IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (KBJ)

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA") challenging the failure of the U.S. Department of Justice ("DOJ") to comply with its obligation under 5 U.S.C. § 552(a) to make publicly available on an ongoing basis (1) the formal written opinions of the Office of Legal Counsel ("OLC") issued to executive branch agencies or to executive branch officials other than the president; and (2) an index of those opinions.

2. The OLC's formal written opinions interpreting the law are controlling on executive agencies. The OLC treats its opinions as a system of precedent, establishing a coherent body of law for the executive branch as a whole. The opinions control the OLC's own future interpretations, and they are binding on all executive branch agencies unless withdrawn or reconsidered by the OLC, displaced by a judicial ruling, or overruled by the only executive branch officials with interpretive authority superseding that of the OLC—the attorney general and the president.

3. Executive branch agencies likewise consider the OLC's formal written opinions to be binding. As one former OLC lawyer and now law professor has explained, the norm of

agencies treating OLC opinions as binding is "longstanding and robust."[1] The OLC "protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it."[2] When asked for a formal written opinion by an independent agency, for instance, the OLC's practice as described in an internal guide is to issue an opinion "only if [the OLC] has received in writing from that agency an agreement that it will conform its conduct to [the OLC's] conclusion."[3]

4. In short, the OLC considers its formal written opinions interpreting the law to be binding, and executive branch agencies treat them as binding. As one former senior executive branch official noted, the OLC is the "Supreme Court of the executive branch."[4]

5. The OLC's formal written opinions are critical to understanding the powers and responsibilities of the government and the private rights of citizens. The OLC's formal written opinions have set out the legal authority of the government to target and kill its own citizens abroad by drone strike; they have interpreted the reach of the anti-torture statute; they have resolved ethical and constitutional disputes over the appointment of family members to certain government positions; they have established the Social Security Administration's obligation to accord social-security benefits to the children of same-sex couples; and much more.

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[1] Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1469 (2010).

[2] *Id.* at 1464.

[3] Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Attorneys of the Office of Legal Counsel (July 16, 2010), http://1.usa.gov/29acGlS [https://perma.cc/8ARY-P7KW].

[4] *Homeland Security Secretary 'Fully Confident' in Legality of Obama's Immigration Action*, PBS NewsHour (Nov. 24, 2014, 6:35 PM), http://www.pbs.org/newshour/bb/homeland-security-secretary-fully-confident-legality-obamas-immigration-action [https://perma.cc/4MSL-2C6Q] (quoting Jeh Johnson, Secretary of the Department of Homeland Security).

6. Despite the fact that the OLC's formal written opinions interpreting the law are binding, the "OLC's published opinions are only a fraction of all its written opinions."[5] The unpublished remainder, whose titles, subject matters, and even precise number are also largely undisclosed, constitute "secret law"—anathema to our democracy and the primary evil Congress sought to extinguish through FOIA. With the aim of ending secret law, Congress required agencies, through FOIA, to proactively publish their working law, including "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B).

7. Notwithstanding FOIA's clear command, the OLC views its opinions as effectively exempt from FOIA's affirmative-disclosure provisions. While the OLC has published approximately 1,300 of its formal written opinions, it has done so pursuant to what it believes to be its sole and unreviewable discretion, subject to criteria of its own choosing.

8. This lawsuit seeks to challenge the OLC's unlawful policy and practice of withholding formal written opinions from the public. Plaintiff seeks, principally, an injunction requiring the OLC to proactively disclose to Plaintiff its formal written opinions and an index thereof so that Plaintiff can make them available to the public.

JURISDICTION AND VENUE

9. The Court has personal and subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201, and 2202, and 5 U.S.C. § 552(a)(4)(B).

10. Venue lies in this district under 28 U.S.C. § 1391(e).

[5] Morrison, *supra* note 1, at 1476.

PARTIES

11. Plaintiff Campaign for Accountability ("CfA") is a non-profit, non-partisan tax-exempt entity organized under § 501(c)(3) of the Internal Revenue Code. CfA uses research, litigation, and communications to expose misconduct and malfeasance in public life. As part of its research, CfA uses government records made available to it under public information laws as well as government records that agencies have made available to the general public.

12. Defendant DOJ is an agency within the meaning of 5 U.S.C. §§ 551 and 701. The DOJ and its component the OLC have possession and control of opinions issued by the OLC, and they are responsible for making those records available to the public.

