position, establishing the proper course for CREW to perfect its claims under the FOIA, *CREW v. Dep't of Justice*, 846 F.3d at 1245-46, which CREW has now followed precisely. Nevertheless, DOJ once again resurrects this

defense here, arguing that if CREW is advancing a narrower claim than that pled in the complaint, "such as, for example, a claim that OLC has unlawfully failed to publish **some** of its formal opinions . . . [it] would be neither ripe nor adequately pled." D's Mem., at 8 (emphasis in original).

The Court should waste no time on this argument, which addresses a claim CREW did not make, or any other jurisdictional argument DOJ has raised. The gravamen of CREW's complaint is that § 552(a)(2) of the FOIA requires OLC to make publicly available OLC's formal written opinions, as described in OLC's Best Practices Memo, and indices of those opinions. Compl., ¶¶ 27. 33. Given the clarity of CREW's complaint, DOJ's arguments addressing an unpled claim appear to be an attempt to divert the Court's attention from those claims that are at issue. CREW's claims as pled are ripe, and DOJ has not demonstrated otherwise.

DOJ attempts to further muddy the waters by suggesting, with no factual support whatsoever, that the term "formal opinions" "has been used to refer to different categories of documents by different people," and that "OLC's practices have varied over the years[.]" D's Mem., at 12 n.2. But the Court certainly is capable of applying the correct legal principles to the facts, regardless of changing practices. At most, DOJ's wordsmithing highlights the need for a more developed factual record, as discussed *infra*.

Moreover, the specificity of CREW's complaint dispels any notion it is not adequately pled. The complaint sets forth the following facts supporting CREW's two legal claims:

- By its own description, OLC's "core function" is "provid[ing] controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government";[2]
- That advice is codified in a category of documents OLC produces that OLC describes as "formal written opinions" or, alternatively, "formal legal opinions";[3]
- CREW has requested in writing that OLC provide it with copies of its formal written opinions, as well as indices of those opinions;[4]
- To date, OLC has refused to provide CREW with either OLC's formal written opinions or indices of those opinions;[5] and
- This refusal has resulted in CREW suffering an informational injury by being deprived of information to which it is lawfully entitled.[6]

Rule 8 of the Federal Rules of Civil Procedure requires pleadings such as complaints to contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). As demonstrated above, the factual assertions underpinning CREW's legal claims satisfy this requirement. Moreover, contrary to DOJ's argument, they include a "specific withholding" and allege a "wrongful action by OLC,"[7] namely OLC's refusal to produce upon request its formal

[2] Compl., ¶ 18.
[3] *Id.*, ¶¶ 17-20.
[4] *Id.*, ¶¶ 7, 22, 28, 34.
[5] *Id.*, ¶¶ 8, 23, 28, 34.
[6] Compl., ¶¶ 8, 29, 35.
[7] D's Mem., p. 11.

written opinions and indices. In short, CREW's complaint leaves no doubt as to the policy and practice it is challenging.

III. CREW HAS STATED VALID CLAIMS THAT OLC'S REFUSAL TO MAKE ITS FORMAL WRITTEN OPINIONS AND INDICES OF THOSE OPINIONS PUBLICLY AVAILABLE IS CONTRARY TO LAW.

A. OLC Produces Final Opinions That Fall Within 5 U.S.C. § 552(a)(2).

DOJ's merits arguments fare no better. They rest, at their core, on the assertion that because one "legal advice document" was found by the D.C. Circuit in *Electronic Frontier Foundation v. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014) ("*EFF*"), to be non-final and exempt from disclosure under section 552(b)(5) of the FOIA, all OLC opinions also fall within the same exemption. From this DOJ argues that because all OLC opinions are exempt, OLC need not make any of its formal written opinions covered by section 552(a)(2) publicly available. D's Mem. at 12. This ascribes a weight to the *EFF* decision it cannot bear.

