

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

CITIZENS FOR RESPONSIBILITY AND  
ETHICS IN WASHINGTON,  
1101 K Street, N.W., Suite 201  
Washington, D.C. 20005

Plaintiff,

v.

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

U.S. DEPARTMENT OF HOMELAND  
SECURITY,  
245 Murray Lane, S.W.  
Washington, D.C. 20528,

U.S. DEPARTMENT OF DEFENSE,  
1400 Defense Pentagon  
Washington, D.C. 20301-1400

Defendants.

Civil Action No. 19-CV-00398-TSC

**DECLARATION OF PAUL P. COLBORN**

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by

others with knowledge of the documents at issue in this case. This declaration incorporates by reference the index of documents withheld in full by OLC attached hereto as Exhibit A.

### **OLC'S RESPONSIBILITIES**

2. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decisionmaking of executive branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. When OLC's client is the President or his senior advisers, OLC's advice requires confidentiality for a key reason: its disclosure would inhibit the President's ability to engage in effective communications and decisionmaking. In order to discharge his duties under Article II of the Constitution, the President must be able to receive confidential advice of all kinds, including legal advice. For this reason, confidential OLC legal advice to the President or his senior advisers is protected by the presidential communications privilege unless waived.

4. Although OLC occasionally publishes some opinions and makes discretionary releases of others, OLC legal advice in all its forms is generally kept confidential, regardless of the recipient within the Executive Branch. The President and other Executive Branch officials (like other public- and private-sector clients) often depend upon the confidentiality of legal advice in order to fulfill their duties effectively. One important reason OLC legal advice often needs to stay confidential is that it is part of a larger deliberative process—a process that itself requires confidentiality to be effective. If government agencies and OLC had to conduct deliberations with knowledge that their deliberations were open to public view, such discussions

would naturally be chilled or inhibited, and the efficiency of government policy making would suffer as a result.

5. These deliberative confidentiality concerns apply with particular force to OLC advice because of OLC's role in the decisionmaking process: OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive activities of the Executive Branch on matters that can be quite controversial. So that executive branch officials may continue to request, receive, and rely on candid legal advice from OLC on such sensitive matters, it is essential that OLC legal advice provided in the context of internal deliberations—and executive branch officials' willingness to seek such advice—not be inhibited by concerns about public disclosure.

6. The foregoing considerations regarding the need for confidential executive branch deliberations are particularly compelling in the context of the provision of legal advice, given the nature of the attorney-client relationship. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. When the advice is provided in confidence, it is protected from compelled disclosure. As the Supreme Court has observed, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critical to protect this relationship of trust in the governmental context, to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote such broader public interests in the government's observance of law and the administration of justice. The free and candid flow of information between agency

decisionmakers and their outside legal advisers depends on the decisionmakers' confidence that the advice they receive will remain confidential. Moreover, disclosure of legal advice may often reveal confidential communications from agency clients made for the purposes of securing advice.

7. Finally, when asked to provide counsel on the law, OLC attorneys stand in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. Thus, the need to protect the relationship of trust between OLC and the client seeking its legal advice provides an additional reason OLC legal advice needs to stay confidential.

8. The interests protected by the presidential communications, deliberative process, and attorney-client privileges continue to apply fully to confidential OLC legal advice in circumstances where the Executive Branch or one of its departments or agencies elects, in the interest of transparency, to explain publicly the Executive Branch's understanding of the legal basis for current or contemplated executive branch conduct. There is a fundamental distinction between an explanation of the rationale and basis for a decision, which would not be privileged, and legal advice received prior to making a decision, which is privileged. Thus, there is no disclosure of privileged legal advice, and therefore no waiver of attorney-client privilege, when, as part of explaining the rationale for its actions or policies, the Executive Branch explains its understanding of their legal basis without reference to any confidential legal advice that executive branch decisionmakers may have received before deciding to take the action or adopt the policy. If merely explaining publicly the legal basis for executive branch conduct were understood to remove the protection of the attorney-client privilege from the confidential legal

advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of executive branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of the decisionmaking process, and it would also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

### **PLAINTIFF'S FOIA REQUEST**

9. On January 10, 2019, OLC received a request from Anne L. Weismann on behalf of plaintiff Citizens for Responsibility and Ethics in Washington ("CREW"), requesting the following records:

all opinions written by the Office of Legal Counsel ("OLC") that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.