STATUTORY AND REGULATORY BACKGROUND

13. Section 552(a)(2) of Title 5, which was enacted in 1946, is known as the "reading room" provision of FOIA. It imposes a number of independent, affirmative obligations on all executive branch agencies, including the obligation to "make available for public inspection and copying" certain designated categories of records. Those categories include, among others,

> (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)(A)–(B).

14. Section 552(a)(2)(E) of this statute imposes on agencies the additional requirement to make publicly available:

> current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph [which includes the reading room requirements] to be made available or published.

15. Under section 552(a)(2), agencies must publish records that fall within the enumerated categories even in the absence of any request from a member of the public.

FACTUAL BACKGROUND

I. The Office of Legal Counsel.

16. The Judiciary Act of 1789 established the position of the attorney general of the United States and charged the attorney general with providing opinions on questions of law to the president and to the heads of executive departments:

> And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.

Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

17. The attorney general's opinion-writing function has, since the early years of our nation, served to centralize interpretation of the law within the executive branch. In a legal opinion authored in 1854, Attorney General Caleb Cushing explained that the opinions of the attorney general "officially define the law" and are "final and conclusive":

> In the discharge of the [opinion-writing function], the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive . . . .
>
> Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

Office and Duties of the Attorney General, 6 Op. Att'y Gen. 326, 334 (1854).[6] Attorney General Cushing also described the role of the attorney general's opinions in deciding not just questions relevant to "the action of public officers in administrative matters," but also "questions of private right." *Id.*

18. The Judiciary Act of 1789, as amended, directs the attorney general to render opinions when requested by heads of executive departments "on questions of law arising in the administration of his department." 28 U.S.C. § 512. The president has directed agency heads to submit interagency disputes to the attorney general "[w]henever two or more Executive agencies are unable to resolve a legal dispute between them." Exec. Order No. 12,146, § 1-4, 44 F.R. 42,657 (1979).

19. In 1933, the attorney general delegated his opinion-writing function to the office that would, in 1953, become the OLC.[7] Beginning in 1977 under the direction of President Carter's attorney general, Griffin Bell, the OLC took on the form in which it persists today.[8] Responding to the "rise of agency general counsels"[9] throughout the executive branch, Attorney General Bell sought to establish the OLC as the preeminent expositor of executive branch law—"a centralized and singular voice of executive branch legality."[10] To that end, Attorney General Bell increased the volume of the OLC's opinion writing[11]; "directed [the] OLC to compile and

[6] *See* Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 815 & nn.24, 27 (2017) (citing and discussing Attorney General Cushing's dominant explanation of the opinion-writing function).

[7] *Id.* at 819.

[8] *Id.* at 819–30.

[9] *Id.* at 819–20.

[10] *Id.* at 821.

[11] *Id.* at 819 & n.47.

begin to publish select opinions"[12]; secured funding for the OLC to professionalize its system of research[13]; and instituted polices meant to insulate the OLC from political pressures.[14] These efforts and others cemented Bell's vision of the OLC, in its exercise of the attorney general's opinion-writing function, "as a singular legal expositor,"[15] with the "unique role of . . . issuing legal opinions for the executive branch as a whole."[16]

20. Today, the OLC's formal written opinions continue to establish the binding law of the executive branch. The DOJ's website confirms that OLC's core function is to provide "authoritative legal advice to the President and all the Executive Branch agencies."[17]

21. The OLC has periodically issued memoranda discussing the office's unique role within the executive branch. On July 16, 2010, then-head of the OLC, Acting Assistant Attorney General David Barron, issued a memorandum to the attorneys of the OLC describing the office's "Best Practices."[18] The memo states that OLC's "core function" is to "provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." According to the memo, the OLC's opinions "may effectively be the final word on controlling law," in part because the OLC "is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts." The memo describes the

[12] *Id.* at 819–20.

[13] *Id.* at 820–21 & n.54.

[14] *Id.* at 822–23

[15] *Id.* at 822.

[16] *Id.* at 824.

[17] *See* Dep't of Justice, Office of Legal Counsel, *About the Office*, https://www.justice.gov/olc (last visited Oct. 22, 2017).

[18] David Barron's "Best Practices Memo" memo is attached hereto as **Exhibit C**.