Significantly, *EFF* was litigated under 5 U.S.C. § 552(a)(3)(A) based on the plaintiff's FOIA request for a single OLC opinion that the D.C. Circuit concluded did no more than give advice to another agency, which the requesting agency was free to accept or reject. 739 F.3d at 9-10. This case, by contrast, is based on 5 U.S.C. § 552(a)(2) for a category of opinions that, by OLC's own admission, are formal, final, and controlling. Moreover, the *EFF* opinion was based expressly on a factual record that was tailored and limited to one OLC opinion. That record established only that the requested record played an advisory-only role in the decision-making process of the agency that requested the opinion. *Id.* at 10. There is no such factual record here; on its motion to dismiss

under Rule 12(b)(6), OLC has provided no factual evidence to support its claim that all formal OLC legal opinions have the same characteristics as the opinion at issue in *EFF*.

In fact, DOJ has not even supported its claim that the opinion at issue in *EFF* was a formal OLC opinion like those CREW has requested. *See* D's Mem. at 13. Instead, drawing from a description offered by the FBI's general counsel in congressional testimony, the *EFF* court repeatedly used the term "OLC opinion" for a document it explained "merely examines policy options available to the FBI," *EFF*, 739 F.3d at 10, and "amounts to advice offered by OLC for consideration by officials of the FBI." *Id.* at 8. At no point did the court reference the category of formal written opinions addressed in OLC's Best Practices Memo, or suggest that other opinions are not accessible under § 552(a)(2) of the FOIA no matter their role in the decision-making process of affected agencies.

Moreover, DOJ's reliance on *EFF* undermines, not advances, its strained statutory construction of § 552(a)(2) as excluding all OLC opinions. In *EFF* the court described the kinds of non-exempt opinions prior decisions had found to be the "working law" of an agency as consisting of "a conclusive or authoritative statement of its policy, usually a higher authority instructing a subordinate on how the agency's general policy applies to a particular case, *or a document that determined policy or applied established policy*." 739 F.3d at 9-10 (emphasis added). Consistent with the statutory text, this description includes both statements of policy – that "usually," but not always, involve "a particular case" – and documents that in and of themselves establish or apply policy. This description precisely applies to the records CREW seeks here under§ 552(a)(2).

Beyond the *EFF* decision, DOJ claims that the formal written opinions CREW seeks do not have the attributes of final opinions within the meaning of § 552(a)(2) because they do not pertain to "adversarial disputes involving private parties." D's Mem. at 14. But neither the statutory language nor the cited cases support this construction. First, the language of § 552(a)(2) describes two distinct categories of records, as evidenced by the use of the conjunctive phrase "as well as": "final opinions . . . *as well as orders*, made in the adjudication of cases" (emphasis added). Thus, under the express statutory language both final opinions *and* orders adjudicating cases are included, and DOJ concedes OLC adjudicates legal disputes between agencies, as the President has directed it to do.

Nor does the language support DOJ's second point that only those orders resolving disputes between private parties are included. DOJ draws this conclusion from the statutory reference to "final opinions, **including concurring and dissenting opinions[.]**" D's Mem. at 14 (quoting 5 U.S.C. § 552(a)(2)) (emphasis in original). But once again DOJ fails to accord the word "include" its plain language meaning: "to take in or comprise *as a part of a* whole or group[.]"[8] Thus, by definition, orders made in the adjudication of cases comprise only a part of a larger category of final opinions. *See Advocate Health Care Network v. Stapleton*, 2017 U.S. LEXIS 3554, *11 (June 5, 2017) (in determining meaning of newly defined "church plan" under ERISA the Court focused on the newly added word "include," which it described as "not literal . . . Rather, it tells

[8] Merriam-Webster's Dictionary, *available at* https://www.merriamwebster.com/dictionary/include (last accessed May 31, 2017) (emphasis added).

readers that a different type of plan should receive the same treatment . . . as the type described in the old definition").