*See* Exhibit B, at 1 (FOIA Request (Jan. 10, 2019) (hereinafter, "the FOIA Request")). The FOIA Request contained no date or other limitation on the types of records sought. *Id.*

10. By letter dated February 12, 2019, I responded to Ms. Weismann on behalf of OLC, acknowledging receipt of the FOIA Request. *See* Exhibit C, at 1 (OLC Acknowledgment (Feb. 1, 2019)).

11. Following the commencement of this action, through counsel the parties reached a narrowing agreement, limiting the request to documents dated on or after January 20, 2017 and excluding records only about economic sanction-related emergency declarations.

12. By letter dated July 15, 2019, I responded to plaintiff's FOIA Request on behalf of OLC. *See* Ex. D, at 1 (OLC Response (May 9, 2017)). I informed Ms. Weismann that a search of OLC's records had identified four records responsive to the request, as narrowed. *Id.* I also informed her that one of those records was enclosed in full. I further informed Ms.

Weismann that the remaining three documents were being withheld in full, pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), because they are protected by the attorney-client, deliberative process, and presidential communications privileges, and that that none of the withheld records was appropriate for discretionary release. *Id.* In the same letter, I also informed Plaintiff that the Department of Homeland Security had referred one record to OLC for processing and direct response, and that the referred record was duplicative of one of the three records already identified and withheld by OLC. *Id.*

### **OLC'S SEARCH**

13. I have been informed that Plaintiff has not challenged the search for responsive records, so I do not discuss it here.

### **DOCUMENTS AT ISSUE**

14. I am personally familiar with the withheld documents at issue in this case.

15. The two documents identified on the attached index as Document Nos. 1 and 3 (the "Form and Legality Memoranda") are documents of the same type. Each of these two documents is a Memorandum to the President regarding the form and legality of a proposed presidential proclamation, containing predecisional legal advice.

16. Many Form and Legality Memoranda provided to the President by OLC simply describe a proposed presidential proclamation or executive order and then state that the document "is approved with respect to form and legality." OLC has, in the past, released some such memoranda as a matter of discretion, if the presidential document has been made public. However, the two withheld Form and Legality Memoranda at issue in this case do not meet this description. Instead, each of these documents contains confidential client communications made for the purpose of seeking legal advice, and predecisional legal advice provided to the President

for his consideration in deciding whether to sign the proposed proclamation as part of a governmental deliberative process in connection with Presidential decisionmaking.

17. The other document, Document No. 2 on the attached index, is a memorandum to John Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council, providing legal advice on a proposed executive branch action. The memorandum contains confidential client communications made for the purpose of seeking legal advice, and predecisional legal advice from OLC attorneys transmitted to Mr. Eisenberg as part of a governmental deliberative process in connection with Presidential decisionmaking. Document No. 2 is the document located by the Department of Homeland Security and referred to OLC, as noted above at Paragraph 12.

### **APPLICABLE PRIVILEGES**

#### ***Withholding Pursuant to Exemption Five***

18. FOIA's Exemption Five exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption Five incorporates the traditional privileges that the government may assert in civil litigation against a private litigant and exempts from FOIA's reach documents covered by such privileges. Exemption Five applies to both the File Memoranda and the Form and Legality Memoranda because they are protected by the presidential communications, deliberative process, and attorney-client privileges.