OLC's "system of precedent" as one in which the OLC's prior opinions are accorded "great weight."

22. According to Barron's memo, the OLC generally does not provide "abstract legal opinions" or "general survey[s]" of the law; it does not offer "unnecessary advice, such as where it appears that policymakers are likely to move in a different direction"; and it typically refuses requests for formal written opinions "on questions likely to arise in pending or imminent litigation involving the United States as a party."

23. Before accepting a request for an opinion, the OLC typically requires the soliciting agency to submit a "detailed memorandum setting forth the agency's own analysis of the question." If the request concerns an interagency dispute, the OLC "will ask each side for a memorandum" and allow each side to "reply" to the other. Even when there is no manifest dispute between agencies, the OLC "will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented."

24. Once the OLC finalizes a formal written opinion, it prints the opinion on bond paper for signature along with a completed opinion control sheet signed by the lawyers responsible for the opinion. The OLC adds all unclassified opinions to an electronic database and to its "unclassified Day Books."

25. Barron's memo on the OLC's practices followed a similar memo issued on May 16, 2005 by then-head of the OLC, Principal Deputy Assistant Attorney General Steven Bradbury.[19] Like Barron's memo, Bradbury's memo states that "OLC opinions are controlling on

[19] Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney Gen., to Attorneys of the Office of Legal Counsel (May 16, 2005),

questions of law within the Executive Branch"; that the opinions "should be focused and concrete"; that they are "more likely to be necessary" when resolving interagency disputes; that the office's past opinions are "given great weight"; and that drafts undergo "rigorous review."

26. Numerous former OLC lawyers have confirmed that the OLC's formal written opinions constitute the controlling legal views of the executive branch. One former head of the OLC, Randolph Moss, has said in his scholarship that the OLC's "formal, written opinions, constitute[] the legal position of the executive branch,"[20] and that "although the heads of departments are not generally required to seek legal guidance from the Department of Justice, when they do so, it is understood that the opinion provided will become the controlling view of the executive branch."[21] Moss also observed that "executive branch agencies have treated Attorney General (and later the Office of Legal Counsel) opinions as conclusive and binding since at least the time of Attorney General William Wirt[, who served from 1817 to 1829]."[22]

27. Another former OLC lawyer, Trevor Morrison, has noted in his scholarship that the OLC's opinions are "treated as binding within the Executive Branch until withdrawn or overruled."[23] In combination with the attorney general's opinions, they "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court."[24]

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https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2005.pdf [https://perma.cc/GNU6-DKKU] (**Exhibit D**).

[20] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1305 (2000).

[21] *Id.* at 1318.

[22] *Id.* at 1320.

[23] Morrison, *supra* note 1, at 1464.

[24] *Id.* at 1451 (internal quotation marks omitted) (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical*

28. More recently, Daphna Renan, a former OLC lawyer and now law professor published a meticulous assessment of the role of the OLC in the development of the law of the executive branch, noting that

> [the] OLC's role among legal advisors inside the executive branch is singular and articulated ex ante, that is, before any particular legal question arises. OLC's opinions are distinctively authoritative inside the executive branch. While the president (or his attorney general) can overrule an OLC opinion, this happens rarely. Barring such a reversal, OLC creates the binding law of the executive.[25]

29. As noted above, the OLC has published only a subset of its formal written opinions[26]; however, the opinions that have been released underscore that they are meant to be authoritative and binding on executive agencies. The opening paragraphs of formal OLC opinions usually describe the legal questions presented in much the same way as judicial opinions would. Their final paragraphs generally announce their resolution of the question presented and their legal conclusions in much the same manner as the final paragraphs of many judicial opinions. The legal analysis within each opinion is grounded in the OLC's own

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Prolegomenon, 15 Cardozo L. Rev. 375, 376 (1993)); *see also* Trevor Morrison, *Constitutional Alarmism*, 124 Harv. L. Rev. 1688, 1711 (2011) (former OLC lawyer noting that "OLC's legal opinions are treated as authoritative and binding within the executive branch").

