IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF DEFENDANT'S RENEWED MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Campaign for Accountability (CFA) has filed an Amended Complaint that is again founded on an extraordinary argument: that the Freedom of Information Act (FOIA) requires the Department of Justice's Office of Legal Counsel (OLC) to publish a large portion of its legal advice documents, even though courts—including the D.C. Circuit—have routinely held that those legal advice documents are privileged and therefore need not be disclosed. CFA's Amended Complaint now focuses on five particular categories of OLC's legal advice documents, contending that those documents must be affirmatively disclosed under two of FOIA's reading-room provisions, 5 U.S.C. § 552(a)(2)(A), (B).

CFA's Amended Complaint fails to plausibly allege a valid claim for relief. As this Court held in the context of dismissing CFA's prior Complaint, "in order to state a claim that an agency has improperly withheld records that it was obligated to make public under section 552(a)(2), the complaint must identify particular records (or categories of records) that the agency has failed to publicize and that plausibly fit within one of the statutory categories." Mot. to Dismiss Op. (ECF No. 19) at 17 [hereafter "MTD Op."]. Here, binding precedent confirms that OLC advice documents, at least as a general matter, are privileged and therefore do not fall within the affirmative-disclosure requirements of § 552(a)(2). *See Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1 (D.C. Cir.), *cert. denied*, 135 S. Ct. 356 (2014) [hereafter *EFF*]; *see also New York Times Co. v. Dep't of Justice*, 806 F.3d 682, 687 (2d Cir. 2015); MTD Op. at 30-35. To plausibly establish its claim with respect to the five categories of OLC opinions, therefore, CFA must allege that these particular types of opinions possess distinguishing characteristics that bring them outside the general rule that OLC advice need not be disclosed. But CFA has failed to allege any such characteristics with respect to its five categories; those five types of OLC opinions, like other OLC opinions, are privileged and need not be disclosed under § 552(a)(2).

A brief discussion of the general principles governing disclosure of OLC opinions demonstrates why CFA's five categories are no different. As the D.C. Circuit has recognized, OLC itself does not possess policymaking authority; OLC instead provides pre-decisional legal advice to client agencies, who then make policy decisions based on that advice (as well as other pre-decisional inputs). *See EFF*, 739 F.3d at 8-10; MTD Op. at 35 ("OLC's opinions *always* advise on legal questions, even if the agency that receives an OLC opinion will use it to inform a policy decision."). Thus, OLC's pre-decisional legal advice is generally protected from disclosure under the deliberative process and attorney-client privileges (among other potential privileges). For that reason, and because OLC does not regulate the public or adjudicate private rights, those advice documents also fall outside § 552(a)(2)'s disclosure requirements. *See* MTD Op. at 32-33. The privileged status of OLC opinions is not diminished even when OLC opinions are considered "controlling" or "precedential" within the Executive Branch. *See EFF*, 739 F.3d at 9-10; MTD Op. at 30-35.

These principles foreclose CFA's claim with respect to each of the five categories alleged here. *First*, opinions resolving interagency disputes: OLC's legal advice provided in this context does not adjudicate the rights of private parties, nor does it determine the ultimate policy of any client agency. Although there is an Executive Order encouraging (and sometimes directing) Executive Branch agencies to submit their legal disagreements to OLC for resolution, that fact does not change the privileged nature of OLC's legal advice—as noted above, the D.C. Circuit and this Court have expressly rejected the argument that the "binding" nature of OLC's advice makes it non-privileged. *See EFF*, 739 F.3d at 9-10; MTD Op. at 30-35.

Second, opinions issued to independent agencies: although OLC may require an upfront commitment from an independent agency before providing legal advice to that agency, that

commitment is nothing more than the independent agency agreeing to treat OLC's advice the same way a non-independent agency would treat it. Thus, the commitment itself does not bring this type of OLC advice outside the general rule. And again, the degree to which OLC's legal advice is considered "binding" is irrelevant to the FOIA analysis.

Third, opinions interpreting non-discretionary legal obligations: this type of advice document likewise does not determine any client agency's ultimate policy about how to address a particular situation. OLC lacks policymaking authority, and the mere provision of legal advice does not determine any private person's rights or obligations. Those rights or obligations are determined only after a client agency performs a separate act, perhaps informed by OLC's legal advice. Ultimately, however, the client agency remains response for its policy decision.

Fourth, opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them: CFA does not identify anything unique about this particular form of legal analysis performed by OLC. The nature of OLC's legal analysis (whether rooted in the Constitution, statutes, or other legal authority) does not affect the privileged status of the advice. And even when OLC concludes a statute is unconstitutional, the client agency still has the ultimate policy decision to make about how to handle the situation.

Fifth and finally, opinions adjudicating or determining private rights: this category is based on a false premise, because OLC lacks policymaking authority and does not adjudicate or determine any private rights; that is the responsibility of the client agencies. Thus, there are no OLC advice documents that fall within this category.

Accordingly, none of the five categories identified by CFA needs to be affirmatively disclosed under FOIA. And to the extent there is any doubt on the issue, CFA's claim should be rejected because of its extreme implications—it would require large swaths of confidential legal

advice to be disclosed (both within OLC and other Executive Branch agencies), thereby interfering with the President's duty to "take Care that the Laws be faithfully executed[.]" U.S. Const., art. II, § 3. FOIA does not require such a result, nor should it be construed to do so. In fact, the D.C. Circuit has consistently interpreted FOIA to protect confidential Executive Branch legal advice. Thus, CFA's claims are without merit and should be dismissed.