19. Because they consist of legal advice made directly to the President, the withheld Form and Legality Memoranda (Document Nos. 1 and 3) are subject in their entirety to the presidential communications privilege. That privilege protects confidential communications that relate to possible presidential decisionmaking and that involve the President or his senior advisers. This privilege preserves the President's ability to obtain frank and informed opinions

from his advisers and to make decisions in confidence. By way of these Form and Legality Memoranda, OLC provided confidential advice directly to the President on a matter of presidential decisionmaking. Accordingly, those communications are protected by the presidential communications privilege in full.

20. The withheld Form and Legality Memoranda are also protected by the deliberative process privilege because the documents are predecisional and contain legal advice that was provided as part of a government deliberative process. The documents are predecisional in multiple ways. First, each is legal advice transmitted to a senior decisionmaker (the President) regarding a decision not yet made (a proposed presidential proclamation). As with all such advice, the President was free upon receipt to accept or reject the advice, and to sign or not sign the proposed proclamation for any reason. Second, each records legal advice provided as part of the review of a proposed proclamation, which reflects the give-and-take and candor of an Executive Branch deliberative process. The limited factual material contained in the document is closely intertwined with that legal advice and analysis.

21. Finally, the withheld Form and Legality Memoranda are also protected by the attorney-client privilege. The memoranda were prepared by lawyers within OLC while providing legal advice to the President and his advisers. The limited factual material contained in the documents was provided to OLC by other executive branch officials from the Office of the Counsel to the President and two executive branch agencies—the Departments of Homeland Security and State for Document No. 1 and the Departments of Homeland Security and Defense for Document No. 3—for purposes of developing this confidential legal advice. The memoranda were intended to be confidential and, to my knowledge, have maintained their confidentiality. Having been asked to provide legal advice, OLC attorneys stood in a special relationship of trust with the President and his advisers. Just as disclosure of client confidences in the course of

seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust.

22. The other withheld memorandum (Document No. 2) is also subject to the presidential communications privilege in its entirety. That privilege protects confidential communications that relate to possible presidential decisionmaking and that involve the President or his senior advisers. This privilege preserves the President's ability to obtain frank and informed opinions from his advisers and to make decisions in confidence. It is not limited to exchanges directly involving the President, but also protects communications between immediate presidential advisers, and communications to such advisers and their staff, made in the course of formulating advice or recommendations for the President. The privilege protects such communications in order to ensure that the President's advisers may fully explore options and provide appropriate advice to the President without concerns about compelled disclosure. In this document, OLC provided legal advice regarding the President's authority to take particular proposed actions to John Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council. In those roles, Mr. Eisenberg is on the staff of two of the President's immediate senior advisers: the Counsel to the President and the National Security Adviser. Accordingly, the communication is protected by the presidential communications privilege.

23. Document No. 2 is also protected by the deliberative process privilege because it contains advice that was predecisional and provided as part of a presidential deliberative process. The advice was predecisional because it was provided to the President's legal adviser (Mr. Eisenberg) to aid the President in deciding whether to direct a particular government action. The material is deliberative because it contains legal advice from OLC to decisionmakers for use in

the deliberations over the President's decisions regarding whether to direct the proposed action, and because it reflects the give-and-take and candor of an Executive Branch deliberative process. The limited factual material contained in the document is closely intertwined with the advice and analysis recorded in the document.

24. Finally, the attorney-client privilege also applies to Document No. 2. The document was authored by the Assistant Attorney General in charge of OLC, providing legal advice directly to the President's attorneys and advisers. The limited factual material contained in these documents was provided to OLC by White House Counsel's Office staff for purposes of obtaining confidential legal advice. The memorandum were intended to be confidential and, to my knowledge, have maintained their confidentiality. Having been asked to provide legal advice, OLC attorneys stood in a special relationship of trust with the President and his senior advisers. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust.