DOJ also contends *none* of its opinions can be considered "final" "because they do not finally dispose of any agency action[.]" D's Mem. at 15. The current record, however, contains no support for this claim, leaving the Court without a factual predicate to determine the role of OLC opinions and the extent to which they provide "what the law is" and "what is not the law," and are issued as part of an "attempt[] to develop a body of coherent, consistent interpretations . . . nationwide." *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997). Indeed, in *Tax Analysts* the Court of Appeals concluded certain field office memoranda had to be disclosed only after the parties had engaged in "extensive discovery[.]" *Id.* at 609. Thus, the plaintiff's proposed interrogatories (attached as Exhibit B) would elicit information about the meaning of "controlling" as used in the Best Practices Memo and show how OLC's formal written opinions actually are used within the executive branch.

Similarly, in *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) ("*Sears*"), the Court resolved the status under the FOIA of two categories of memoranda issued by the NLRB – Advice Memoranda and Appeals Memoranda – only after a lengthy discussion of how the legal memoranda were used in the NLRB adjudication process. The Court emphasized that "*[c]rucial* to the decision of this case is an understanding of the function of the documents at issue in the context of the administrative process which generated them." 421 U.S. at 138 (emphasis added). Based on a fully developed record, the Court held that the subcategory of Advice and Appeals Memoranda concluding that the NLRB should dismiss a complaint were "'final opinions'

made in the 'adjudication of cases' which must be indexed pursuant to 5 U.S.C. § 552(a)(2)(A)." *Id.* at 158. This is precisely the description of the opinions that CREW seeks here under that very same provision.

`DOJ also cites *Sears* as standing for the proposition that only those opinions that pertain to "action already taken" or "an agency decision already made" fall within § 552(a)(2). D's Mem. at 15 (citing *Sears*, 421 U.S. at 153-54). What DOJ omits from its citation, however, is the *Sears* Court's express recognition that "the line between predecisional documents and postdecisional documents may not always be a bright one." *Id.* DOJ also ignores the unique role OLC plays within the executive branch as the entity charged by statute with determining "what the law is" and "what is not the law" for the government as a whole. *Tax Analysts v. IRS*, 117 F.3d at 617.

Here, no record has been developed beyond the Best Practices Memo. Far from supporting DOJ's position, that document makes a strong case that many OLC opinions do much more than provide legal advice or recommendations to agencies, and refutes DOJ's blanket characterization of all OLC memos as non-final. OLC's Best Practices Memo states OLC formal opinions "may effectively be the final word on the controlling law," especially because OLC "is frequently asked to opine on issues of first impression, that are unlikely to be resolved by the courts[.]" Best Practices Memo at 1. That same memo describes the core function of OLC as "provid[ing] *controlling advice* to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." *Id.* (emphasis added). In addition, OLC's formal opinions establish a "system of precedent" that may "reflect the institutional traditions and competencies" of the subject agency, and that "give[s] great weight to any relevant

opinions of Attorneys General and the Office." *Id.* at 2. Thus, they have a precedential effect much like judicial opinions whose preparation process they mirror. *See id.*

Further, formal OLC opinions are subject to specified procedural requirements. First, they are personally signed by the head of OLC, two deputies, and any attorney advisers who worked on them. Second, they are prepared on bond paper. Third, they go through additional clearance processes, including the preparation of an opinion control sheet. And fourth, they are separately filed and indexed internally. Best Practices Memo at 2-4. As such, both in form and substance they bear all the indicia of final opinions developed to provide "what the law is" and "what is not the law," and issued as part of an "attempt[] to develop a body of coherent, consistent interpretations . . . nationwide[.]" *Tax Analysts v. IRS*, 117 F.3d at 627. Accordingly, they are final opinions and must be disclosed under the statute.

The animating concern of Congress in enacting § 552(a)(2)(A) reinforces this conclusion. Congress sought to compel disclosure of decisions "that affect any member of the public," H.R. Rep. No. 89-1497, at 28 (1966), and to "prevent the development of secret law." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (quotation omitted). This concern is present even when a statement, interpretation, or opinion resolves internal governmental conflicts over the meaning of a statute, rule, or policy, as how those conflicts are resolved often will directly impact those outside the public.

