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.	Civ. No. 1:17-cv-00432-JEB

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

This lawsuit seeks a radical expansion of the Freedom of Information Act ("FOIA"), as confirmed by Citizens for Responsibility and Ethics in Washington's ("CREW") opposition brief, *see* ECF No. 12 ("Opp."). CREW seeks to compel the Department of Justice's Office of Legal Counsel ("OLC") to affirmatively publish a vast number of its formal written opinions. This request cannot be reconciled with the overwhelming number of judicial decisions recognizing that OLC advice documents may lawfully be withheld as privileged, including a decision from the D.C. Circuit that rejects many of the same arguments that CREW advances here.

CREW's allegations have shifted throughout the brief history of this litigation. CREW's Complaint asserted that CREW was seeking ***all*** OLC formal written opinions as described in a 2010 OLC memorandum ("Best Practices Memo").[1] CREW's opposition, however, acknowledges that some OLC opinions may be privileged, speculates that "many" unidentified OLC opinions are required to be published, and asserts that discovery is required to resolve this case. Opp. at 17, 20 n.9, 23. But elsewhere in its opposition, CREW ***denies*** that it is arguing that only some OLC formal written opinions must be published, chastises the Government for addressing such an argument, and doubles down on the Complaint's allegation that all formal opinions must be disclosed. Opp. at 10-11. However CREW's allegations are framed, the Complaint must be dismissed.

The claim articulated in the Complaint—that ***all*** OLC formal written opinions as described in the Best Practices Memo must be affirmatively disclosed as a matter of law—is plainly meritless and foreclosed by binding D.C. Circuit precedent. And to the extent CREW wishes to challenge

[1] *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), http://justice.gov/olc/pdf/olc-legal-advice-opinions.pdf.

a "policy and practice" that violates FOIA, Opp. at 13, the only purported policy or practice it identifies is the Best Practices Memo. But CREW cannot challenge the Best Practices Memo under FOIA in the abstract because the Best Practices Memo does not purport to represent OLC's attempt to implement FOIA's affirmative-publication provision, 5 U.S.C. § 552(a)(2).

As noted above, CREW's opposition also appears to advance a claim that ***some*** OLC opinions are subject to § 552(a)(2) and not privileged, although CREW vigorously denies doing so. As Defendant pointed out in its opening brief, *see* ECF No. 8-1 ("Mem.") at 8-11, any such claim is neither adequately pled nor ripe. CREW does not identify a single formal written opinion it believes OLC has wrongfully failed to publish, and does not point to any prior instance in which OLC failed to publish a formal written opinion later found to be subject to § 552(a)(2). And aside from its claim that OLC issues legal opinions that are "controlling" and "precedential" (which, the D.C. Circuit has held, does not make a document non-privileged), CREW pleads no facts in support of its claim that OLC is violating § 552(a)(2). Instead, CREW merely speculates that OLC fails to publish opinions subject to § 552(a)(2), even though CREW neither identifies nor describes any such opinions, and despite the judicial authority recognizing that OLC's opinions are, at least as a general matter, privileged. And having now ***disclaimed*** the argument that OLC should be ordered to publish some but not all of its formal written opinions, CREW would not be entitled to relief on its Complaint even if it had plausibly alleged that OLC has wrongfully failed to publish particular opinions (which it has not).

More fundamentally, CREW does not persuasively explain how its broad legal theory can be reconciled with the wealth of precedent permitting OLC opinions to be withheld under FOIA. As confirmed by the D.C. Circuit, OLC opinions—including formal ones that are "controlling" and "precedential"—generally constitute pre-decisional legal advice that is protected from

disclosure. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 356 (2014) ("*EFF*"). Contrary to CREW's arguments, that precedent cannot be cast aside as merely resolving the privileged status of one particular OLC opinion. The OLC opinion at issue in *EFF* was "controlling" and "precedential" in the same sense that CREW uses the terms. But the D.C. Circuit held that the opinion was exempt from disclosure. And CREW's claim also fails because OLC generally does not produce documents that fall within § 552(a)(2)(A) or (B).

In short, CREW's opposition brief simply confirms that this case must be dismissed. Moreover, accepting CREW's interpretation of FOIA would raise significant constitutional concerns. For all of these reasons, CREW's Complaint should be dismissed.

ARGUMENT

I. CREW'S PLED CLAIM FAILS AS A MATTER OF LAW AND ANY ALTERNATIVE CLAIM IS NEITHER ADEQUATELY PLED NOR RIPE

CREW's abstract challenge to OLC's publication practices fails at the outset. The theory CREW's Complaint articulates—that all OLC formal written opinions must be affirmatively published—is plainly meritless and CREW appears to abandon it here. And although CREW's opposition speculates that ***some*** OLC formal written opinions must be affirmatively published—even as CREW denies making such an argument elsewhere in its opposition—any such alternative claim is neither adequately pled nor ripe for review.