25. In sum, compelled disclosure of the three withheld memoranda would undermine the President's ability to seek and receive confidential advice. It would also compromise the deliberative processes of the Executive Branch—in this case, of the President and his advisers. Attorneys at OLC are often asked to provide advice and analysis with respect to very difficult and unsettled questions of law, and on matters that can be quite controversial. It is essential to the President in carrying out his mission and to the proper functioning of the Executive Branch overall that OLC's legal advice not be inhibited by concerns about the risk of public disclosure. Protecting the confidentiality of OLC's legal advice provided in the context of presidential (or other Executive Branch) deliberations is essential both to ensure that creative and sometimes controversial legal arguments and theories may be examined candidly, effectively, and in

writing, and to ensure that the President, his advisers, and other Executive Branch officials continue to request and rely on frank legal advice from OLC and other government attorneys on sensitive matters.

*Segregability, Adoption, and Waiver*

26. I have personally reviewed the documents at issue to determine whether any withheld portion or portions could be released without divulging information protected by one or more of the applicable FOIA exemptions. All factual information contained in the documents was provided to OLC in confidence for the purpose of seeking legal advice from OLC, and the documents do not contain reasonably segregable, nonexempt information. In addition, segregation is also not required due to the application of the presidential communications privilege.

27. To my knowledge, the withheld records have never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision.

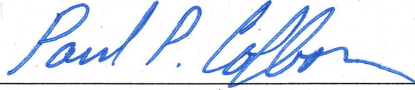
28. To my knowledge, the withheld records have not been previously disclosed publicly. In addition, I am not aware of any public statements by government officials that could constitute waiver of the privileges applicable to these documents.

\* \* \* \* \*

29. In conclusion, I respectfully submit that the documents described herein are protected by the presidential communications, deliberative process, and attorney-client privileges. Accordingly, all three documents fall squarely within Exemption Five. The compelled disclosure of these documents would disrupt the President's ability to carry out his constitutional responsibilities, would interfere with the government's deliberative processes, and would disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: September 16, 2019, Washington, D.C.



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PAUL P. COLBORN

# Exhibit A

**Office of Legal Counsel (“OLC”)**  
**Index of withheld records**  
*CREW v Dep’t of Justice*, No. 19-cv-398

<b>Doc.</b>	<b>Date</b>	<b>Author(s)</b>	<b>Description</b>	<b>Exemption</b>
1	Feb. 22, 2018	Steven A. Engel, Assistant Attorney General	Memorandum to the President regarding the form and legality of a proposed presidential proclamation. Contains predecisional legal advice to the President regarding the proposed proclamation, including limited amounts of factual information from officials in the White House Counsel’s Office and Department of State and Department of Homeland Security provided to OLC for the purpose of allowing OLC to provide the President predecisional legal advice.	(b)(5): deliberative process privilege (“DPP”), attorney-client privilege (“ACP”), presidential communications privilege (“PCP”)
2	Jan. 23, 2019	Steven A. Engel, Assistant Attorney General	Memorandum to John Eisenberg, Deputy Counsel to the President and NSC Legal Adviser, regarding a proposed executive branch action. Contains predecisional legal advice concerning the proposed executive branch action, including limited amounts of factual information from officials in the White House Counsel’s Office provided to OLC for the purpose of allowing OLC to provide Mr. Eisenberg legal advice.	(b)(5): DPP, ACP, PCP
3	Feb. 15, 2019	Steven A. Engel, Assistant Attorney General	Memorandum to the President regarding the form and legality of a proposed presidential proclamation. Contains predecisional legal advice to the President regarding the proposed proclamation, including limited amounts of factual information from officials in the White House Counsel’s Office and Department of Homeland Security and Department of Defense provided to OLC for the purpose of allowing OLC to provide the President predecisional legal advice.	(b)(5): DPP, ACP, PCP

# Exhibit B

# CREW | citizens for responsibility and ethics in washington

January 10, 2019

**BY EMAIL: [usdojo-officeoflegalcounsel@usdoj.gov](mailto:usdojo-officeoflegalcounsel@usdoj.gov)**

Melissa Golden  
Lead Paralegal and FOIA Specialist  
Office of Legal Counsel  
Department of Justice  
950 Pennsylvania Avenue, N.W., Room 5511  
Washington, D.C. 20530-0001

**Re: Expedited Freedom of Information Act Request**

Dear Ms. Golden:

Citizens for Responsibility and Ethics in Washington ("CREW") makes this expedited request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and U.S. Department of Justice ("DOJ") regulations.