Just consider the potential impact of the OLC opinion concluding a sitting president is not subject to indictment or criminal prosecution, which has been offered as grounds for why President Donald Trump cannot be prosecuted for obstruction or

collusion while in office. In one sense, that opinion binds only the Special Counsel appointed by the Deputy Attorney General, but its impact on the Senate and House investigations, as well as the conduct of the other persons who are subject to those investigations, is inevitable. OLC's opinion has the potential to literally alter the course of history, as did OLC's torture memos. The government also is relying on OLC opinions as precedents to defend the President's acceptance of emoluments, arguing they do not violate any constitutional provision. Those opinions have been made public only as a matter of OLC's discretion. Guaranteeing public access to these and other formal opinions is precisely the result Congress intended when it enacted § 552(a)(2).

B. OLC Produces Final Opinions That Are Not Exempt From Disclosure Under The FOIA.

DOJ also asserts that OLC opinions are "generally exempt" under the attorney-client and deliberative process privileges and suggests that to compel their disclosure would somehow invalidate these privileges. D's Mem. at 17. DOJ goes even further to argue that, even if the OLC final opinions at issue fall within § 552(a)(2), they would still be exempt under Exemption 5, citing *Sears*, 421 U.S. at 154 n.21. D's Mem. at 17. *Sears*, in fact, stands for the very opposite proposition, holding that for "final opinions" within the scope of § 552(a)(2) "Exemption 5 can *never* apply." 421 U.S. at 154 (emphasis added).

Further, although the government argued in *Sears* that all the memoranda at issue were exempt – the argument DOJ makes here – the Court accorded different treatment to different categories of memoranda depending on their function in the adjudicative process. This led the Court to conclude that the memoranda that were, in fact, "final," because they resulted in the dismissal of pending cases, were subject to disclosure, while

other memoranda that were issued in cases still being litigated were exempt under the deliberative process privilege. This approach undermines DOJ's position, extrapolated from the *EFF* decision, that if one OLC opinion is deliberative and therefore exempt from disclosure, all OLC opinions also are exempt. Without knowing the "function" of the OLC opinions "in the context of the administrative process which generated them," *Sears*, 421 U.S. at 138, the Court cannot reasonably treat all final OLC opinions as protected by the deliberative process privilege.[9] Indeed, language in *Sears* suggests the presumption should be that all final OLC opinions are subject to disclosure under § 552(a)(2) based on its construction of the FOIA as "call[ing for disclosure of *all* 'opinions and interpretations' which embody the agency's effective law and policy[.]" 421 U.S. at 153 (quoting Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 Chi. L. Rev. 7861 (1967)) (emphasis added).

DOJ's reliance on *EFF* for its claim that all OLC final opinions are protected by privilege falls apart upon close examination. As even DOJ concedes, *EFF* involved "'advice offered by OLC for consideration by officials of the FBI[.]'" D's Mem. at 17 (quoting *EFF*, 739 F.3d at 8). This stands in stark contrast to the "controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government" described in the Best Practices Memo at 1. Properly read, *EFF* stands only for the proposition that a specific OLC opinion in which OLC offered advice as part of the requesting agency's policy deliberations, and which

[9] CREW's proposed discovery (Exhibit B), which CREW is holding in abeyance until the Court rules on the pending motion to dismiss, would elicit information specifically on the function of OLC opinions and the extent to which they serve as precedents within the executive branch.

was neither accepted nor followed, may be withheld as privileged. But that holding does not resolve the larger issue presented here: whether OLC's insistence on treating all its opinions, including all formal opinions described in the Best Practices Memo, as outside the scope of § 552(a)(2) is correct.

Not only is there no legal or evidentiary support for DOJ's broad claim that all – or virtually all – OLC opinions are privileged, but there is no specific factual record for this Court to address any privilege claims that may attach to specific OLC opinions. For the deliberative process privilege, the government must establish the communication at issue is both predecisional and deliberative. *See, e.g.*, *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Within this factual context, those documents that "discuss established policies and decisions" fall outside the privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980. Also relevant is the nature of the decision-making authority vested in the author of the document. *See, e.g.*, *Pfeiffer v. CIA*, 721 F. Supp. 337, 340 (D.D.C. 1989) ("What matters is that the person who issues the document has authority to speak finally and officially for the agency."). And even deliberative documents can lose their protection if they are either adopted or incorporated by reference. *Coastal States*, 617 F.2d at 866.