A. The Theory Articulated in CREW's Complaint Fails as a Matter of Law

The gravamen of CREW's claims—as expressed in multiple parts of the Complaint—is that ***all*** of OLC's formal written opinions must be disclosed. Indeed, the Complaint is very clear on this point. *See* ECF No. 1 ("Compl.") ¶ 27 ("OLC's formal written opinions, described in the Best Practice[s] 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).”). The Complaint contends that CREW is entitled to an injunction directing Defendant to “mak[e] 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.” *Id.* ¶ 31 (emphasis added)). And CREW’s Prayer for Relief similarly demands declaratory and injunctive relief as to ***all*** OLC current and future formal opinions. Prayer for Relief ¶¶ (1)-(4).

As Defendant noted in moving to dismiss, this claim—that all OLC formal written opinions must, as a matter of law, be affirmatively published—might be ripe for review. Mem. at 12. But any such claim is utterly meritless. It is foreclosed by the D.C. Circuit’s decision in *EFF*, which confirmed that OLC’s written opinions generally need not be disclosed. *See EFF*, 739 F.3d at 4-6, 9. Although CREW advances an implausibly narrow interpretation of *EFF*, *see* pp. 12-14, *infra*, even CREW acknowledges—contrary to what the Complaint alleges—that not all OLC opinions need be disclosed. *See* Opp. at 23 (“CREW is not arguing that no OLC opinion is subject to the attorney-client privilege, in whole or in part.”).

More fundamentally, the only feature of the formal legal opinions CREW believes must be affirmatively published is the purportedly “controlling” nature of the legal conclusions in those opinions. Opp. at 2, 3, 12, 13, 16, 17, 20, 22; Compl. ¶¶ 2, 18, 20, 24; *see also* Best Practices Memo at 1 (referring to formal written opinions as “one particularly important form of controlling legal advice the Office conveys”). But the D.C. Circuit in *EFF* acknowledged the plaintiff’s argument that the OLC opinion at issue was “controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn,” and that it bore “indicia of a binding legal decision,” but held that the opinion was privileged “[e]ven if the OLC Opinion describes the legal parameters of what the FBI is ***permitted*** to do.” 739 F.3d at 9-10. There is thus

no legal basis for CREW's pled claim that ***all*** formal written opinions as described in the Best Practices Memo must be affirmatively published.

Moreover, to the extent CREW alleges that the Best Practices Memo is itself a policy or practice that is contrary to FOIA, any such claim likewise fails as a matter of law. As set forth in the Best Practices Memo, OLC recognizes its responsibilities under FOIA. *See* Best Practices Memo at 5-6 (describing "Opinion Publication ***and Other Public Disclosure***," including a separate discussion of OLC's process for responding to FOIA requests (emphasis added)). The publication decision-making process is designed to evaluate whether OLC, and its client Executive Branch agencies and components, ought to waive privilege and make public confidential, pre-decisional OLC legal advice as a policy matter (despite the fact that such opinions are privileged). *See id.* at 5. Separately, OLC also recognizes its distinct responsibilities under FOIA, including that there may be circumstances in which FOIA compels disclosure of OLC advice documents. *See id.* at 6. The letter from Deputy Assistant Attorney General Bies discussed in Defendant's opening brief further confirms this point: OLC is "committed to complying with [its] obligations under [FOIA]." ECF No. 8-3. The publication of the Best Practices Memo does not equate to OLC asserting it is not bound by the requirements of § 552(a)(2), or that this process is a substitute for the requirements of § 552(a)(2).

B. CREW's Claim As Described in Parts of Its Brief is Not Adequately Pled or Ripe

As noted above, the core assertion in the Complaint—that ***all*** OLC formal written opinions as described in the Best Practices Memo must be disclosed—is meritless. In Defendant's opening brief, after noting that, because this assertion is so clearly wrong, CREW might argue in its opposition "that OLC has unlawfully failed to publish ***some*** of its formal opinions," the

Government argued that any such re-characterized claim would be neither ripe nor adequately pled. Mem. at 8.

CREW responds that "[t]he Court should waste no time on this argument, which addresses a claim CREW did not make." Opp. at 11.[2] CREW is correct that the ***Complaint*** does not make this claim. But CREW's opposition acknowledges that some OLC opinions may be privileged, Opp. at 23, contends that the Best Practices Memo "makes a strong case that ***many*** OLC opinions" fall within section 552(a)(2), *id.* at 17 (emphasis added), and asserts that it needs discovery to determine whether opinions must be published, *id.* at 20 n.9, 27. CREW's opposition and request for discovery thus appears—contrary to CREW's denial—to constitute an argument that some (but not all) of OLC's formal written opinions must be disclosed; CREW's opposition is certainly not consistent with its Complaint.