BACKGROUND

I. LEGAL FRAMEWORK

A. The Freedom of Information Act

Pursuant to the so-called "reading room" provisions of the Freedom of Information Act, government agencies are required to affirmatively publish certain categories of records. *See* 5 U.S.C. § 552(a)(1), (2). As relevant here, those provisions require that:

> Each agency . . . shall make available for public inspection . . . (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; [and] (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register[.]

Id. § 552(a)(2).

For records that have not been affirmatively disclosed, FOIA permits individuals to submit requests to agencies for the disclosure of specific records:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection . . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Id. § 552(a)(3)(A).

Not all records, however, need to be disclosed under FOIA. The Act contains nine specific exemptions, which allow the agency to withhold the information falling within such exemptions. *See id.* § 552(b). In light of the language of § 552(b)—"[t]his section does not

apply to matters that [fall within an exemption]"—agencies may withhold such exempt information regardless of whether the record falls within the affirmative-disclosure provisions of § 552(a)(2), or was requested by an individual under § 552(a)(3). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975) (holding that the attorney work-product privilege applied, and thus the document was exempt regardless of whether it fell within a § 552(a)(2) category).

Here, the most relevant exemption is Exemption 5, 5 U.S.C. § 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]" This exemption incorporates the privileges traditionally available to the government in civil discovery, such as the deliberative process, attorney-client, and attorney work-product privileges. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-801 (1984).

As this Court previously noted, the scope of Exemption 5 "correlates with, and sheds light on, the scope of the FOIA's reading-room provision" because "courts generally should construe Exemption 5 and the reading-room provision such that they do not overlap." MTD Op. at 7. Because Exemption 5 applies to deliberative material in which an agency is "in the process of working out its policy and determining what its law shall be," whereas the reading-room requirements were enacted "only to require disclosure of documents which have the force and effect of law," Exemption 5 is thus "a kind of mirror image of the reading-room requirement." *Id.*

B. The Office of Legal Counsel

The Office of Legal Counsel (OLC) is a component of the United States Department of Justice charged with providing confidential legal advice within the Executive Branch. Specifically, OLC's responsibilities include "[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the

Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet." 28 C.F.R. § 0.25(a). These functions are vested in the Attorney General by statute, 28 U.S.C. §§ 511-513, and since the 1950s OLC has assisted the Attorney General in their performance. *See* Am. Compl. (ECF No. 22) ¶ 19. "OLC's authority to render advice is, in some sense, nearly as old as the Republic itself." *Citizens for Responsibility & Ethics in Wash. (CREW) v. Dep't of Justice*, 846 F.3d 1235, 1238 (D.C. Cir. 2017) (discussing the Judiciary Act of 1789); *see also* MTD Op. at 8; Am. Compl. ¶¶ 16-19.

As part of its advice-giving function, OLC will sometimes prepare "formal written opinions," and has developed certain guiding principles for preparing those opinions. *See* Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, Re: Best Practices for OLC Legal Advice and Written Opinions 2-5 (July 16, 2010) (ECF No. 22-4) [hereafter "Best Practices Memo"]; *see also* Am. Compl. ¶¶ 21-24. As part of those principles, OLC has developed "a longstanding internal process . . . for regular consideration and selection of significant opinions for official publication." Best Practices Memo at 5. That process includes consideration of a variety of different factors, including "countervailing considerations" that "may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication." *Id.* at 5-6. Consistent with that process, "OLC has published over 1,300 opinions, dating from 1934 to the present." MTD Op. at 9 (citing Office of Legal Counsel, Opinions, Dep't of Justice, http://www.justice.gov/olc/opinions-main).

II. FACTUAL AND PROCEDURAL HISTORY

A. The Original Request and Complaint

On March 22, 2016, CFA sent a letter to the then-head of OLC, Principal Deputy

Assistant Attorney General Karl Remón Thompson, requesting that 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." Am. Compl. ¶ 50; *see also* Letter from Weismann to Thompson (ECF No. 22-2). CFA asserted that "OLC opinions . . . function as binding law on the executive branch" and therefore "must be made publicly available as either 'final opinions . . . made in the adjudication of cases' or 'statements of policy and interpretations which have been adopted by the agency[.]'" Weismann Letter at 3 (quoting 5 U.S.C. § 552(a)(2)(A), (B)).

OLC responded to CFA's letter on May 26, 2016. Am. Compl. ¶ 51; *see also* Letter from Bies to Weismann (ECF No. 22-3). The response explained that "OLC does not have policymaking authority, nor does it enforce laws against or adjudicate the rights of private individuals," but instead "OLC provides confidential legal advice within the Executive Branch." Bies Letter at 1. "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[.]" *Id.* (citing 5 U.S.C. § 552(b)(5)). Additionally, the Bies letter stated that "as confidential and pre-decisional legal advice, our opinions generally constitute neither 'final opinions . . . made in the adjudication of cases' nor 'statements of policy and interpretations which have been adopted by the agency.'" *Id.* (quoting 5 U.S.C. § 552(a)(2)(A), (B)).