[25] Renan, *supra* note 6, at 816; *see also* McGinnis, *supra* note 24, at 376 (OLC attorney–advisor from 1985 to 1987 and Deputy Assistant Attorney General from 1987 to 1991); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 Cardozo L. Rev. 437, 466 (1993) (OLC attorney–advisor from 1986 to 1987 noting that "Department of Justice legal opinions are generally treated as binding throughout the executive department"); Renan, *supra* note 6, at 878 ("It creates the formal, binding common law of the executive branch); *id.* at 815–22, 834. There is some academic disagreement over whether the OLC's opinions are binding in a formal sense or only as a matter of custom; regardless, all agree that they are binding by custom. *See* Moss, *supra* note 20, at 1320 ("[W]e have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding.").

[26] *See also* Renan, *supra* note 6, at 858 ("While OLC published more opinions under Carter than under any other president, for example, those opinions still constituted only a small percentage of the Office's formal opinions.").

precedents. And the opinions state their legal conclusions in mandatory language. They do not equivocate or confine themselves to presenting the advantages and disadvantages of a particular legal interpretation. Instead, they conclusively resolve concrete legal questions about the executive branch's legal obligations.

30. The OLC's formal written opinions are always binding, but sometimes the OLC underscores this. On August 21, 2009, for example, the OLC issued a formal written opinion affirming the lawfulness of the Small Business Administration's regulations implementing several federal contracting programs. The OLC wrote that its opinion was "binding on all Executive Branch agencies," and it explicitly superseded Government Accountability Office decisions inconsistent with the opinion:

> Our conclusion that the SBA's regulations we have reviewed are reasonable is binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary.
>
> Our Office has on many occasions issued opinions and memoranda concluding that GAO decisions are not binding on Executive Branch agencies and that the opinions of the Attorney General and of this Office are controlling. *See* Bradbury Memo at 1 ("This memorandum is being distributed to ensure that general counsels of the Executive Branch are aware that the Office of Legal Counsel [] has interpreted this same appropriations law in a manner contrary to the views of GAO, and to provide a reminder that it is OLC that provides authoritative interpretations of law for the Executive Branch.") . . . .[27]

31. The OLC's formal written opinions also reflect the law of the executive branch insofar as an opinion concluding that certain conduct is lawful effectively immunizes that conduct from criminal liability. The DOJ has declined to investigate or prosecute individuals

[27] Office of Legal Counsel, Dep't of Justice, *Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs* 13–14 (2009), https://www.justice.gov/file/18471/download [https://perma.cc/6TVM-TTNQ] (**Exhibit E**).

who relied on OLC opinions to justify their conduct,[28] and former head of the OLC Jack Goldsmith has called the OLC opinions authorizing the Central Intelligence Agency's "enhanced interrogation techniques" a "golden shield" from prosecution.[29]

32. In short, the OLC itself considers its formal written opinions to be binding upon all agencies, and the rigorous process it has implemented for the initiation, drafting, review, preservation, and precedential consideration of its formal written opinions reflects that view. As Karl Thompson, the acting head of the OLC in 2014, said at the time: the OLC's formal written opinions are "authoritative" and "binding by custom and practice in the executive branch. It's the official view of the office. People are supposed to and do follow it."[30]

II. Specific categories of formal written opinions.

33. The OLC issues many different types of opinions, memoranda, and advice, including: formal written opinions, informal opinions and advice,[31] advice concerning litigation decisions,[32] reviews of the form and legality of executive orders, advice directly to the president or the attorney general, and letters concerning the constitutionality of pending legislation. This

[28] *See* Renan, *supra* note 6, at 832 & n.117 (explaining that the OLC's torture memos effectively conferred immunity from criminal liability on those who relied upon them).

[29] Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 162 (2007).

[30] The Department of Justice's Office of Professional Responsibility has also said that "OLC opinions are binding on the Executive Branch." Office of Prof'l Responsibility, Dep't of Justice, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 15 (July 29, 2009).

[31] Renan, *supra* note 6, at 847 n.177 (quoting Karl Thompson, an acting head of the OLC under President Obama, as commenting "that '[t]he vast majority of our advice is provided informally'" (alteration in original)).

[32] Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 509–10 (1993) ("it is not uncommon for OLC to express its views on litigation decisions").

lawsuit concerns only a single type: formal written opinions issued to executive branch agencies or to executive branch officials other than the president.