If CREW is truly ***not*** arguing that it is entitled to only some of OLC's formal opinions—and instead insisting, as the Complaint asserts, that it is entitled to all such opinions as a matter of law—the Court can resolve this case by rejecting that meritless claim. CREW, moreover, should be held to the allegations in its Complaint. "[I]t is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Agnew v. Nat'l Collegiate Athletic*

[2] CREW criticizes the Government for observing that "OLC's practices have varied over the years and the term 'formal opinions' has been used to refer to different categories of documents by different people." Mem. at 12 n.2. CREW accuses the Government of attempting to "muddy the waters" and contends that "DOJ's wordsmithing highlights the need for a more developed factual record." Opp. at 11. This argument goes nowhere. In the section containing this passage, the Government stated that, to the extent CREW was advancing a legal claim that all formal written opinions described in the Best Practices Memo must be affirmatively published, this legal claim could be ripe for review (albeit meritless). Mem. at 12. The Government simply cautioned that, outside the context of the Best Practices Memo, the term "formal written opinions" has at times been used in different ways and that, to the extent CREW later sought to advance a different claim, the Government reserved the right to revisit this topic. Regardless, this is all much ado about very little since CREW's claim fails in any event.

Ass'n, 683 F.3d 328, 348 (7th Cir. 2012) (quoting *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989)); *Dana Ltd. v. Aon Consulting, Inc.*, 984 F. Supp. 2d 755, 767 n.2 (N.D. Ohio 2013) (rejecting attempt to "recast" claim because "a complaint cannot be amended by briefs in opposition to a motion to dismiss" (quotation marks omitted)). CREW's Complaint claimed that all formal written opinions described in the Best Practices Memo must be published. Since that claim is meritless, the Government and this Court should not be required to parse CREW's opposition and evaluate a moving target.

Consistent with the anticipatory argument in Defendant's opening brief, to the extent CREW alleges that OLC is wrongly failing to publish some unspecified subset of its formal opinions (and to the extent this Court opts to consider any such allegations), such a claim is neither adequately pled nor ripe for review.

1. *Adequacy of Pleading*: As the Government previously explained and CREW does not dispute in its opposition, CREW's lawsuit does not identify any specific OLC advice document that CREW contends OLC has wrongfully failed to publish. Nor does it identify a specific OLC policy that it asserts is contrary to § 552(a)(2) (as discussed above, the Best Practices Memo does not represent OLC's attempt to implement § 552(a)(2)). Although CREW contends that OLC is failing to publish numerous opinions that § 552(a)(2) requires be published, the only apparent basis for this contention is CREW's observation that OLC produces opinions with legal conclusions that are "controlling"; as noted above, *EFF* squarely rejected the argument that this feature of an OLC opinion rendered it non-privileged. *See* p. 4, *supra*. And aside from its observation that OLC produces formal opinions that provide controlling advice to Executive Branch officials on questions of law—a fact which, as just noted, was also present in *EFF*—CREW presents no basis for its contention that OLC has wrongfully failed to publish any opinion that is subject to

§ 552(a)(2) and not privileged. Absent factual allegations plausibly establishing that some unlawful withholding has actually occurred, CREW has not adequately stated a claim for relief.

CREW insists that "the specificity of [its] complaint dispels any notion it is not adequately pled," Opp. at 11, and cites four alleged facts supporting its legal claims: (1) OLC provides "controlling advice to Executive Branch officials on questions of law . . ."; (2) such "controlling advice" is set forth in formal written opinions; (3) CREW requested that OLC provide it with copies (and indices) of its formal written opinions; and (4) OLC has not provided CREW with those opinions.[3] *Id.* at 12 (quotation marks omitted). "[S]pecificity" this is not. The latter two items simply relate that OLC has not published or provided to CREW all of its formal written opinions. And as to the first two, once again, *EFF* held that the opinion at issue there was privileged even if the legal advice contained in that document was "controlling." Neither Plaintiff's Complaint nor its opposition brief contains facts plausibly establishing that OLC has failed to publish opinions it was obligated to publish under § 552(a)(2). Particularly in light of *EFF*, Plaintiff cannot meet this burden simply by observing that OLC provides "controlling" legal advice. Yet that is all CREW does. Indeed, despite the more than 1,300 published OLC opinions available to consult, *see* http://www.justice.gov/olc/opinions (listing 1,309 opinions) (last accessed on July 26, 2017), CREW does not even attempt to identify with specificity the features of those OLC opinions it contends OLC is obligated to publish.