Specifically, CREW seeks copies of all opinions written by the Office of Legal Counsel ("OLC") that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, as well as those who were cc'ed or bcc'ed on any emails.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Please be advised that CREW intends to pursue all legal remedies to enforce its right under the FOIA to access these documents. Accordingly, because litigation reasonably is

Melissa Golden  
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foreseeable, GSA should institute an agency-wide preservation hold on documents potentially responsive to this request.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A) and DOJ regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

President Donald Trump and his White House have suggested he may invoke emergency powers and declare a national emergency to bypass Congress' refusal to fund his wall along the Mexican border and to direct federal officials to go ahead and construct the wall.<sup>1</sup> Vice President Pence has stated publicly that the White House Counsel's Office is examining the president's ability to declare a national emergency to fund the border wall.<sup>2</sup> This has raised serious concerns that the president is considering actions of doubtful legality based on misstated facts and outright falsehoods to make an end-run around Congress' constitutional authority to make laws and appropriate funds. The requested records will shed light on the legality of the action the president is threatening and the extent to which he may be motivated to advance a political agenda rather than address a true need requiring the invocation of his emergency powers.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, [www.citizensforethics.org](http://www.citizensforethics.org). The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989)

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<sup>1</sup> *See, e.g.,* Robert Costa and Philip Rucker, *Trump aides lay foundation for emergency order to build wall, saying border is in 'crisis.'* *Washington Post*, Jan. 7, 2019, available at [https://www.washingtonpost.com/politics/trump-lays-groundwork-for-national-emergency-as-officials-argue-border-is-in-crisis/2019/01/07/e0f9aa34-1299-11e9-b6ad-9cf62dbb0a8\\_story.html?utm\\_term=.dceec7d07ada](https://www.washingtonpost.com/politics/trump-lays-groundwork-for-national-emergency-as-officials-argue-border-is-in-crisis/2019/01/07/e0f9aa34-1299-11e9-b6ad-9cf62dbb0a8_story.html?utm_term=.dceec7d07ada).

<sup>2</sup> Jim Acosta and Betsy Klein, *Pence says White House looking into Trump's ability to declare border emergency*, *CNN*, Jan. 7, 2019, available at <https://www.cnn.com/2019/01/07/politics/border-national-emergency-white-house-counsel/index.html>.

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January 10, 2019  
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(holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely and systematically disseminates information to the public in several ways. CREW’s website receives tens of thousands of page views every month. The website includes blogposts that report on and analyze newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts the documents it receives under the FOIA on its website, which has been visited hundreds of thousands of times.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

### **Request for Expedition**

Finally, please be advised that CREW also has requested expedition of this request because its subject matter is of widespread and exceptional media interest and the requested information involves possible questions about the government’s integrity that affect public confidence. Pursuant to 28 C.F.R. § 16.5(e)(2), CREW submitted that request to the Director of Public Affairs; a copy of the request is enclosed.

### **Conclusion**

If you have any questions about this request or foresee any problems in fully releasing the requested records on an expedited basis, please contact me at (202) 408-5565 or [aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org). Where possible, please produce records in electronic format. Please send the requested records to me either at [aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org) or Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, 1101 K Street, N.W., Suite 201, Washington, D.C. 20005. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Anne L. Weismann', with a long horizontal flourish extending to the right.

Anne L. Weismann  
Chief FOIA Counsel

encl.