OLC explained, however, that notwithstanding the fact that OLC opinions are generally exempt from FOIA, OLC nonetheless "make[s] an individualized, case-by-case determination with respect to whether each opinion of our Office is appropriate for publication." *Id.* (citing Best Practices Memo at 5-6). When OLC receives a FOIA request and an OLC opinion is

responsive to that request, OLC similarly "consider[s] whether to waive applicable privileges and release the opinion as a matter of administrative discretion." *Id.* at 2 (citing Best Practices Memo at 6). OLC's letter made clear that if at any point OLC concluded an advice document needed to be disclosed under § 552(a)(2), it would do so: "If OLC were to conclude during the publication review process, the FOIA response process, or at any other time that the Department had an obligation under 5 U.S.C. § 552(a)(2) to make a particular opinion publicly available, we would do so at that time." *Id.*

Shortly after receiving OLC's response, CFA filed its initial Complaint containing two claims. The primary claim was that OLC had failed to comply with the affirmative-disclosure provisions of § 552(a)(2), in particular by failing to publish "those written opinions issued by OLC that provide controlling advice to executive branch officials and agencies on questions of law, whether formal or informal, those opinions that serve as precedent within OLC and the executive branch, and those opinions that serve as interpretive guides for the executive branch." Compl. (ECF No. 1) ¶ 35. Such opinions, CFA alleged, were within §§ 552(a)(2)(A) and (B) because they are "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." Compl. ¶ 30. The non-disclosure of those opinions allegedly "resulted in the creation of a body of authoritative controlling secret law." *Id.* ¶ 28.

CFA's second claim was that OLC had failed to index its opinions under 5 U.S.C. § 552(a)(2), which also requires each agency to "maintain and make available for public inspection . . . 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 to be made available or published." *See* Compl. ¶¶ 37-38.

B. Motion to Dismiss Proceedings

The Government moved to dismiss CFA's Complaint, raising several threshold arguments, and also arguing, as relevant here, that CFA had not plausibly alleged that OLC had failed to disclose advice documents subject to § 552(a)(2). *See* Mem. in Supp. of Def.'s Mot. to Dismiss at 19-40 (ECF No. 9-1) at 19-40. In particular, the Government argued that CFA's theory was contrary to the D.C. Circuit's decision in *EFF*, in which the D.C. Circuit held that a formal OLC opinion of the type sought by CFA was properly withheld under the deliberative process privilege, did not represent "working law" of the policymaking agency, and was privileged regardless of its "controlling" nature. *See EFF*, 739 F.3d at 9.

Following briefing and argument, this Court granted the Government's motion to dismiss. The Court held that "CfA has not identified an ascertainable set of OLC opinions that OLC has withheld from the public and that is also plausibly subject to the FOIA's reading-room requirement." MTD Op. at 3. In particular, the Court held CFA's claim that the "controlling" and "precedential" nature of OLC opinions required their publication was contrary to the *EFF* decision, which "makes clear that these features of an OLC legal opinion *do not* render it subject to the reading-room requirement[.]" MTD Op. at 29; *see also id.* at 35 ("[A]n OLC opinion does not become the 'working law' of the agency that requested it merely by virtue of the fact that it espouses a 'controlling' legal interpretation[.]"). Thus, CFA had failed to plausibly allege a violation of the reading-room requirements. *See also id.* at 30-36. And because CFA had not plausibly alleged a violation of the reading-room requirements, it likewise had not plausibly alleged a violation of FOIA's indexing requirements. *See id.* at 29-30 n.11.

Despite the Complaint's failure to plausibly allege a violation of the reading-room requirements, the Court noted that, at oral argument, CFA had tried to "identify[] two discrete subsets of OLC opinions that, according to CfA, . . . must be made available to the public." *Id.*

at 36. Those "delineated categories of records do not appear in CfA's complaint as the basis for CfA's claims," however, and therefore "CfA's oral assertion . . . cannot be the means by which CfA alleges a plausible violation of the reading-room provision." *Id.* The Court thus dismissed the Complaint, but granted CFA leave to file an Amended Complaint to "cure the fatal pleading defect"—*i.e.*, to "add allegations of specific, ascertainable categories of records that CfA believes are subject to the reading-room requirement and that OLC has failed to make publicly available." *Id.* at 37.

C. The Amended Complaint and OLC's Response

Following the Court's decision on the motion to dismiss, CFA filed an Amended Complaint (ECF No. 22). The Amended Complaint now states that "[t]his lawsuit concerns only . . . formal written opinions issued to executive branch agencies or to executive branch officials other than the president," Am. Compl. ¶ 33, and in particular it identifies five categories of such formal opinions that CFA believes "fall within the scope of the affirmative-disclosure provisions of FOIA even under this Court's broad reading of" *EFF*. *Id.* ¶ 34. Those five categories are:

(A) opinions resolving interagency disputes;

(B) opinions issued to independent agencies;

(C) opinions interpreting non-discretionary legal obligations;

(D) opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them; and

(E) opinions adjudicating or determining private rights.

Id. ¶¶ 35-49. CFA also identifies five particular OLC opinions; each one, in CFA's view, falls within one of the above categories but has not yet been made public. *See id.* ¶ 38 n.36; ¶ 40 n.38; ¶ 44 n.41; ¶ 46 n.43; and ¶ 49 n.45.