34. All of the OLC's formal written opinions are binding on the executive branch and, for that reason, fall within the scope of FOIA's affirmative-disclosure provisions. Some categories of these opinions fall within the scope of the affirmative-disclosure provisions of FOIA even under this Court's broad reading of *Electronic Frontier Foundation v. Department of Justice* (*EFF*), 739 F.3d 1 (D.C. Cir. 2014), discussed below.

A. Opinions resolving interagency disputes.

35. A core function of the OLC is to adjudicate disputes between agencies concerning the law. Executive Order 12,146 directs executive agencies to submit legal disputes to the OLC for resolution. Exec. Order No. 12,146, § 1-4, 44 F.R. 42,657 (1979). Barron's memo on the OLC's practices explains that a formal written opinion is "most likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies." Formal written opinions resolving "interagency disputes constitute at least 25% of opinions rendered to outside agencies."[33]

36. On August 13, 2014, for example, the OLC issued a formal written opinion adjudicating a dispute between the Social Security Administration ("SSA") and the Equal Employment Opportunity Commission ("EEOC") over whether the EEOC had the authority to order the SSA "to pay a monetary award as a remedy for breach of a settlement agreement entered to resolve a dispute under Title VII of the Civil Rights Act of 1964."[34] The dispute arose

[33] McGinnis, *supra* note 24, at 423 n.181.

[34] Office of Legal Counsel, Dep't of Justice, *The Authority of the Equal Employment Opportunity Commission To Order a Federal Agency To Pay a Monetary Award To Remedy a Breach of a Settlement Agreement*, (2008),

after "a group of African–American male employees working in the Baltimore, Maryland headquarters of SSA filed a class complaint alleging that the agency had discriminated against them." The employees ultimately settled their dispute with the SSA, but they later sought monetary relief against the SSA for its breach of the settlement agreement. After administrative proceedings, the EEOC agreed with the employees and ordered the SSA to pay the requested monetary relief. The SSA then submitted the dispute to the OLC, arguing that the monetary relief ordered was precluded by sovereign immunity. The OLC ultimately agreed with the SSA: "We conclude that the doctrine of sovereign immunity precludes the monetary relief ordered in this case."

37. On February 11, 2008, the OLC issued an opinion resolving a similar interagency dispute between the Department of Veterans Affairs ("VA") and the Department of Labor. The Department of Labor had concluded that the VA had "failed to pay the required prevailing wage to eleven alien physicians employed by VA hospitals pursuant to the H-1B visa program."[35] After the Department of Labor ordered the VA to pay back wages, the VA submitted the dispute to the OLC, which ultimately "conclude[d]" that sovereign immunity barred an award of back wages to the eleven physicians.

38. OLC opinions adjudicating interagency disputes, such as these, constitute both "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B). Nonetheless, the OLC has not published all formal written opinions adjudicating interagency

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https://www.justice.gov/opinion/file/833591/download [https://perma.cc/5YX2-TX24] (**Exhibit F**).

[35] Office of Legal Counsel, Dep't of Justice, *Payment of Back Wages to Alien Physicians Hired Under H-1b Visa Program*, 2008 WL 825557, at *1 (2008), https://www.justice.gov/file/482131/download [https://perma.cc/H22V-HUV6] (**Exhibit G**).

disputes. At least one published OLC opinion cites an unpublished opinion that appears to resolve an interagency dispute.[36]

B. Opinions issued to independent agencies.

39. Before the OLC issues a formal written opinion to an independent agency—that is, an agency whose head does not serve at the pleasure of the president—the OLC's practice is to require the agency to confirm "in writing . . . that [the agency] will conform its conduct to [the OLC's] conclusion." In other words, the OLC requires independent agencies to adopt the conclusions of the OLC in advance of receiving any formal written opinion. Many of the OLC's published opinions evidence this practice.[37]

40. OLC opinions adopted in this manner constitute both "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B). Nonetheless, the OLC has not published all formal written opinions issued to independent agencies. At least one published OLC opinion cites an unpublished opinion issued to an independent agency.[38]

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[36] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *The Effect of Veterans' Health Administration Nurses' Additional Pay for Sunday and Night Duty on Calculation of Workers' Compensation Benefits* (2001) (unpublished opinion addressed to the Department of Labor and the Department of Veteran Affairs), *cited in* Office of Legal Counsel, Dep't of Justice, *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges* (2003), https://www.justice.gov/file/18906/download [https://perma.cc/S3YB-CZEH] (**Exhibit H**).