# CREW | citizens for responsibility and ethics in washington

January 10, 2019

**By facsimile: (202) 514-1009**

Sarah Isgur Flores  
Director, Office of Public Affairs  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Re: Request for Expedition of Freedom of Information Act Request

Dear Ms. Flores:

Pursuant to Department of Justice (“DOJ”) regulations, 28 C.F.R. § 16.5(e)(2), Citizens for Responsibility and Ethics in Washington (“CREW”) requests that you authorize the expedition of a Freedom of Information Act (“FOIA”) request CREW made today to the Office of Legal Counsel (“OLC”). I have enclosed a copy of this request.

The OLC FOIA request seeks copies of all opinions written by OLC that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president’s power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.

CREW seeks expedition because the subject matter of the request is of widespread and exceptional media interest and the requested information involves possible questions about the government’s integrity, which clearly affect public confidence. President Donald Trump and the White House have indicated he is considering invoking emergency powers to declare a national emergency so that he may bypass Congress’ refusal to fund the building of a wall or other barrier along the Mexican border and direct federal officials to go ahead and construct the wall.<sup>1</sup> Vice President Michael Pence stated publicly that the White House Counsel’s Office is examining the president’s ability to declare a national emergency to fund the border wall,<sup>2</sup> raising serious concerns that the president is considering actions of doubtful legality based on misstated facts and outright falsehoods to make an end-run around Congress’ constitutional authority to make laws and appropriate funds. The requested records will shed light on the legality of the action the president is threatening and the extent to which he may be motivated to advance a political agenda rather than address a true need requiring the invocation of emergency powers. The public

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<sup>1</sup> See, e.g., Robert Costa and Philip Rucker, Trump aides lay foundation for emergency order to build wall, saying border is in ‘crisis.’ *Washington Post*, Jan. 7, 2019, available at [https://www.washingtonpost.com/politics/trump-lays-groundwork-for-national-emergency-as-officials-argue-border-is-in-crisis/2019/01/07/e0f9aa34-1299-11e9-b6ad-9cfd62dbb0a8\\_story.html?utm\\_term=.dccec7d07ada](https://www.washingtonpost.com/politics/trump-lays-groundwork-for-national-emergency-as-officials-argue-border-is-in-crisis/2019/01/07/e0f9aa34-1299-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.dccec7d07ada).

<sup>2</sup> Jim Acosta and Betsy Klein, Pence says White House looking into Trump’s ability to declare border emergency, *CNN*, Jan. 7, 2019, available at <https://www.cnn.com/2019/01/07/politics/border-national-emergency-white-house-counsel/index.html>.

needs to have confidence that if the president takes the extraordinary step of invoking emergency powers in this situation he is acting in the best interests of the nation and not for political gain.

CREW's primary purpose is to inform and educate the public about the activities of government officials and those who influence public officials. Toward that end, CREW uses statutes like the FOIA to gather information the public needs to hold public officials accountable. The request for which CREW seeks expedition will further those goals.

I certify the following is true and correct.

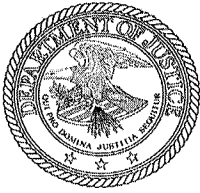
Sincerely,

A handwritten signature in blue ink, appearing to read 'Anne L. Weismann', with a stylized, flowing script.

Anne L. Weismann  
Chief FOIA Counsel

encl.

# Exhibit C



U.S. Department of Justice

Office of Legal Counsel

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Washington, D.C. 20530

February 12, 2019

Anne L. Weismann  
Chief FOIA Counsel  
CREW  
aweismann@citizensforethics.org

**Re: FOIA Tracking No. FY19-068**

Dear Ms. Weismann:

This letter acknowledges receipt of your January 10, 2019 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), in which you seek "all opinions written by [OLC] that discuss in any way the power of the president to invoke emergency powers to declare a national emergency." We received your request on January 10, 2019 and your request has been assigned tracking number **FY19-068**. Based on our preliminary review of your request, and pursuant to 28 C.F.R. § 16.5(b), your request has been tentatively assigned to the "complex" processing track. If you would like to narrow your request so that it can be transferred to the "simple" track and processed more quickly, please contact Melissa Golden at the address and phone number provided below.