Following the filing of the Amended Complaint, this Court directed that OLC should

construe the Amended Complaint "as a clarification of CfA's March 22, 2016 request for publication of documents under 5 U.S.C. § 552(a)(2)," and further directed OLC to "send Plaintiff a response to that clarification[.]" ECF No. 26 at 9. OLC responded to CFA's request, as clarified by the Amended Complaint, on January 2, 2018. *See* Letter from Curtis E. Gannon, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Messrs. Abdo and Jaffer, *Re: Campaign for Accountability v. U.S. Dep't of Justice* (Jan. 2, 2018) (ECF No. 27-1) [hereafter "OLC Resp. Ltr."].

In that response letter, OLC further explained its role within the Executive Branch, *see id.* at 2-3, and also discussed the five particular categories discussed in the Amended Complaint. *See id.* at 4-7. Specifically, OLC made clear that none of the characteristics of those categories "render inapplicable the various privileges that apply to OLC documents providing legal advice," nor do they "render those documents subject to section 552(a)(2)'s provisions as a categorical or general matter." *Id.* at 4.

Finally, OLC discussed the five specific opinions that CFA's Amended Complaint alleged were being withheld, and noted that, although "[w]e do not believe that section 552(a)(2) requires disclosure of any the five documents," OLC has nonetheless "determined that two are appropriate for discretionary release, in whole or in part" and therefore OLC provided copies of those advice documents to CFA. *Id.* at 7; *see Payment of Attorney's Fees under the Equal Access to Justice Act*, Mem. to Stephen Colgate, Asst. Att'y Gen., Justice Management Division, Dep't of Justice from Richard Shiffrin, Deputy Asst. Att'y Gen., Office of Legal Counsel (Aug. 25, 1994) (ECF No. 27-2 at 1-2) (cited in Am. Compl. ¶ 44 n.41); *Applicability of 18 U.S.C. § 1913 to the Provision of Official Time to Employee Union Representatives to Lobby Congress on Representational Issues*, Mem. to Charlotte Hardnett, Acting Gen. Counsel, Soc. Sec'y Admin.

from Daniel Koffsky, Acting Asst. Att'y Gen., Office of Legal Counsel (Mar. 23, 2001) (ECF No. 27-2 at 3-6) (cited in Am. Compl. ¶ 40 n.38).

STANDARD OF REVIEW

Defendant, the United States Department of Justice, hereby moves to dismiss CFA's Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In evaluating the sufficiency of the Complaint, the Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

A motion under Rule 12(b)(6) "tests the legal sufficiency of a plaintiff's complaint[.]" *Herron v. Fannie Mae*, 861 F.3d 160, 173 (D.C. Cir. 2017). Additionally, to survive such a motion to dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to satisfy the Rule 12(b)(6) standard, the plaintiff's complaint must allege "more than a sheer possibility that a defendant has acted unlawfully"). Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Twombly*, 550 U.S. at 555.

ARGUMENT

As this Court previously noted, "in order to state a claim that an agency has improperly withheld records that it was obligated to make public under section 552(a)(2), the complaint must identify particular records (or categories of records) that the agency has failed to publicize and that plausibly fit within one of the statutory categories." MTD Op. at 17. To meet this standard with respect to the alleged withholding of OLC opinions, it is insufficient simply to allege that OLC's legal advice is "controlling" or "binding"—"CfA's complaint needs to identify

an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed[.]" *Id.* at 33.

Here, CFA's Amended Complaint sometimes appears to seek all "formal written opinions issued to executive branch agencies or to executive branch officials other than the president." Am. Compl. ¶ 33; *see also id.*, Prayer for Relief ¶¶ 1-3. That claim plainly would not satisfy the standard announced above, nor would it comply with this Court's instruction that CFA is permitted to amend its Complaint to challenge the withholding of "discrete subsets of [OLC] opinions[.]" MTD Op. at 37. Thus, the present motion to dismiss focuses on what appears to be CFA's actual claim—*i.e.*, that OLC must disclose advice documents falling within five particular categories of opinions. *See* Am. Compl. ¶¶ 35-53.

In order to evaluate CFA's claim with respect to those five categories, it is first necessary to understand the general principles governing disclosure of OLC's legal advice documents. Courts have routinely recognized that those advice documents are privileged, and therefore do not come within § 552(a)(2)'s affirmative-disclosure requirements. In particular, because OLC itself lacks policymaking authority and does not regulate private parties, OLC's legal advice documents are instead pre-decisional inputs to assist client agencies in their regulation of the public. *See* Part I, *infra*. And based on those general principles, CFA has not plausibly alleged that any of the five categories of OLC opinions possess special features or other distinguishing characteristics that bring those types of advice documents outside the general rule recognizing OLC's advice as privileged. *See* Part II, *infra*. Finally, to the extent there were even any doubt, embracing CFA's claim would undermine important rule-of-law values and raise significant constitutional concerns, which is reason enough to reject CFA's claim. *See* Part III, *infra*.

Accordingly, CFA has failed to plausibly allege a violation of FOIA's reading-room

requirements in Count I, and for the same reason has failed to plausibly allege a viable indexing claim in Count II. Thus, the Court should dismiss CFA's Amended Complaint with prejudice for failure to state a claim upon which relief can be granted.

