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 SUR-REPLY IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

To further buttress its argument that CREW's complaint must be dismissed, the Department of Justice's "(DOJ") reply brief faults CREW for ignoring the features of the "more than 1,300 published OLC opinions" as guidance in explaining CREW's reference to "'controlling' legal advice."[1] Contrary to DOJ's suggestion, however, consulting those opinions reinforces, not undermines, the critical distinctions between the legal *opinions* CREW asserts the Office of Legal Counsel ("OLC") must publish and the "*advice* documents" DOJ falsely insists are all that are at issue.[2]

A review of just some published OLC opinions lays bare the stark differences between the opinions at issue in cases like *Electronic Frontier Foundation v. DOJ*, 739 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 354 (2014) ("*EFF*"), and those that determine definitively what the law is or means and therefore fall within the Freedom of Information Act's ("FOIA") reading room provision, 5 U.S.C. § 552(a)(2). First, they reinforce OLC's statutorily based role of

[1] Reply Memorandum in Support of Defendant's Motion to Dismiss ("D's Reply") (Dkt. 14), at 8.
[2] D's Reply at 11 (emphasis added).

"provid[ing] authoritative interpretations of law for the Executive Branch."[3] For example, Office of Management and Budget ("OMB") Director Joshua B. Bolton, in circulating to the heads of all departments and agencies an OLC memorandum on the use of government funds for video news releases that conflicted with the conclusions of the Government Accountability Office ("GAO"), stressed that "it is OLC (subject to the authority of the Attorney General and the President), and not the GAO, that provides the controlling interpretations of law for the Executive Branch."[4] The "controlling interpretation" OLC offered in that case went well beyond offering an "'advisory opinion,'"[5] to dictate that agencies could not follow GAO guidance, but instead must adhere to "the definitive Executive Branch position" OLC had spelled out on using appropriated funds to prepare prepackaged news stories.[6]

OLC affirmed the primacy of its opinions over those of GAO in another memorandum opinion concerning regulations of the Small Business Administration ("SBA") governing the interplay of three programs for specified small businesses that also answered the question of whether GAO had the authority to invalidate SBA's regulations.[7] OLC concluded SBA's regulations not only were reasonable, but also were "binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary."[8]

---

[3] *Whether Appropriations May be Used for informational Video News Releases*, 29 Op. O.L.C. 74 (2005).
[4] *Use of Government Funds for Video News Releases*, Mar. 11, 2005, *available at* https://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2005/m05-10.pdf.
[5] *EFF*, 739 F.3d at 10, quoting *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010).
[6] 29 Op. O.L.C. at 75.
[7] *Permissibility of Small Business Regulations Implementing the Historically Underutilized Business Zone, 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs*, 33 Op. O.L.C. __, (Aug. 21, 2009), *available at* https://www.justice.gov/file/18471/download.
[8] *Id.* at *13.

In both opinions, OLC went well beyond offering "advice" that the requesting agency was free to accept or ignore, as in *EFF*. The OLC opinions were more than merely "persuasive,"[9] and did more than "provide helpful guidance[.]"[10] Instead, they provided legal interpretations that the Executive Branch is not free to ignore, and must accept over those of the GAO.[11]

Further evidence of this role is found in an OLC memorandum from October 16, 200, in which the question before OLC was whether the Defense of Marriage Act ("DOMA") would prevent the Social Security Administration from providing social security benefits to the non-biological child of a same-sex couple.[12] OLC concluded DOMA would not have that effect in a memorandum opinion that went far beyond merely offering legal advice, instead stating definitively that DOMA does not bar the child of a same-sex couple from qualifying for Social Security Act benefits.[13] To be sure, OLC was not itself providing or paying out such benefits, but its legal opinion dictated a specific interpretation of DOMA that the requesting agency (the Social Security Administration) was not free to ignore.

---

[9] *Id.*, citing *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. O.L.C. 65, 68 n.8 (1992).
[10] *Id.*, citing *Administrative Settlement of Disputes Concerning Mineral Royalties Due the Government* at n.7 (1998), *available at https://www.justice.gov/opinion/file/844111/download.*
[11] If DOJ is to be taken at its word that all of its opinions merely offer "advice" that agencies are free to ignore, the opinions OLC has issued concerning whether a sitting president is amenable to federal criminal prosecution while in office, which include *Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate*, 24 Op. O.L.C. 110 (2000), and Robert G. Dixon, Jr., *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, (1973, *available at* https://fas.org/irp/agency/doj/olc/092473.pdf, are advisory only
[12] *Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act*, 31 Op. O.L.C. 243 (2007).
[13] *Id.* at 247.

Notably, OLC issued many of these opinions at the request of independent agencies. OLC's 2010 Best Practices Memo (Dkt. 12-1) directs that when OLC is

> asked to provide an opinion to an executive agency the head of which does not serve at the pleasure of the President (*e.g.*, an agency head subject to a 'for cause' removal restriction), our practice is to issue our opinion *only if we have received in writing from that agency an agreement that it will conform its conduct to our conclusion.*

Best Practices Memo at 3 (emphasis added). Quite clearly OLC seeks this agreement because without it OLC has no assurance an independent agency "will conform its conduct to [OLC's] conclusion." *Id.* 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 – features that make them subject to the FOIA's reading room provision.

