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

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY

INTRODUCTION

Relying on a single sentence in Defendant's reply memorandum—which Plaintiff implausibly characterizes as raising a new issue—Plaintiff seeks the Court's permission to file a seven page sur-reply with twenty-five footnotes. *See* ECF No. 15 ("Motion"); ECF No. 15-1 ("Proposed Sur-Reply"). The Motion should be denied. Defendant's reply did not raise any new issues; it only responded to the arguments that Plaintiff had raised in its opposition. And far from addressing anything new, the Proposed Sur-Reply simply repeats Plaintiff's legal claim that at least some of the Office of Legal Counsel's ("OLC") formal written opinions must be published because those opinions provide "controlling" legal advice to Executive Branch officials. For reasons set forth in Defendant's briefs, this theory is foreclosed by binding D.C. Circuit precedent. *See Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) ("*EFF*"). In any event, both

parties have had a full and fair opportunity to brief this legal issue, and there is no reason to permit Plaintiff to file an additional brief opposing Defendant's motion to dismiss.

ARGUMENT

I. Standards For Authorizing Filing of Additional Briefs

The Court's Local Rules contemplate that there will ordinarily be a maximum of three memoranda for a given motion: an opening memorandum, an opposition, and a reply. *See* LCvR 7; *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012). Sur-replies, consequently, are "generally disfavored." *Banner Health*, 905 F. Supp. 2d at 187.

"As the courts have made clear, '[a] surreply may be filed . . . only to address new matters raised in a reply, to which a party would otherwise be unable to respond.'" *Gonzalez-Vera v. Townley*, 83 F. Supp. 3d 306, 315 (D.D.C. 2015) (quoting *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 276 (D.D.C.2002)) (emphases omitted). Accordingly, "[a]s Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' and the reply 'does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate.'" *Banner Health*, 905 F. Supp. 2d at 188 (quoting *Crummey v. Social Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011)).

II. The Court Should Deny Plaintiff's Motion for Leave to File a Sur-Reply

The Court should deny Plaintiff's Motion for two related reasons. First, Defendant's reply did not raise any new issues that would justify Plaintiff's request. And second, the Proposed Sur-Reply simply repeats arguments Plaintiff has already made at length in its opposition brief; it does not add anything new that would be helpful in resolving Defendant's motion to dismiss.

1. In its initial brief, Defendant explained that, to the extent Plaintiff's claim was that

all OLC formal written opinions must be published—as the Complaint alleges—such a claim might be ripe for review but is meritless. *See* ECF No. 8-1 ("Dft's Mem.") at 12. Defendant further argued that, to the extent Plaintiff was advancing a more limited claim—such as a claim that "OLC has unlawfully failed to publish ***some*** of its formal opinions"—any such claim was neither ripe nor adequately pled. *Id.* at 8-11. Defendant noted, inter alia, that Plaintiff's "lawsuit does not identify or seek to obtain access to any specific OLC advice document" and that "[t]o the extent [Plaintiff] is seeking access to a more limited set of documents, the Complaint provides no indication—even generally—of what documents are at issue." *Id.* at 9; *see also id.* at 11 (noting that "aside from [Plaintiff's] (legally foreclosed) claim that all OLC formal written opinions must be disclosed, the Complaint consists of nothing more than conclusory allegations that OLC is failing to comply with its FOIA obligations").

In its opposition, Plaintiff disputed Defendant's arguments, asserting that "the specificity of [its] complaint dispels any notion it is not adequately pled," and citing four alleged facts supporting its 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) Plaintiff requested that OLC provide it with copies (and indices) of its formal written opinions; and (4) OLC has not provided Plaintiff with those opinions. ECF No. 12 ("Opp.") at 11-12.

In its reply memorandum, Defendant explained that these allegations are not sufficient to plausibly allege that unlawful withholding has actually occurred. ECF No. 14 ("Reply") at 7-9. Defendant noted that *EFF* held that the opinion at issue was properly withheld as privileged even if the legal advice contained in the document was "controlling." *Id.* at 8. Plaintiff thus could not meet its burden to adequately plead unlawful withholding simply by observing that OLC provides "controlling" legal advice. *Id.* "Yet that is all [Plaintiff] does." *Id.* Defendant then added the

following sentence, which is the sole basis for the Proposed Sur-Reply: "Indeed, despite the more than 1,300 published OLC opinions available to consult, CREW does not even attempt to identify with specificity the features of those OLC opinions it contends OLC is obligated to publish." *Id.* (citation omitted).

Contrary to Plaintiff's argument, this sentence did not raise any new matters; nor did it expand the scope of the issues before the Court. Defendant was responding to Plaintiff's argument that Plaintiff had adequately alleged wrongful withholding. All this subsequent sentence did was point out that Plaintiff had not done so ***despite*** the availability of numerous public examples it could have drawn from. This observation did not inject into the case "the issue of [OLC's] previously published opinions, their impact here, and [Plaintiff's] failure to address those opinions until its reply brief." Motion at 2. Defendant, moreover, has consistently emphasized that, to the extent Plaintiff is seeking only a subset of OLC formal written opinions (the claim actually pled in the Complaint being meritless), it failed to provide a sufficient basis for such a claim.[1] Plaintiff obviously knew that OLC has published certain of its opinions and can hardly claim to have been blindsided by Defendant's brief reference to them in a one-sentence aside in its reply.[2]

In short, the purported basis for Plaintiff's motion to file a sur-reply—a single sentence in

[1] *See* Dft's Mem. at 9 (noting that this "lawsuit does not identify or seek to obtain access to any specific OLC advice document" and that "[t]o the extent [Plaintiff] is seeking access to a more limited set of documents, the Complaint provides no indication—even generally—of what documents are at issue").