[37] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *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* 1 n.1 (2007), https://www.justice.gov/file/451616/download [https://perma.cc/8TW4-UX8D] (**Exhibit I**) ("We are informed that the Commissioner has agreed to be bound by the opinion of this Office.").

[38] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *Applicability of 18 U.S.C. § 1913 to the Provision of Official Time to Employee Union Representatives to Lobby Congress on Representational Issues* (2001) (unpublished opinion issued to the Social Security Administration, an independent agency), *cited in* Office of Legal Counsel, Dep't of Justice,

C. Opinions interpreting non-discretionary legal obligations.

41. The OLC issues binding interpretations of statutes and other authorities that impose non-discretionary legal obligations on federal agencies. These opinions have the effect of directly determining an agency's policies and practices, because the agency is under a non-discretionary obligation to comply with the authority at issue, and because the OLC's interpretation of that authority is binding on the agency.

42. For example, on October 16, 2007, the OLC issued a formal written opinion addressing whether the Defense of Marriage Act affected the obligation of the Social Security Administration to provide "child's insurance benefits" to children of disabled parents in same-sex unions.[39] The OLC determined that the Defense of Marriage Act did not interfere with the Administration's legal obligation to provide social security benefits. The opinion had the effect of deciding the Social Security Administration's policies and the legal entitlement to social security benefits of the children of same-sex couples. Moreover, the OLC opinion adjudicated the entitlement to social security benefits of a specific child—Elijah, the son of Karen and Monique, who had entered into a civil union under Vermont law in 2002. In other words, the opinion determined not just the Social Security Administration's non-discretionary legal obligations, but their application to a specific individual.

43. Similarly, on November 1, 2011, the OLC issued a formal written opinion determining the scope of the Office of Personnel Management's non-discretionary obligation to provide service credit to federal employees under the Federal Employees' Retirement System

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Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives 3 (2005), https://www.justice.gov/file/450926/download [https://perma.cc/TVM6-ZYE4] (**Exhibit J**).

[39] *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* (2007), *supra* note 37.

Act.[40] In an interagency dispute with the U.S. Postal Service, the Office of Personnel Management argued that Postal Service employees were not entitled to service credit for periods during which the Postal Service had defaulted on its contributions to its employees' retirement and disability fund. The OLC rejected that view, concluding that "OPM may not address the Postal Service's failure to make the employer contributions required by FERS by denying postal employees coverage or creditable service under FERS." The OLC's legal conclusion had the effect of determining OPM's policies and practices.

44. The OLC's opinions interpreting non-discretionary legal obligations of federal agencies constitute both "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B). Nonetheless, the OLC has not published all such formal written opinions. At least one published OLC opinion cites an unpublished opinion that appears to interpret a federal agency's non-discretionary legal obligation.[41]

[40] Office of Legal Counsel, Dep't of Justice, *Whether Postal 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*, 2011 WL 7431070 (2011), https://www.justice.gov/file/18331/download [https://perma.cc/K9E7-S7D5] (**Exhibit K**).

[41] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *Payment of Attorney's Fees Under the Equal Access to Justice Act* (1994) (unpublished OLC opinion concerning the Department of Justice's obligation to pay attorneys' fees under the Equal Access to Justice Act), *cited in* Office of Legal Counsel, Dep't of Justice, *Responsibility of Agencies to Pay Attorney's Fee Awards Under the Equal Access to Justice Act* (2007), https://www.justice.gov/file/451596/download [https://perma.cc/9DVV-R5S6] (**Exhibit L**) (determining which agency is, under the Equal Access to Justice Act, responsible for paying a fee award and citing the 1994 opinion as "acknowledging DOJ's responsibility to pay [an] EAJA fee award where DOJ had intervened in bankruptcy litigation").

D. Opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them.

45. Some OLC opinions determine that a congressional enactment is unconstitutional and that federal agencies may therefore decline to give the statute effect. For example, on January 29, 2008, the OLC issued an opinion holding that the "direct reporting requirement" of the Implementing Recommendations of the 9/11 Commission Act of 2007—which mandated that certain reports of the Department of Homeland Security's Chief Privacy Officer be sent directly to Congress—would be unconstitutional if applied to restrict the president's review of the reports.[42] "In such circumstances," the OLC noted, "the statute must yield to the President's exercise of his constitutional authority."