Applying the Best Practices directive, OLC received an agreement to be bound by its opinion from the Postal Service as to whether its employees are entitled to receive credit for purposes of their retirement annuity for employment periods when the Postal Service failed to make required employer contributions.[14] Both OPM and the Postal Service requested an opinion on this issue from OLC, and the Postal Service, "an independent agency . . . agreed to be bound by [OLC's] decision."[15] Similarly, the National Labor Relations Board ("NLRB") sought an opinion from OLC on whether it could "issue decisions and orders in unfair labor practice and representation cases once three of the five seats on the Board have become vacant."[16] Pursuant

---

[14] *Whether Postal Service Employees are Entitled to Receive Service Credit, for Purposes of Their Retirement Annuity Under the Federal Employees' Retirement System, for Periods of Employment During Which the United States Postal Service Has Not Made its Required Employer Contributions*, 36 Op. O.L.C. __, (2011) ("Postal Service Employees Opinion"), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2011/11/31/postal-service-fers-opinion_0.pdf.

[15] *Id.* at 1.

[16] *NLRB Quorum Requirements*, 27 Op. O.L.C. 82 (2003).

to OLC policies governing independent agencies, the NLRB expressly "agreed to be bound" by the OLC's opinion.[17] So, too, the SEC agreed to be bound by OLC's opinion concerning whether a former SEC official would be communicating on behalf of the United States during the year following the end of his SEC service,[18] as did the Nuclear Regulatory Commission ("NRC") on the issue of the NRC's authority to collect annual fees from certain federal agencies.[19]

By contrast, OLC needs and seeks no such agreement from non-independent agencies, whose heads are subject to the direction of the President and the attorney general when exercising statutory authority conferred by 28 U.S.C. §§ 511-13. All of this points unmistakably to the conclusion that the legal *opinions* OLC issues, unlike the legal *advice* OLC may offer upon request, are binding and controlling in the fullest sense of those words. They represent the authoritative views of the Executive Branch that agencies have no latitude to ignore – agencies can neither adopt a policy nor reach an interpretation that conflicts with the legal pronouncements set forth in OLC's legal opinions.

Second, many of the published OLC opinions demonstrate the significant impact they have on private individuals by dictating the outcome of disputes to which private individuals are or would otherwise be the beneficiaries. For example, an OLC memorandum opinion concluding sovereign immunity barred VA hospitals from paying back pay to VA physicians hired under the H-1B visa program clearly had a direct financial impact on those physicians.[20]

---

[17] *Id.* at 82 n.1.
[18] *Status of Public Company Accounting Oversight Board under 18 U.S.C. § 207(c)*, 31 Op. O.L.C. 47 n.1 (2008).
[19] *Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies*, 15 Op. O.L.C. 74, 75 n.1 (1991).
[20] *Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program*, 32 Op. O.L.C. 47 (2008).

Of note, in discussing why it was resolving a sovereign immunity dispute that "does not fall wholly within the Executive Branch," OLC explained the back pay order at issue follows an administrative adjudication brought at the behest, and on behalf, of private parties, namely the H-1B physicians,"[21] although the relief in question "clearly would 'expend itself on the public treasury.'"[22] In the same vein, OLC's DOMA opinion discussed *supra* determined whether or not a non-biological son of a same-sex union in Vermont would receive certain Social Security benefits. And the Postal Service OLC opinion discussed above dictated the full retirement annuities certain Postal Service workers would receive.[23] These opinions illustrate how 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.

Finally, none of the published opinions to which DOJ cites, including the ones addressed above, were published pursuant to 5 U.S.C. § 552(a)(2). Instead, as the Best Practices Memo explains, they were published pursuant to OLC's internal, discretionary policy – the very policy that CREW challenges here.[24] This is not simply a distinction without a difference; full compliance with section 552(a)(2) requires *timely* publication of both the opinions and an index. OLC, however, typically waits years before publishing its opinions,[25] and it has yet to publish an index of any kind.

CONCLUSION

---

[21] *Id.* at 50.
[22] *Id.*, quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963).
[23] Postal Service Employees Opinion.
[24] The section of the Best Practices Memo dealing with OLC's publication practices cites Executive Order 12146 as one of the primary authorities for its practices. Significantly, section 1-501 of that order expressly references "disclosure now required by law" in discussing access to legal opinions, an obvious allusion to 5 U.S.C. § 552(a)(2).
[25] For example, Volume 32, which contains OLC opinions from 2008, was published in 2014. *See* https://www.justice.gov/olc/file/477051/download.

For the foregoing reasons, and those set forth in plaintiff's opposition to defendant's motion to dismiss, defendant's motion should be denied.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann
(D.C. Bar No. 298190)
Adam J. Rappaport
(D.C. Bar No. 479866)
Citizens for Responsibility and Ethics
in Washington
455 Massachusetts Ave., N.W., Sixth Floor
Washington, D.C. 20001
Phone: (202) 408-5565
Facsimile: (202) 588-5020
aweismann@citizensforethics.org

Alan B. Morrison
(D.C. Bar No. 073114)
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7120 (telephone)
abmorrison@law.gwu.edu

August 7, 2017