CREW also asserts that it cannot yet describe the advice documents subject to publication under § 552(a)(2) because it has not had the benefit of discovery. *See, e.g.*, Opp. at 3 (contending

[3] CREW also contends that "[t]his refusal has resulted in CREW suffering an informational injury by being deprived of information to which it is lawfully entitled," Opp. at 12, but this is merely a legal conclusion and, in any event, does not affect the conclusion that CREW has failed to adequately allege that OLC has wrongfully failed to publish non-privileged documents subject to § 552(a)(2).

that this case "cannot be resolved until CREW has obtained limited discovery"). But the possibility of future discovery cannot excuse CREW's antecedent failure to file a Complaint containing sufficient factual allegations plausibly establishing a claim for relief. Here, CREW's Complaint pleads no facts plausibly establishing that OLC has failed to publish opinions it was obligated to publish under § 552(a)(2), and Plaintiff's opposition brief adds nothing besides a legal conclusion that the D.C. Circuit already rejected in *EFF*. The Federal Rules of Civil Procedure do "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); they certainly do not unlock the doors of discovery for a plaintiff armed with nothing more than a legal conclusion that has been ***rejected*** by binding appellate authority. Yet that is all CREW offers here.

2. *Ripeness*: Any re-characterized claim is also not ripe for review. As the Government pointed out in its opening brief, the only claim that could conceivably be ripe here is a (meritless) claim that all of OLC's formal written opinions must be published. Mem. at 9. The Complaint does not set forth a factual basis for any other claim and, if CREW believes that OLC has unlawfully failed to disclose ***some*** formal written opinions, there is no legally cognizable hardship in requiring that CREW raise its legal argument through a more concrete factual setting. *Id.* at 10-11. CREW has no response to any of this, other than to assert that "DOJ's arguments address[] an unpled claim" and that its actual claim is that "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." Opp. at 11. Again, if CREW's claim is that ***all*** formal written opinions described in the Best Practices Memo must be published, that claim is possibly ripe. *See* p. 4, *supra*. But as previously discussed, any such claim is plainly meritless and CREW's arguments (and its accompanying demand for discovery) suggest that what CREW is really claiming is that

some unspecified subset of OLC opinions must be—but have not been—affirmatively published. *See* p. 6, *supra*. That claim is not ripe for review and CREW has no meaningful response.[4]

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Notwithstanding these threshold defects requiring dismissal, CREW briefly argues that the D.C. Circuit's decision in *CREW v. Department of Justice*, 846 F.3d 1235 (D.C. Cir. 2017) ("*CREW I*") supports its claims, and that it has followed *CREW I* "precisely." Opp. at 10. *CREW I* lends no support to Plaintiff's argument here. The D.C. Circuit held in *CREW I* that § 552(a)(2) is enforceable apart from requests seeking pre-existing documents under § 552(a)(3). *See* 846 F.3d at 1240 ("[A] plaintiff may bring an action under FOIA to enforce the reading-room provision, and may do so without first making a request for specific records under section 552(a)(3)."). But a conclusion that § 552(a)(2) is judicially enforceable says nothing about what a plaintiff must plead to obtain relief under that provision. And in particular, *CREW I* does not affect the core requirements that a plaintiff must plead facts that plausibly give rise to an entitlement to relief, and must present its claims in a sufficiently concrete factual context to allow for judicial resolution. Neither *CREW I* nor any other decision permits CREW to file a lawsuit with no well-pled factual allegations (and with a legal conclusion the D.C. Circuit has rejected), and then claim it needs discovery to learn whether OLC is complying with its FOIA obligations. The Complaint should be dismissed.

[4] In addition to the above points, CREW now disavows any argument that OLC should be ordered to publish some but not all of its formal written opinions—for good reason since, as discussed above, CREW has not identified or plausibly alleged the existence of such opinions that must be published. Having disclaimed any intent to seek particular formal written opinions, CREW would not be entitled to relief on this Complaint even if CREW had plausibly alleged the existence of particular opinions that must be published (which CREW has not done).

II. THE COMPLAINT FAILS AS A MATTER OF LAW BECAUSE FOIA DOES NOT REQUIRE OLC TO AFFIRMATIVELY DISCLOSE ITS ADVICE DOCUMENTS

Even if CREW could overcome the issues discussed above, CREW's Complaint must still be dismissed as a matter of law. The fundamental theory of CREW's lawsuit—that formal OLC opinions must be affirmatively disclosed under § 552(a)(2) because the legal conclusions set forth in those opinions are "controlling" and "precedential"—is squarely disproven by the D.C. Circuit's binding decision in *EFF*. CREW's opposition only further confirms that granting the relief requested here would raise significant institutional and constitutional concerns for the Executive Branch.