[2] As Defendant previously informed the Court, a similar lawsuit brought by a different organization is currently pending before Judge Ketanji Brown Jackson. *See Campaign for Accountability v. Dep't of Justice*, No. 1:16-cv-01068-KBJ (D.D.C.) ("*CFA*"). Lead counsel for Plaintiff in this case was, until quite recently, lead counsel for the plaintiff in *CFA*; in moving to dismiss the *CFA* complaint, both of the Government's briefs (each of which was filed before the Complaint in this case, while Plaintiff's lead counsel was still lead counsel of record for CFA) noted that CFA had failed to identify particular features or parameters based on opinions publicly available on OLC's website. *See CFA*, ECF No. 9-1 at 22; *CFA*, ECF No. 12 at 16.

Defendant's reply—is well within the scope of the matters raised in Plaintiff's opposition brief. Hewing to this district's usual rules for motion practice will not put Plaintiff at an unfair disadvantage, and the Motion should thus be denied.

2. The Motion should be denied for a second reason as well. "A surreply may not be used simply to . . . reiterate arguments already made." *Nix El v. Williams*, 174 F. Supp. 3d 87, 92 (D.D.C. 2016); *accord Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002). However, that is all the Proposed Sur-Reply does, merely repeating the central legal argument set forth in Plaintiff's opposition. In particular, virtually all of the Proposed Sur-Reply—and every example Plaintiff cites—appears to be devoted to the proposition that OLC issues opinions controlling within the Executive Branch. *See, e.g.*, Proposed Sur-Reply at 2 (asserting that OLC issued a "controlling interpretation"); *id.* ("OLC affirmed the primacy of its opinions over those of GAO."); *id.* at 3 (OLC "provided legal interpretations that the Executive Branch is not free to ignore"); *id.* (claiming that a different OLC "legal opinion dictated a specific interpretation of [a statute] that the requesting agency . . . was not free to ignore"); *id.* at 4 (asserting that "OLC's stated goal of agency conformance with its legal opinions underscores the very nature of these opinions as setting forth what the law means and how agencies are to comply with the law"); *id.* at 5 (arguing that OLC opinions "are binding and controlling in the fullest sense of those words").

None of this is at all new. The ***central*** argument of Plaintiff's opposition and of its Complaint was that OLC's formal written opinions must be affirmatively published because of the controlling nature of the legal conclusions in those opinions. *See, e.g.*, Opp. at 2, 3, 12, 13, 16, 17, 20, 22; Compl. ¶¶ 2, 18, 20, 24. Indeed, the word "controlling" alone appears thirteen times in Plaintiff's opposition brief. Nor does Plaintiff's citation of particular released opinions add anything to the analysis: OLC has never denied in this litigation that it issues opinions with legal

conclusions that are controlling on client agencies, and it has explained at length why this feature of OLC's advice does not render its opinions non-privileged. *See, e.g.*, Reply at 4-5, 12-13. And although the Proposed Sur-Reply relatedly characterizes *EFF* as involving mere "advice that the requesting agency was free to accept or ignore," Proposed Sur-Reply at 3, Plaintiff made similar points in its opposition, *see* Opp. at 13-14. Defendant, in turn, has responded by noting that the opinion at issue in *EFF* was "controlling" and "precedential" in the same sense that Plaintiff uses the terms, and by explaining why Plaintiff's attempts to minimize *EFF* fail. Reply at 4-5, 13-14. This Court is perfectly capable of determining whether Plaintiff or Defendant correctly construes *EFF*, and there is no reason to permit Plaintiff to file another brief on this same topic.

Finally, the Proposed Sur-Reply asserts that "many of the published OLC opinions demonstrate the significant impact they have on private individuals" and that "OLC opinions have a direct and often financial impact on private citizens, even though they address issues that arise in the context of inter- or intra-agency disputes." Proposed Sur-Reply at 5-6. Again, Plaintiff has made this argument already. *See, e.g.*, Opp. at 18-19. Defendant, in turn, has explained why Plaintiff's theory—that Congress sought to compel disclosure of OLC opinions that might affect members of the public—misconstrues the legislative history and would mark a radical expansion of agencies' disclosure obligations under § 552(a)(2). Reply at 19-20. Once again, there is nothing new here. Permitting a sur-reply under these circumstances is not appropriate.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for leave to file the Proposed Sur-Reply.

Dated: August 17, 2017

Respectfully submitted,

CHAD A. READLER

Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Andrew M. Bernie
Andrew M. Bernie (DC BAR# 995376)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Telephone: (202) 616-8488
Facsimile: (202) 616-8470
Email: andrew.m.bernie@usdoj.gov
Counsel for Defendant