Here, as discussed, the absence of any factual context prevents this Court from concluding that all or even a substantial number of OLC opinions and interpretations properly are privileged. While DOJ cites to the Best Practices Memo as proof that OLC opinions generally fall within the attorney-client privilege, that memo describes the opinions OLC provides as "*controlling*" on "Executive Branch officials," Best Practices Memo at 1 (emphasis added), a quintessential element of a final, non-privileged opinion

subject to disclosure. *See Coastal States*, 617 F.2d at 866. And there is no factual predicate from which the Court could conclude that any particular OLC opinion consists entirely, or even in part, of information supplied to an attorney from his or her client.

Even more fundamentally, 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. OLC issues its controlling legal opinions in fulfillment of the role assigned by statute to the Attorney General: rendering definitive legal advice on behalf of the executive branch. OLC serves the interests of the United States, not merely those of an individual agency. The Best Practices Memo underscores this constitutional role, noting OLC provides

> 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.'

Best Practices Memo at 1 (quoting U.S. Const. art. II, § 3) (emphasis added). This function has been vested in DOJ to ensure its legal opinions are as objective and accurate as possible, not swayed by the more parochial concerns animating the traditional attorney-client relationship.[10]

DOJ advances similar arguments regarding the deliberative process privilege, claiming it "generally" protects OLC opinions. D's Mem. at 19. Once again, however, the government makes this argument with no factual support and based solely on cases holding that individual documents are privileged based on the specific records before the

[10] *See* 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, 1312 (Fall 2000).

courts without taking into account the distinctions made by the Supreme Court in *Sears*. These cases say nothing about whether the deliberative process privilege protects all OLC opinions and interpretations, including those designated as formal and subject to extensive internal procedural requirements.

To be clear, CREW is not arguing that no OLC opinion is subject to the attorney-client privilege, in whole or in part. For example, OLC opinions providing the definitive legal position of the executive branch on the meaning of a statute or treaty obligation, as applied to a particular situation, may include specific, factual information provided by the agency seeking the interpretation that properly is protected by the attorney-client privilege. But this is a far cry from DOJ's position here that the entirety of all OLC opinions and interpretations are privileged.

C. By Refusing To Comply With § 552(a)(2), OLC Is Creating Secret Law.

Accepting at face value the government's assertion that virtually all of OLC's work is privileged would blanket that office and its work in secrecy, producing a result directly at odds with the congressional intent behind § 552(a)(2): the elimination of secret law. Before Congress strengthened § 552(a)(2) in 1966 with the passage of the FOIA, many agencies had developed bodies of law they kept secret. According to a leading administrative law authority, before the FOIA "nearly all" agencies had "in some degree systems of secret law." *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758, and S. 1879, Administrative Procedure Act*, 89th Cong., 1st Sess. 143 (1966) (statement of Kenneth Culp Davis). DOJ's Immigration Service, for example, granted public access to only 58 of the approximately 700,000 orders and decisions it issued in 1963, even

though many of those opinions served as agency precedent. *Id.* at 144, 187-88. The House Committee on Government Operations observed that these agency policy statements and interpretations were "the end product of Federal administration" with the "force and effect of law in most cases," yet so many "have been kept secret from the members of the public affected by the decisions." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

These concerns led Congress to strengthen § 552(a)(2) and incorporate it into the newly enacted FOIA, with the goal of eliminating secret law. *See, e.g.*, *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 796 n.20 (1989) (the FOIA's "primary objective is the elimination of 'secret law'") (quoting Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. Legal Studies 774, 777 (1980)); *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 29-30 (D.D.C. 2013) ("engag[ing] in what is in effect governance by 'secret law' . . . conflicts with the very purpose of FOIA"). To accomplish this goal, Congress included in § 552(a)(2) the affirmative disclosure provisions requiring agencies to make available to the public the countless orders, opinions, statements, and instructions federal agencies issue. H.R. Rep. No. 1497 at 7.