I. OLC LEGAL ADVICE DOCUMENTS ARE GENERALLY PRIVILEGED AND NEED NOT BE AFFIRMATIVELY DISCLOSED

To evaluate CFA's claims regarding specific categories of opinions, it is first necessary to understand the general principles governing disclosure of OLC's advice documents. As discussed below, because OLC lacks policy-making authority and does not regulate private parties, OLC's legal advice documents need not be affirmatively disclosed and are generally privileged, as numerous courts have recognized.

A. OLC Advice Documents Generally Do Not Fall Within FOIA's Affirmative Disclosure Provisions

CFA alleges that certain OLC advice documents fall within § 552(a)(2)(A) and (B), which require the affirmative disclosure of "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;" and "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). As this Court has recognized, whether a document falls within those affirmative-disclosure requirements can also be answered by asking whether the document is protected by the deliberative process privilege, because § 552(a)(2) and the deliberative process privilege are "mirror images of each other." MTD Op. at 32.

1. The D.C. Circuit's controlling decision in *EFF* confirms that OLC opinions generally do not fall within FOIA's affirmative-disclosure provisions. In that case, a requester sought a formal, final OLC opinion that was prepared for the FBI and the plaintiff argued that the opinion must be disclosed because it represented the agency's effective law and policy. *See* MTD Op. at 31. The D.C. Circuit squarely rejected this argument, concluding that "OLC is not authorized

to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy." 739 F.3d at 9. The court also went on to reject the "working law" argument, notwithstanding the "precedential" nature of the OLC opinion:

> EFF argues that the OLC Opinion must be "working law" because it is controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn. That the OLC Opinion bears these indicia of a binding legal decision does not overcome the fact that OLC does not speak with authority on the FBI's policy; therefore, the OLC Opinion could not be the "working law" of the FBI unless the FBI "adopted" what OLC offered. In *Brinton*, we rejected the appellant's claim that memoranda must be released because they constituted the "final opinions" of the Department of State. We explained that while the privilege does not protect final decisions or authoritative statements on agency policy, the "final opinions" of the Department of State's Legal Adviser, "who has no authority to make final decisions concerning United States policy in the Middle East," are not final decisions of the Department of State. The same is true of the OLC Opinion in this case.

Id. at 9-10 (internal citations omitted).

This controlling decision makes clear that OLC opinions, at least as a general matter, are legal advice documents—rather than final agency policy decisions—and therefore need not be disclosed under § 552(a)(2). *See* MTD Op. at 34 (describing *EFF* as distinguishing cases where the requested document "reflected the position of *the agency* itself," and instead "specifically h[o]ld[ing] that an OLC opinion does *not* necessarily reflect the adopted policy of the agency that requests it"); *see also* OLC Resp. Ltr. at 2 ("OLC does not purport, and in fact lacks authority, to make policy decisions. OLC's legal advice and analysis may inform the decision-making of executive branch officials on matters of policy, but OLC's legal advice is not itself dispositive with respect to any policy adopted.").

2. Even going beyond *EFF*, there are ample reasons why OLC's legal advice documents do not fall within § 552(a)(2). First, OLC does not issue any opinions in adversarial disputes involving private parties. *See* Bies Letter (ECF No. 22-3) at 1 ("OLC does not . . . enforce laws against or adjudicate the rights of private individuals."); OLC Resp. Ltr. at 4. Section 552(a)(2),

however, is limited to agency regulation of private citizens' rights and obligations. This limitation is confirmed by the text of § 552(a)(2) itself, which makes clear that the covered documents refer to typical adjudicatory and regulatory contexts involving private individuals, not internal agency documents. *See* 5 U.S.C. § 552(a)(2) (failure to publish a covered document precludes using the document "as precedent . . . *against a party other than an agency*," *i.e.*, against a private party (emphasis added)); *see also id.* § 552(a)(2)(A) (referring to "final opinions, *including concurring and dissenting opinions, as well as orders*, made in the adjudication of cases" (emphasis added)).

A passage from FOIA's House Report likewise makes clear that Congress's primary concern in § 552(a)(2) was with the adjudication of private rights:

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

H.R. Rep. 89-1497 at 29 (emphasis added); *see also Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 352 (D.C. Cir. 1972) (quoting legislative history and stating that Congress enacted § 552(a)(2) because it was "troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information"), *rev'd on other grounds*, 415 U.S. 1 (1974); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) ("'The act's indexing and reading-room rules indicate that the primary objective is the elimination of secret law. Under the FOIA an agency must disclose its rules *governing relationships with private parties and its demands on private conduct*.'" (emphasis added, quoting Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. Legal Studies 775, 777 (1980))); MTD Op. at 6 (noting that § 552(a)(2)'s

requirements "prevent an agency from subjecting *members of the public* to a rule that the agency has not publicly announced" (emphasis added)).[1]

The D.C. Circuit's decisions have consistently confirmed this focus on adjudication of private rights as well. *See EFF*, 739 F.3d at 9-10 (rejecting the "working law" line of cases in the context of an OLC opinion); *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) ("A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it *in the discharge of its regulatory duties and in its dealings with the public*[.]" (emphasis added)); *see also Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352-53, 360 n.23 (1979) (policy directives are "intra-agency memorandums" exempt from § 552(a)(2) because they "do not establish rules that govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public"); *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (holding that a report was not subject to affirmative disclosure because it "sets forth the conclusions of a voluntarily undertaken internal agency investigation, not a conclusion about agency action (or inaction) *in an adversarial dispute with another party*" (emphasis added)). The only other appellate court to take up the question agreed with the D.C. Circuit. *See New York Times Co.*, 806 F.3d at 687 (citing *EFF* and rejecting "the general argument that the legal reasoning in OLC opinions is 'working law'").