You requested expedited treatment of your request under 28 C.F.R § 16.5(e)(1)(iv). On January 28, 2019, we referred your request to the Director of the Office of Public Affairs ("OPA"), who determines whether a request pertains to "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R § 16.5(e)(1)(iv); *see id.* § 16.5(e)(2). On February 5, 2019, we were informed that OPA has denied your request for expedited processing under standard (iv) because, in the judgment of the Director of OPA, the topic of your request is neither a "matter of widespread and exceptional media interest" nor "[a] matter . . . in which there exist possible questions about the government's integrity that affect public confidence." *Id.* § 16.5(e)(1)(iv). Accordingly, your request for expedited processing is denied.

Because of the considerable number of FOIA requests received by OLC prior to your request, we likely will be unable to comply with the twenty-day statutory deadline for responding to your request. I regret the necessity of this delay, but I assure you that your request will be processed as soon as practicable. In the meantime, if you have any questions or wish to discuss your request, you may contact Melissa Golden, OLC's FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530. We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

Additionally, you may contact the Office of Government Information Services (“OGIS”) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

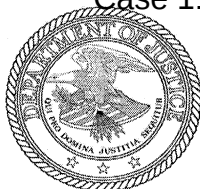
You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy (“OIP”), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP’s FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

Sincerely,

A handwritten signature in blue ink, reading "Paul P. Colborn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul P. Colborn  
Special Counsel

# Exhibit D



**U.S. Department of Justice**

Office of Legal Counsel

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*Washington, D.C. 20530*

July 15, 2019

Anne L. Weismann  
Chief FOIA Counsel  
CREW  
aweismann@citizensforethics.org

**Re: FOIA Tracking No. FY19-068;  
CREW v. U.S. Dep't of Justice, et al., D.D.C. No. 19-cv-398**

Dear Ms. Weismann:

This letter responds to your January 10, 2019 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "all opinions written by [OLC] that discuss in any way the power of the president to invoke emergency powers to declare a national emergency." As you know, the request was assigned the tracking number **FY19-068**, is also the subject of the above-captioned litigation, and has been narrowed by negotiations through counsel to include only documents created since January 20, 2017 and to exclude documents about economic sanction-related emergency declarations. Pursuant to 28 C.F.R. § 16.5(b), your request was processed in the complex track.

We have completed our search of OLC files and have identified four responsive records. We have enclosed one record in full. We are withholding the remaining three records pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5). The withheld documents are protected by the attorney-client, deliberative process, and presidential communications privileges. We have determined that none of the withheld material is appropriate for discretionary release.

In processing your related request, also at issue in the above-captioned case, the Department of Homeland Security referred one record to OLC for our direct response to you. We received the referral on June 25, 2019, and it was assigned tracking number **FY19-174**. Pursuant to 28 C.F.R. § 16.5(b), that referral was processed in the simple track. The referred document is duplicative of one of the three withheld records identified above, and we are withholding it in full for the reasons already stated.

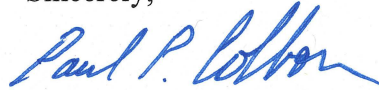
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Your counsel may contact Nicholas Cartier of the Civil Division, Federal Programs Branch, at 202-616-8351 or at [nicholas.cartier@usdoj.gov](mailto:nicholas.cartier@usdoj.gov), to discuss any aspect of your request.

Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Although your request is the subject of ongoing litigation, and administrative appeals are not ordinarily acted upon in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Paul P. Colborn  
Special Counsel

Enclosure

cc: Nicholas Cartier, Trial Attorney  
Civil Division, Federal Programs Branch