46. The OLC's opinions finding congressional statutes unconstitutional constitute both "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B). Nonetheless, the OLC has not published all such formal written opinions. At least one published OLC opinion cites an unpublished opinion that appears to find a congressional enactment unconstitutional.[43]

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[42] Office of Legal Counsel, Dep't of Justice, *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007* (2008), https://www.justice.gov/file/477336/download [https://perma.cc/BA7R-2NZ9] (**Exhibit M**).

[43] Office of Legal Counsel, Dep't of Justice, *Legal Authority to Withhold Information from Congress* (1998) (unpublished OLC opinion), *cited in Constitutionality of the Direct Reporting Requirement*, *supra* note 42, at 18–19 (quoting the unpublished opinion of 1998 for the proposition that "the 'application of [statutory] reporting requirements . . . is limited by a constitutional restraint—the executive branch's authority to control the disclosure of information when necessary to preserve the Executive's ability to perform its constitutional responsibilities'" (alterations in original)).

E. Opinions adjudicating or determining private rights.

47. Some OLC opinions directly or indirectly determine private rights. As former OLC lawyer and then–Judge Samuel A. Alito, Jr. commented in a law-review article, "many of the questions on which OLC opines do involve private rights."[44] OLC opinions determining private rights are similar in effect to administrative or judicial decisions concerning private rights: they define, at least in the first instance, the rights and liabilities of private individuals vis-à-vis the government.

48. Many of the opinions discussed above fall into this category, including the OLC's opinions concerning: the availability of monetary relief for the violation of an agreement settling discrimination claims, the availability of back wages to redress improperly withheld pay, the entitlement to service credit under a federal retirement and disability plan, and the entitlement to social security benefits for the children of same-sex couples. Each of these opinions decided the rights of classes of individuals as well as the rights of specific individuals whose claims, entitlements, or benefits the OLC was addressing.

49. The OLC's opinions adjudicating or determining private rights constitute both "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency," *id.* § 552(a)(2)(B). Nonetheless, the OLC has not published all such formal written opinions. At least one published OLC opinion cites unpublished opinions that determine private rights.[45]

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[44] Alito, *supra* note 32, at 509–10.

[45] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *Proposed Award of Honorary British Knighthood to Retiring Military Officer* (1996) (unpublished OLC opinion determining that retired military officers remain subject to the Emoluments Clause), *cited in* Office of Legal Counsel, Dep't of Justice, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, https://www.justice.gov/file/18441/download [https://perma.cc/E4X2-CA23] (**Exhibit N**); *see*

III. Procedural posture.

50. On March 22, 2016, the executive director of CfA wrote to Principal Deputy Assistant Attorney General Thompson requesting that the OLC comply immediately with its obligations under 5 U.S.C. § 552(a)(2) to make available for public inspection and copying on an ongoing basis all unpublished OLC opinions that provide controlling legal advice to executive branch agencies and a general index of all such opinions. The letter made clear it was not a request for records under 5 U.S.C. § 552(a)(3).[46]

51. Deputy Assistant Attorney General John Bies responded to CfA's request by letter dated May 26, 2016. He articulated OLC's continuing position that none of the opinions it issues are covered by the requirements of 5 U.S.C. § 552(a)(2). Mr. Bies asserted that the "OLC does not have policymaking authority, nor does it enforce laws against or adjudicate the rights of private individuals. Rather, OLC provides confidential legal advice within the Executive Branch. As such, OLC's advice is ordinarily covered by the attorney–client and deliberative process privileges, and is therefore exempt from mandatory disclosure under the FOIA."[47]

52. The refusal of the DOJ and the OLC to comply with their statutory obligations to provide CfA and the public at large, on an ongoing basis, OLC opinions that fall within 5 U.S.C. § 552(a)(2) and an index of such opinions has harmed, and continues to harm, CfA in carrying out its core programmatic activities. CfA has suffered an informational harm by being deprived of information the law requires the DOJ to affirmatively make available to the public. This

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also Applicability of the Emoluments Clause at 8, 11 (citing other unpublished OLC opinions concerning the applicability of the Emoluments Clause to other classes of individuals).

[46] The CfA's request letter is attached hereto as **Exhibit A**.