Furthermore, OLC opinions generally cannot be considered "final opinions," because they do not finally dispose of any agency action—OLC simply provides legal advice relating to

[1] The *Sears* decision and its reliance on Professor Davis's article also makes clear the degree to which § 552(a)(2) is limited to documents involving the adjudication of private rights. *See Sears*, 421 U.S. at 153; Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 774 (1967) (discussing the scope of § 552(a)(2) and stating that "[t]he case law of the agencies has to be available for public inspection" because, as an example, "[i]f a letter ruling interprets tax law in favor of X, fairness requires that Y who has the same problem should have opportunity to know the interpretation in X's case").

an agency's prospective policy choices, and that advice may or may not ultimately be relevant to an agency's final decision. *See* MTD Op. at 34 ("[T]he D.C. Circuit in *EFF* . . . specifically held that an OLC opinion does *not* necessarily reflect the adopted policy of the agency that requests it."); OLC Resp. Ltr. at 3 ("OLC opinions provide legal advice regarding the overall legal framework within which policymakers act as a predecisional part of government deliberative processes, but the opinions do not compel the ultimate policy decision reached or adopted by any agency. OLC does not have direct supervisory authority over its clients. Like any other client, a department or agency receives the opinion of its counsel, but then must bear the responsibility for making the final decision.").

This description contrasts starkly with "final opinions" under § 552(a)(2), which the Supreme Court has stated will "not only invariably explain agency action already taken or an agency decision already made, but also constitute 'final dispositions' of matters by an agency." *Sears*, 421 U.S. at 153-54; *see also Common Cause v. Internal Revenue Serv.*, 646 F.2d 656, 659 (D.C. Cir. 1981) (holding that an internal agency opinion was not a "final opinion" under § 552(a)(2)(A) because the document only "involves the voluntary suggestion, evaluation, and rejection of a proposed policy by an agency," unlike documents that are "adjudicatory in nature and constitute[] final dispositions of pending disputes"); *cf. EFF*, 739 F.3d at 10 ("Even if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy."); *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 203 (2d Cir. 2012). OLC's limited advisory role in the policymaking process thus confirms that OLC opinions are not "final opinions" subject to affirmative disclosure. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 74-78 (D.D.C. 2008) (rejecting the "final opinion" argument with respect to OLC documents); *see also*

Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 187-89 (1975).

Similarly, OLC advice documents cannot be considered "statements of policy" within the meaning of FOIA, given that OLC itself does not have authority to act on or implement matters of policy. *See* OLC Resp. Ltr. at 2-3. Rather, it is the client agencies ultimately responsible for making policy decisions that may, after receiving OLC's deliberative and pre-decisional advice, choose to adopt a statement of interpretation or policy that is subject to the publication requirement of § 552(a)(2)(B)—"statements of policy and interpretations *which have been adopted by the agency*[.]" (emphasis added); *see also Viet. Veterans of Am. v. Dep't of Navy*, 876 F.2d 164, 164-65 (D.C. Cir. 1989) (holding that when an entity has authority only to dispense legal advice on certain topics, but not to actually act on behalf of the agency on those topics, the legal opinions do not constitute statements of policy); MTD Op. at 34.

3. There may conceivably be circumstances in which an OLC opinion needs to be disclosed under § 552(a)(2), for example if a policymaking agency were to expressly adopt both the conclusion and the reasoning of an OLC advice document as the policymaking agency's *own* statement of interpretation or policy.[2] In such a circumstance, however, that publication requirement would run to the policymaking agency, not OLC, which has no policymaking authority. *Cf.* OLC Resp. Ltr. at 3, 5. Whatever publication obligations may rest with individual client agencies in certain circumstances, therefore, OLC itself is not required to affirmatively publish its confidential legal advice.

[2] An agency must expressly adopt both the conclusion and the reasoning of a pre-decisional and deliberative document in order transform that document into agency policy. *See Grumman Aircraft Eng'g Corp.*, 421 U.S. at 184–85. Consequently, in order establish that an OLC advice document has become the agency policy of a policymaking agency, there must be evidence that the agency adopted not only the conclusion, but also the reasoning, of that OLC advice as the agency's own view.

B. OLC's Opinions Are Generally Exempt from Disclosure Pursuant to Both the Deliberative Process Privilege and the Attorney-Client Privilege

As a general matter, OLC legal advice documents are also protected from disclosure pursuant to various privileges, particularly the deliberative process and attorney-client privileges.[3] The applicability of Exemption 5 means that OLC's advice documents (at least as a general matter) would be exempt from disclosure even if CFA were correct that such documents fell within § 552(a)(2) in the first instance. *See Sears*, 421 U.S. at 154 n.21 (disclosure under § 552(a)(2) is not required where a record falls within FOIA's Exemption 5).

1. The deliberative process privilege applies when material is both "predecisional" and "deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The purpose of the privilege is to "prevent injury to the quality of agency decisions." *Sears*, 421 U.S. at 151. Because "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public," the privilege "focus[es] on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 150.