A. The Overwhelming Precedent Approving the Withholding of OLC Opinions as Privileged Disproves CREW's Claim Here

As the Government pointed out in its opening brief, *see* Mem. at 19, there is ample case law confirming that OLC opinions are generally protected by the deliberative process privilege. *See, e.g.*, *New York Times v. Dep't of Justice*, 806 F.3d 682, 687 (2d Cir. 2015); *New York Times v. Dep't of Justice*, 2013 WL 174222, at *4-9 (S.D.N.Y. Jan. 7, 2013); *CREW v. Nat'l Archives & Records Admin.*, 583 F. Supp. 2d 146, 166 (D.D.C. 2008); *CREW v. Office of Admin.*, 249 F.R.D. 1, 4-8 (D.D.C. 2008); *New York Times v. Dep't of Def.*, 499 F. Supp. 2d 501, 516 (S.D.N.Y. 2007); *Southam News v. INS*, 674 F. Supp. 881, 886 (D.D.C. 1987); *Morrison v. Dep't of Justice*, 1988 WL 47662, at *1-2 (D.D.C. Apr. 29, 1988). Several courts have also recognized that OLC may withhold its opinions on the basis of the attorney-client privilege. *See, e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 196 (D.D.C. 2013) ("[T]he Court concludes that the attorney-client privilege does apply to the sixteen OLC opinions because they embody legal advice that was provided in confidence at the request of and to Executive Branch officials."), *denying reconsideration*, 206 F. Supp. 3d 241 (D.D.C. 2016); *ACLU v. Dep't of Justice*, 2011 WL 10657342 at *9 (D.D.C. Feb. 14, 2011); *CREW v. Nat'l Archives & Records Admin.*, 583 F. Supp.

2d at 165; *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 68-69 (D.D.C. 2007).

The import of this overwhelming precedent, as well as the D.C. Circuit's binding decision in *EFF*, is not simply that particular OLC advice documents are privileged and therefore not all advice documents need to be published. Rather, the critical point is that CREW cannot reconcile its view that all "controlling" advice documents need to be published with the authority approving the withholding of materially indistinguishable documents. The case law thus disproves the basic theory on which CREW's lawsuit here is predicated.

Turning to *EFF* in particular, CREW asserts that the decision in that case "was based expressly on a factual record that was tailored and limited to one OLC opinion" and that the "record established only that the requested record played an advisory-only role in the decision-making process of the agency that requested the opinion." *See* Opp. at 13. *EFF* will not bear this strained characterization.

With respect to the OLC opinion at issue in *EFF*, the FBI had sought ***legal advice*** from OLC about a particular investigative tactic and (as the opinion was summarized in a subsequent Office of Inspector General Report), OLC's advice agreed with the FBI that, under certain circumstances, the tactic at issue was legally permissible. 739 F.3d at 5. Before the D.C. Circuit, EFF argued, as CREW does here (and citing the Best Practices Memo), that the controlling nature of OLC's legal conclusions meant that the opinion could not be withheld under the deliberative process privilege. Reply Brief of Plaintiff-Appellant Electronic Frontier Foundation, *EFF v. Dep't of Justice*, Case No. 12-5363 (D.C. Cir. filed June 20, 2013) at 15 (asserting that "[t]he Opinion does not represent the give-and-take of an ongoing discussion on the appropriate interpretation of the relevant statute" and instead was "the final word on the controlling law" (quotation marks and citation omitted)). Indeed, ***CREW itself*** made a similar argument in an amicus brief filed in

support of EFF. Brief of Amici Curiae CREW et al., *EFF v. Dep't of Justice*, Case No. 12-5363 (D.C. Cir. filed Mar. 22, 2013) at 19 ("[T]he OLC Opinion represents the definitive word from the executive branch on the legality of a very controversial practice.").

The D.C. Circuit was not persuaded:

> EFF argues that the OLC Opinion must be "working law" because it is controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn. That the OLC Opinion bears these indicia of a binding legal decision does not overcome the fact that OLC does not speak with authority on the FBI's policy; therefore, the OLC Opinion could not be the "working law" of the FBI unless the FBI "adopted" what OLC offered.

EFF, 739 F.3d at 9. The D.C. Circuit went on to explain that "[e]ven if the OLC Opinion describes the legal parameters of what the FBI is ***permitted*** to do, it does not state or determine the FBI's policy." *Id.*; *see also Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 77 n.19 (D.D.C. 2008) ("[A] legal conclusion that is part of a larger decision-making process may well be subject to the deliberative process privilege.").