[47] The OLC's response letter is attached hereto as **Exhibit B**.

informational harm establishes CfA's standing to sue to enforce the provisions of 5 U.S.C. § 552(a)(2). *See Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998).

53. The CfA filed this lawsuit on June 8, 2016, arguing that the OLC had violated FOIA's reading-room provision by failing to proactively publish its formal written opinions. On October 6, 2017, the district court granted the government's motion to dismiss the CfA's original complaint without prejudice. The district court interpreted the D.C. Circuit's decision in *EFF* as foreclosing application of FOIA's reading-room provision to the OLC's opinions solely on the basis of their controlling and precedential nature. The district court permitted CfA to amend its complaint, and Plaintiff now files this Amended Complaint.

CAUSES OF ACTION

I. Failure to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2).

54. Section 552(a)(2) of Title 5 requires all agencies, including the DOJ and its component the OLC, to make available for public inspection and copying final opinions made in the adjudication of cases and statements of policy and interpretations that have been adopted by the agency and not published in the Federal Register.

55. The OLC issues opinions that fall within the categories of records that 5 U.S.C. § 552(a)(2) requires be made available for public inspection and copying, including formal written opinions issued to executive branch agencies and officials.

56. Notwithstanding the clear, non-discretionary mandate set forth in 5 U.S.C. § 552(a)(2), which requires the DOJ to act regardless of whether there has been a request for specified records pursuant to 5 U.S.C. § 552(a)(3), the DOJ and the OLC have refused for years to make available for public inspection and copying all final written opinions made in the adjudication of cases and statements of policy and interpretations that have been adopted by the agency.

57. As a result, CfA and the public have been deprived of information the statute guarantees them a right to access. This has led to the creation of a body of secret law within the DOJ and the OLC—the precise danger Congress sought to avoid through the enactment of 5 U.S.C. § 552(a)(2).

58. Plaintiff is therefore entitled to relief in the form of a declaratory judgment that Defendant has failed to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2).

59. Plaintiff also is entitled to an injunction directing the DOJ and the OLC to redress their failure to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2) by disclosing to Plaintiff, without a specific request, all past and future formal written opinions issued to executive branch agencies or to executive branch officials other than the president, and not published in the Federal Register.

II. Failure to comply with the indexing requirement of 5 U.S.C. § 552(a)(2)(E).

60. Section 552(a)(2)(E) of Title 5 imposes on agencies the additional requirement to make publicly available current indices providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by 5 U.S.C. § 552(a)(2) to be made available or published.

61. Notwithstanding the clear, non-discretionary mandate set forth in 5 U.S.C. § 552(a)(2)(E), which requires DOJ to act regardless of whether there has been a specific request for an index, the DOJ and the OLC have failed for years to make available for public inspection and copying indices of all formal written opinions issued by the OLC to executive branch agencies or officials.

62. As a result, CfA and the public have been deprived of information the statute guarantees them a right to access. This has led to the creation of a body of secret law within the

OLC and the DOJ—the precise danger Congress sought to avoid through the enactment of 5 U.S.C. § 552(a)(2).

63. Plaintiff is therefore entitled to relief in the form of a declaratory judgment that defendant has failed to comply with the indexing and disclosure obligations of 5 U.S.C. § 552(a)(2)(E).

64. Plaintiff also is entitled to an injunction directing the DOJ and the OLC to redress their failure to comply with 5 U.S.C. § 552(a)(2)(E) by disclosing to Plaintiff, without a specific request, indices of all past and future formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president.

PRAYER FOR RELIEF

WHEREFORE, the Campaign for Accountability respectfully requests that this Court:

1. Declare that Defendant has failed to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2) by refusing to make available for public inspection and copying all formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president;

2. Order Defendant to disclose to Plaintiff all formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president;

3. Declare that Defendant has failed to comply with the disclosure obligations of 5 U.S.C. § 552(a)(2)(E) by refusing to make available for public inspection and copying indices of all formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president;

4. Order Defendant to make available for public inspection and copying indices of all formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president, if issued, adopted, or promulgated after July 4, 1967;

5. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Alex Abdo

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute
at Columbia University
314 Low Library
535 West 116th Street
New York, NY 10027
(212) 854-9600
alex.abdo@knightcolumbia.org

Counsel for Plaintiff

October 27, 2017