OLC opinions generally meet these requirements. As discussed above, OLC itself does not make policy decisions; instead, it provides legal advice for other agencies, and those agencies in turn make policy decisions within the legal framework articulated by OLC. Accordingly, OLC's advice is ordinarily simply one input into its client agencies' ongoing deliberations about how to conduct or implement their policy goals. *See EFF*, 739 F.3d at 10 ("Even if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or

[3] Many OLC opinions could be withheld on the basis of additional exemptions as well, such as the presence of classified information, § 552(b)(1); information specifically exempted from disclosure by statute, § 552(b)(3); information subject to privacy protections, § 552(b)(6); or law enforcement sensitive information, § 552(b)(7). And OLC opinions may be subject to other privilege protections, including the presidential communications privilege and the attorney work-product doctrine. At a minimum, however, OLC opinions may generally be withheld pursuant to the deliberative process and attorney-client privileges.

determine the FBI's policy."); *Elec. Privacy Info. Ctr.*, 584 F. Supp. 2d at 77 n.19 ("[A] legal conclusion that is part of a larger decision-making process may well be subject to the deliberative process privilege."). In general, then, OLC opinions are critical aspects of the "process by which governmental decisions and policies are formulated," *Sears*, 421 U.S. at 150, and the public disclosure of these opinions would undoubtedly chill the "candid, independent, and principled advice" that OLC aims to provide. Best Practices Memo at 1; *see also* OLC Resp. Ltr. at 2 ("One important reason OLC legal advice needs to stay confidential is that it often constitutes part of a larger deliberative process—a process that itself requires confidentiality to be effective.").

Again, there is ample case law confirming that OLC opinions are generally protected by the deliberative process privilege. *See, e.g.*, *EFF*, 739 F.3d at 9; New *York Times Co.*, 806 F.3d at 687; *New York Times Co. v. Dep't of Justice*, 2013 WL 174222, at *4-9 (S.D.N.Y. Jan. 7, 2013); *CREW v. Nat'l Archives & Records Admin.*, 583 F. Supp. 2d 146, 166 (D.D.C. 2008); *CREW v. Office of Admin.*, 249 F.R.D. 1, 4-8 (D.D.C. 2008); *New York Times Co. v. Dep't of Def.*, 499 F. Supp. 2d 501, 516 (S.D.N.Y. 2007); *Southam News v. INS*, 674 F. Supp. 881, 886 (D.D.C. 1987); *Morrison v. Dep't of Justice*, 1988 WL 47662, at *1-2 (D.D.C. Apr. 29, 1988). These cases confirm that OLC's legal advice, at least as a general matter, is deliberative in nature.

2. There can similarly be little debate that OLC's legal advice falls within the attorney-client privilege, which protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). This privilege applies to government officials seeking advice from government attorneys, just as it does to private parties. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011); *Coastal States Gas*

Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980).

OLC opinions generally fall within the privilege. "OLC's central function is to provide . . . controlling legal advice to Executive Branch officials[.]" Best Practices Memo at 1. That advice aims to "focus intensively on the central issues raised by a [client agency's] request[.]" *Id.* at 2. And although OLC "operates from the presumption that it should make its significant opinions fully and promptly available to the public," frequently there will be "countervailing considerations" that lead OLC to conclude that public disclosure is inappropriate. *Id.* at 5; *see also* OLC Resp. Ltr. at 3 ("OLC legal opinions may need to remain confidential . . . to protect the relationship of trust between OLC and the clients seeking its legal advice.").

Again, several courts have previously recognized that OLC may withhold its opinions on the basis of the attorney-client privilege. *See, e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 196 (D.D.C. 2013) ("[T]he Court concludes that the attorney-client privilege does apply to the sixteen OLC opinions because they 'embody legal advice that was provided in confidence at the request of and to Executive Branch officials.'"); *ACLU v. Dep't of Justice*, 2011 WL 10657342, at *9 (D.D.C. Feb. 14, 2011); *CREW v. Nat'l Archives & Records Admin.*, 583 F. Supp. 2d at 166; *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 69 (D.D.C. 2007).

In light of this significant amount of case law holding that OLC's legal advice is privileged and thus exempt from disclosure, CFA cannot plausibly maintain that OLC is compelled to publish wholesale categories of its opinions. CFA's Complaint must therefore be dismissed for failure to state a claim upon which relief can be granted.

C. OLC Does Not Create Secret Law

CFA's Amended Complaint continues to allege that OLC's unpublished legal opinions "constitute 'secret law'—anathema to our democracy and the primary evil Congress sought to

extinguish through FOIA." Am. Compl. ¶ 6. Much of the above discussion already refutes this allegation, but a few additional points are worth mentioning. OLC does not create "secret law," nor does the nature of OLC's legal advice require it to be disclosed. In particular, the relevant privileges should not be construed in a manner that would undermine OLC's important role of providing confidential legal advice to the Executive Branch.

In the FOIA context, the phrase "secret law" is a term of art, also referred to as "working law." The "working law" doctrine is a narrow one, under which agencies are prohibited from withholding decisional or post-decisional documents that govern the substantive rights or liabilities of private citizens:

> [W]e recognize that there is a narrow definition of "working law" that limits the term to those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person. This appears to be the definition understood by all the sources relied upon by the Supreme Court in *Sears* for the proposition that "working law" is not protected by exemption 5. All of the sources apparently operate under the assumption that the reason "working law" should be disclosed is that a private party may have cause to rely on it.