CREW attempts to minimize *EFF*, asserting that "DOJ has not even supported its claim that the opinion at issue in *EFF* was a formal OLC opinion like those CREW has requested," and noting that the D.C. Circuit did not reference the "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." Opp. at 14. But it is irrelevant that the D.C. Circuit did not mention the Best Practices Memo and, indeed, it also makes no difference whether the opinion at issue in *EFF* "was a formal OLC opinion like those CREW has requested." The dispositive fact here is that the D.C. Circuit expressly held that the opinion was privileged regardless of whether it was "controlling" and "precedential." That directly-on-point holding forecloses CREW's materially indistinguishable theory that OLC's formal opinions must be disclosed because they are "controlling" and "establish a system of precedent." Opp. at 17.

CREW also notes that *EFF* described the relevant OLC opinion as "examin[ing] policy options available to the FBI" and "amount[ing] to advice offered by OLC for consideration by officials of the FBI." Opp. at 14. CREW misunderstands these passages. The D.C. Circuit was not suggesting, as CREW implies, that the FBI was entitled to ignore the legal conclusions contained in the particular OLC opinion at issue; as previously discussed, that opinion was "controlling" and "precedential" in the same sense that CREW uses those terms, and the D.C. Circuit held that this was irrelevant to the privilege analysis. *See* p. 13, *supra*. Rather, the D.C. Circuit's point was that, although OLC advice might be controlling as to the legal parameters within which an agency can set policy, it is not controlling as to the agency ***policy decisions***. *See* 739 F.3d at 10 (noting that "[e]ven if the OLC Opinion describes the legal parameters of what the FBI is ***permitted*** to do, it does not state or determine the FBI's policy"); *id.* at 9 ("OLC cannot speak authoritatively on the FBI's policy."). This simply reinforces that OLC's legal advice is predecisional to the agency's policy decision and therefore protected by the deliberative process privilege. As the Government previously noted, *see* Mem. at 18, OLC itself does not make policy decisions; instead, it provides legal advice to other agencies, and those agencies in turn make policy decisions within the legal framework articulated by OLC. Accordingly, OLC's advice is ordinarily simply one input into its client agencies' ongoing deliberations about how to conduct or implement their policy goals.

Aside from its misplaced reliance on the "controlling" and "precedential" nature of the formal opinions it seeks, CREW makes a hodgepodge of additional points, none of them persuasive. CREW asserts that "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" and contends that "OLC serves the interests of the United

States." Opp. at 22. But it cannot be seriously questioned that OLC's role—effectively functioning as agencies' outside counsel, *see* 28 C.F.R. § 0.25—is sufficient to invoke attorney-client protections.[5] CREW also contends that "documents that discuss established policies and decisions fall outside the privilege," and that "the person who issues the document [must have] authority to speak finally and officially for the agency." Opp. at 21 (quotation marks omitted). But CREW does not even attempt to explain the relevance of these principles to the formal written opinions described in the Best Practices Memo, which consist of controlling legal advice in "the form of signed memoranda, issued to an Executive Branch official who has requested the Office's opinion." Best Practices Memo at 2.

CREW further notes that "even deliberative documents can lose their protection if they are either adopted or incorporated by reference." Opp. at 21 (quotation marks omitted). But CREW pleads no facts suggesting that there are unpublished formal written opinions for which an agency has adopted both OLC's conclusion and reasoning, as required to transform a pre-decisional and deliberative document into agency policy. *See* Mem. at 16 n.4. And even if CREW had done so, any resulting publication requirement would run to the policymaking agency, not OLC, which has no policymaking authority (a point the Government made in its opening brief, to which CREW does not respond). *Id.* at 16. More fundamentally, if CREW believes that a particular OLC advice document has been adopted as agency policy, it can seek ***that*** document under FOIA—CREW is not entitled to conduct an audit of OLC's publication practices based on nothing more than its own unsupported speculation.

[5] *Cf. Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (noting that the attorney-client relationship applies when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests").

B. OLC Advice Documents Do Not Fall Within § 552(a)(2)

Even setting aside the privileged nature of OLC's advice documents, CREW's claim also fails as a matter of law because OLC generally does not produce documents that fall within § 552(a)(2)(A) or (B). Section 552(a)(2) requires agencies to make available for public inspection: "(A) final opinions, including concurring and dissenting 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). As the Government explained in its opening brief, both affirmative publication provisions are limited to disputes involving private parties, and OLC does not issue any opinions in adversarial disputes involving private parties. Mem. at 14-15. This limitation is supported by the text of § 552(a)(2) itself—which makes clear that the covered documents refer to typical adjudicatory contexts involving private individuals—as well as the sanction within § 552(a)(2), prohibiting the use of unpublished opinions in a dispute ***with individuals***, which CREW wholly ignores. Moreover, OLC does not have policymaking authority and thus its opinions cannot be an authoritative statement of an agency's ***policy*** or an interpretation that regulates members of the public, *id.* at 15-17; indeed, the D.C. Circuit recognized this exact point in *EFF*, concluding that "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." 739 F.3d at 9.