The D.C. Circuit summarized its opinions on the issue of secret law as follows:

> A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and its dealings with the public . . . The theme was sounded as early as 1971 when the court emphatically stated that agencies would be required to disclose 'orders and interpretations which it actually applies to cases before it,' in order to prevent the development of 'secret law.'

Coastal States, 617 F.2d at 876 (citation omitted). The court further described "binding agency opinions and interpretations" as "the law itself" that "'should be made available to the public . . . to prevent the development of secret law.'" *Id.* at 868 (quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)). As a necessary consequence, this "'working law' of the agency" is "outside the protection of Exemption 5." *Brotherhood of Locomotive Engineers v. Surface Transportation Board*, 1997 U.S. Dist. LEXIS 11808, *12-13 (D.D.C. July 10, 1997) (quoting *Sears*, 421 U.S. at 152-53). *See also Taxation With Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981) (deliberative process privilege does not apply to "final opinions that have the force of law").

Despite the clear intent of this provision, DOJ insists its refusal to make OLC opinions publicly available does not implicate the secret or "working law" doctrine because OLC does not regulate the public. D's Mem. at 21. To the contrary, OLC opinions have profound effects on members of the public, as they determine the lawfulness of a range of conduct from warrantless surveillance to targeted killing of Americans on foreign soil. Further, DOJ generally does not prosecute individuals who relied on OLC opinions, regardless of whether their actions later are believed or determined to be illegal. Compl., ¶ 21. As a result, OLC opinions confer the functional equivalent of immunity from criminal prosecution. Without question, OLC's opinions "create or determine the extent of the substantive rights and liabilities of a person." *Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983).[11]

[11] In arguing to the contrary, DOJ cites *CREW v. Office of Admin.*, 249 F.R.D. 1, 6-8 (D.D.C. 2008), D's Mem at 21 n.21, a case plainly inapplicable here. There the court

DOJ's Best Practices Memo comprises the only hard evidence before this Court at this point in the litigation. It shows definitively that OLC produces at least one category of formal written opinions that bear all the hallmarks of final opinions that have a precedential effect within the executive branch and therefore are subject to the mandatory affirmative disclosure requirements of § 552(a)(2). From this the Court certainly cannot conclude OLC produces nothing that constitutes the "working" or "secret law" of the agency. And without further factual development, the Court cannot yet determine the full universe of documents OLC creates that are subject to § 552(a)(2).

D. OLC's Role Within The Executive Branch Supports The Conclusion Its Formal Final Opinions Are Subject To Disclosure Under § 552(a)(2).

In a remarkable sleight of hand, DOJ attempts to turn the unique role OLC plays within the executive branch into evidence its opinions are privileged. DOJ concedes, as it must, that OLC is the "single office . . . responsible for conclusively resolving difficult (and sometimes disputed) legal questions." D's Mem. at 23. DOJ further acknowledges that the statute conferring this responsibility on the Attorney General (and OLC, in turn) "does not expressly declare what effect shall be given to his opinion," yet the goal is to

> act[] according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications *and official authority*.

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rejected the secret law argument based on the specific record before it, which demonstrated that the executive branch had neither relied on the opinion at issue nor used it in dealings with the public. This does not answer the question this case presents: whether OLC produces any opinions or interpretations on which the executive branch relies or that affect the public.

D's Mem. at 23 (quoting *Offices and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 334 (1854)) (emphasis added). From this DOJ draws the unsustainable conclusion that OLC opinions therefore must be considered privileged to maintain "certain norms" within OLC "governing the provision of legal advice." D's Mem. at 23. That OLC is charged with "conclusively resolving difficult (and sometimes disputed) legal question," D's Mem. at 23, only underscores the critical importance of ensuring public access to OLC's opinions. The right of the public to access statements of policy and interpretations that have the "force and effect of law," H. Rep. No. 89-1497, at 28 (1966), must outweigh maintaining internal "norms."