Addressing the two clauses individually, CREW makes a number of arguments, none of them persuasive.

As to § 552(a)(2)(A)'s category of "final opinions, including concurring and dissenting opinions, . . . as well as orders, made in the adjudication of cases," CREW asserts that "orders made in the adjudication of cases comprise only a part of a larger category of final opinions." Opp.

at 15. But that interpretation plainly misreads the statute and its use of commas, which make clear that the phrase "made in the adjudication of cases" is a requirement applicable to both "final opinions" and "orders" covered by § 552(a)(2)(A). That understanding is further confirmed by the sanction within § 552(a)(2) discussed above (prohibiting the use of unpublished opinions in a dispute ***with individuals***), which CREW does not address. *See* Mem. at 15. Nor does CREW address the D.C. Circuit decisions that have also confirmed this limitation. *Id.*; *see also Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (report not subject to affirmative disclosure because it "sets forth the conclusions of a voluntarily undertaken internal agency investigation, not a conclusion about agency action (or inaction) ***in an adversarial dispute with another party***" (emphasis added)). CREW also asserts that "OLC adjudicates legal disputes between agencies, as the President has directed it to do." Opp. at 15. But even when OLC provides controlling legal advice on an issue as to which federal agencies are in disagreement, the resulting legal advice document cannot reasonably be characterized as "the adjudication of [a] case[]" and CREW does not argue otherwise.

CREW then relies on the language in *EFF* that a "working law" document includes "a document that determined policy or applied established policy," 739 F.3d at 9, as if OLC advice documents fall within that category. *See* Opp. at 14. Of course, the D.C. Circuit in *EFF* went on to refute that very notion. *See* 739 F.3d at 9 (holding that "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," and therefore "the OLC Opinion differs from memoranda we have found to constitute the 'working law' of an agency"). CREW's attempts to rely on other cases fare no better, because *EFF* makes clear that OLC does not perform any regulatory duties, and that the

purportedly "controlling" nature of its legal advice does not transform that advice into "working law." 739 F.3d at 9-10; *see also N.Y. Times*, 806 F.3d at 687.

With respect to § 552(a)(2)(B) and its category of "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," CREW also asserts that the current record does not support a conclusion that OLC's advice is not dispositive regarding agency action. Opp. at 16. But the Complaint itself confirms that OLC's function is to provide ***opinions*** and ***advice***, not to determine matters of policy. *See* Compl. ¶¶ 13-21. OLC's governing regulation confirms the same point: although OLC may provide its opinion and advice to policymaking agencies, it has no policymaking authority itself. *See* 28 C.F.R. § 0.25(a), (c). This limitation is further confirmed by the *EFF* decision, as well as the Bies letter, *see* ECF No. 8-3. In response, CREW again relies on OLC's Best Practices Memo and makes a series of arguments about the "controlling" nature of OLC advice documents. *See* Opp. at 16-17. But as *EFF* makes clear, this feature of OLC's advice does not require the publication of such advice. *See* 739 F.3d at 9-10; *see also Vietnam Veterans of Am. v. Dep't of Navy*, 876 F.2d 164, 164-65 (D.C. Cir. 1989) (holding that when an entity has authority only to dispense legal advice on certain topics, but not to actually act on behalf of the agency on those topics, the legal opinions do not constitute statements of policy).

CREW also asserts that "formal OLC opinions are subject to specified procedural requirements," including that they must be signed by certain individuals, prepared on bond paper, go through certain clearance processes, and be separately filed and indexed internally. Opp. at 18. But none of these internal processes undermines the basic point that, as confirmed by *EFF* and other sources, OLC does not have policymaking authority and thus does not determine agency action.

CREW also relies on FOIA's legislative history to argue that § 552(a)(2) was intended to reach documents "resolv[ing] internal governmental conflicts over the meaning of a statute, rule, or policy." Opp. at 18. But this argument inaccurately describes the legislative history. CREW relies on a single phrase from the House Report to argue that "Congress sought to compel disclosure of decisions 'that affect any member of the public'" *Id.* (quoting H.R. Rep. No. 89-1497, at 7 (1966)). CREW's quoted phrase, however, was attached to Congress's concern about disclosing ***staff manuals and instructions*** that affect members of the public. *See* 5 U.S.C. § 552(a)(2)(C) (requiring the affirmative disclosure of "administrative staff manuals and instructions to staff ***that affect a member of the public***" (emphasis added)). CREW cannot impute this purported congressional purpose to final opinions or unpublished statements of policy, given that those provisions do not contain such statutory language. *Id.* § 552(a)(2)(A), (B). Moreover, another passage from the House Report makes clear that Congress's primary concern in § 552(a)(2) was with the adjudication of private rights:

> Subsection (b) [referring to § 552(a)(2)] would . . . requir[e] each agency to maintain for public inspection an index of all the documents having precedential significance which would be made available or published under the law. The indexing requirement will ***prevent a citizen from losing a controversy with an agency*** because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it.