Further, the fact that OLC chooses to label certain of its opinions as "authoritative legal advice," D's Mem. at 24, does not alter their fundamental nature as "effectively . . . the final word on the controlling law." Best Practices Memo at 1. Again, CREWs proposed discovery would shed light on this issue, seeking information on, for example, instances where agencies have refused to follow OLC opinions. Exhibit B. As the record now stands, these opinions, like the non-exempt documents at issue in *Tax Analysts*, are created to promote "uniformity," and represent "a body of coherent, consistent interpretations" of federal laws. 117 F.3d at 617. In short, OLC's "unique mission," Best Practices Memo at 6, reinforces not refutes how and why the final legal opinions it issues are subject to disclosure under § 552(a)(2).

E. REQUIRING OLC TO COMPLY WITH § 552(a)(2) DOES NOT IMPLICATE ANY CONSTITUTIONAL CONCERNS.

DOJ's constitutional arguments rest on the false assertion that granting CREW its requested relief would interfere with the President's ability to obtain confidential advice and the "discharge of his constitutional obligation to take care that the agencies faithfully

execute the laws[.]" D's Mem. at 25-26. CREW, does not, however, challenge the ability of the President to obtain confidential legal advice from OLC. Nor does CREW argue that the FOIA trumps the Constitution. CREW recognizes the President has the unique constitutional authority to disregard OLC's opinions and to assert executive privilege in appropriate circumstances. *See Soucie v. David*, 448 F.2d 1067, 1072 n.9 (D.C. Cir. 1971) (if government claims executive privilege "it would become necessary for a court to consider whether he disclosure provisions of the act [at issue there]] exceeds the constitutional power of Congress to control the actions of the executive branch"). None of that is at issue here, however. Instead, CREW seeks access to those OLC opinions that have been formalized, finalized, and not overturned by either the Attorney General or the President.

Moreover, the clear answer to the constitutional concern DOJ raises is not to eliminate OLC's obligations under § 552(a)(2) altogether, but to construe those obligations in a manner consistent with the President's constitutional right to obtain confidential legal advice. Tellingly, OLC has not provided any evidence that any of its formal controlling opinions contain confidential legal advice to the President that would fall within executive privilege. CREW's proposed interrogatories ask OLC to identify the number of times it has prepared a formal written opinion in response to a request from the President. *See* Exhibit B. Yet DOJ is asking this Court essentially to gut § 552(a)(2) because of the unproven possibility it could implicate constitutional rights of the President, an invitation the Court should decline. Even more significantly, any OLC opinion that truly represents confidential legal advice to the President would not be subject to compelled disclosure under § 552(a)(2), as clearly the President's right to keep

confidential legal advice OLC provides him would overcome CREW's right to access that advice. In short, DOJ's makeweight constitutional arguments are a distraction from the actual issues CREW's complaint raises.

F. CREW HAS STATED A VALID INDEXING CLAIM.

Another provision of the FOIA, which is the final paragraph of 5 U.S.C. § 552(a)(2), imposes on agencies the requirement to "maintain and make available for public inspection and copying current indexes" of the matters that section requires be made public. Nevertheless, the indexing requirement is of obvious importance to the public, as without it, the public would be unaware of which final OLC opinions even exist. Yet DOJ's only response to CREW's indexing claim in Count Two of its complaint is to label it "entirely derivative of its first claim" and therefore subject to dismissal. D's Mem. at 27.

DOJ's argument, however, rests on its unsupported and unsupportable claim that not a single OLC opinion falls within § 552(a)(2). Having failed to prove legally or factually that is the case, OLC necessarily must comply with its indexing obligations.

CONCLUSION

For the foregoing reasons, DOJ's motion to dismiss should be denied and CREW should be permitted to engage in limited discovery to develop the necessary factual record.

Respectfully submitted,

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