H.R. Rep. No. 89-1497, at 8 (emphasis added); *see also Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 352 (D.C. Cir. 1972) (quoting legislative history and stating that Congress enacted § 552(a)(2) because it was "troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information"), *rev'd on other grounds*, 415 U.S. 1 (1974). Because OLC opinions do not involve disputes with private parties, then, OLC need not disclose its advice documents under § 552(a)(2). Indeed, CREW's theory—that "Congress sought to compel disclosure of decisions 'that affect any member of the public,'" Opp. at 18—would mark

a radical expansion of agencies' disclosure obligations under § 552(a)(2), since virtually ***every*** agency opinion can be described as affecting a member of the public in some manner.

Finally, CREW asserts in a separate sub-section that OLC's formal written opinions implicate the "working law" (or "secret law") doctrine. *See* Opp. at 24-26. The cases CREW cites are inapplicable, as confirmed by the *EFF* decision. 739 F.3d at 9 ("Because OLC cannot speak authoritatively on the FBI's policy, the OLC Opinion differs from memoranda we have found to constitute the 'working law' of an agency."); *see also N.Y. Times*, 806 F.3d at 687 (citing *EFF* and rejecting "the general argument that the legal reasoning in OLC opinions is 'working law'"); *accord Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (stating that "[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 in its dealings with the public***" (emphasis added)). CREW makes no effort to explain how its arguments on working law can be reconciled with the D.C. Circuit's definitive holding in *EFF*.

C. Granting CREW's Requested Relief Would Undermine OLC's Important Role in the Executive Branch, and Raise Significant Constitutional Concerns.

CREW's requested relief—the compelled disclosure of a significant number of OLC advice documents—is extremely broad, and would undermine OLC's important role of providing confidential legal advice to assist the Executive Branch in the discharge of its constitutional and statutory responsibilities. As CREW itself acknowledges, OLC serves an important function in the Executive Branch by providing legal advice representing "the interests of the United States, not merely those of an individual agency." Opp. at 22. Granting CREW's requested relief here, however, would undermine this and other important rule-of-law interests by discouraging agencies from seeking OLC's legal advice and potentially inhibiting OLC's ability to provide full and frank advice. *See* Mem. at 25-26.

CREW's opposition largely ignores the potentially devastating effect that its requested relief could have on OLC's important function, contending that "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" and "propose[s] interrogatories [that] ask OLC to identify the number of times it has prepared a formal written opinion in response to a request ***from the President***." Opp. at 28 (emphases added). But the important constitutional interests safeguarded by OLC's ability to provide confidential legal advice are not limited to opinions submitted directly to the President. As the Government noted in its opening brief, CREW's requested relief would also interfere with the President's ability "to take care that agencies faithfully execute the laws, including by ensuring that those agencies may receive confidential legal advice directly, to inform both their decisionmaking processes and their ability to faithfully execute the law." Mem. at 26. CREW's underlying legal theory in this lawsuit—that authoritative legal advice provided within the Executive Branch must be affirmatively published under FOIA—raises significant constitutional concerns, and should be rejected on this basis alone.

III. THE INDEXING CLAIM MUST BE DISMISSED.

Count Two of CREW's Complaint—which asserts that CREW is entitled to an index of all OLC's formal written opinions, *see* Compl. ¶¶ 32-37—also must be dismissed. As the Government explained in its opening brief, this claim is meritless because Count One is also meritless. *See* Mem. at 27. CREW criticizes the Government's articulation of this point, asserting that "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." Opp. at 29. But Section 552(a)(2)'s indexing requirement applies only to materials "required by this paragraph to be made

available or published," 5 U.S.C. § 552(a)(2),[6] and CREW does not appear to dispute that if Count One is dismissed, then Count Two must also be dismissed. Because Count One must be dismissed for all the reasons discussed above, Count Two must be dismissed as well. Thus, both claims in CREW's Complaint ought to be dismissed.

CONCLUSION

For the foregoing reasons, CREW's Complaint should be dismissed with prejudice.

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Respectfully submitted,

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[6] Any argument that such an index would be required for advice documents not themselves required to be published under the statute must also fail for the additional reason that such an index would contain privileged information, such as the subjects and recipients of OLC's privileged legal advice.