Afshar v. Dep't of State, 702 F.2d 1125, 1141 (D.C. Cir. 1983) (internal citations omitted). Here, of course, OLC opinions do not regulate the public. OLC simply provides legal advice to agencies, which then may (or may not) make policy decisions that may (or may not) regulate the public. *See, e.g.*, OLC Resp. Ltr. at 1-2. Regardless of whether those agencies' rationales must be disclosed as working law in some circumstances, OLC's legal advice itself is not the working law of any agency (though an agency could subsequently remove the protection of the deliberative process privilege by adopting both the conclusions and the reasoning of OLC's legal advice as the agency's own official policy, *see supra* note 2).

Again, the D.C. Circuit expressly rejected the plaintiff's "working law" argument in the *EFF* decision, as this Court has previously noted. *See* MTD Op. at 30-32; *see also EFF*, 739

F.3d at 9-10 ("OLC does not speak with authority on the FBI's policy; therefore, the OLC Opinion could not be the 'working law' of the FBI unless the FBI 'adopted' what OLC offered."); *New York Times Co. v. Dep't of Justice*, 806 F.3d at 687 ("[T]hese OLC documents are not 'working law.' At most, they provide, in their specific contexts, legal advice as to what a department or agency is *permitted* to do, but OLC did not have the authority to establish the 'working law' of the agency, and its advice is not the law of an agency unless the agency adopts it." (internal modifications and citations omitted)); *CREW v. Office of Admin.*, 249 F.R.D. at 6-8 (rejecting the "secret law" argument).

Thus, as confirmed by *EFF* and numerous other cases, the proper way to view OLC's advice is not as the "working law" of OLC or any particular agency, but rather as confidential legal advice that is just one of the pre-decisional inputs an agency may receive when fashioning its policies. *See* MTD Op. at 35 ("OLC's opinions *always* advise on legal questions, even if the agency that receives an OLC opinion will use it to inform a policy decision."); *see also EFF*, 739 F.3d at 8 ("The authorities that control the disposition of this case are the decisions holding that the deliberative process privilege *does* cover legal memoranda that concern the *advisability* of a particular policy, but do not authoritatively state or determine the agency's policy."); *Elec. Privacy Info. Ctr.*, 584 F. Supp. 2d at 75 ("The D.C. Circuit has long recognized that legal advice is an integral part of the decision-making process and is protected by the deliberative process privilege." (citing *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), and *Coastal States Gas Corp.*, 617 F.2d at 868)); *Murphy v. Dep't of Army*, 613 F.2d 1151, 1154 (D.C. Cir. 1979) (holding that the provision of legal advice to a person with "decision-making power" is "a classic case of the deliberative process at work"). Just as in *Brinton*, *Coastal States*, and *Murphy*, the legal advice provided by OLC aids the recipient agencies in their decisionmaking

processes, and thus the advice is protected as privileged.

II. THE PARTICULAR CATEGORIES OF OLC OPINIONS IDENTIFIED IN THE AMENDED COMPLAINT ARE EQUALLY PRIVILEGED AND NEED NOT BE AFFIRMATIVELY DISCLOSED

As the above discussion demonstrates, OLC advice documents are generally privileged and not subject to § 552(a)(2). In order to survive this motion to dismiss, therefore, CFA must identify features of the five particular categories of opinions discussed in its Amended Complaint that bring those opinions outside the general principles discussed above. *See* MTD Op. at 33 ("[I]n order to state a claim that OLC is violating the FOIA, CfA's complaint needs to identify an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed[.]"). Moreover, CFA also must allege that OLC has not made such opinions publicly available. *See id.* at 28-29, 37.

Here, CFA has not demonstrated these elements with respect to the five categories discussed in its Amended Complaint. As OLC's Response Letter explained at length, nothing about each category brings those OLC advice documents outside the general principles discussed above. Thus, CFA's Amended Complaint still fails to "to identify an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed[.]" MTD Op. at 33.

A. Opinions Resolving Interagency Disputes

CFA first alleges that opinions resolving interagency disputes must be affirmatively disclosed, noting that "Executive Order 12,146 directs executive agencies to submit legal disputes to the OLC for resolution." Am. Compl. ¶ 35. CFA also alleges that "[f]ormal written opinions resolving interagency disputes constitute at least 25% of opinions rendered to outside agencies." *Id.* CFA alleges that these opinions must be disclosed under both § 552(a)(2)(A) and (B). *See id.* ¶ 38.

1. As an initial matter, CFA's Amended Complaint fails to heed this Court's prior instructions. *See* MTD Op. at 37 n.13 ("In particular, if CfA chooses to allege that OLC's withholding of its opinions that resolve inter-agency disputes constitutes a violation of section 552(a)(2)(A), CfA should address whether those are opinions issued 'in the adjudication of cases,' as that phrase is used in the FOIA." (modifications omitted)). CFA's Amended Complaint makes no effort to explain how, in light of the legal authorities discussed above, *see supra* Part I.A-B, such opinions could be considered "issued in the adjudication of cases" given the lack of any private rights at issue in the resolution of the disputes between agencies.

2. Even setting aside that immediate defect, CFA does not identify any concrete features of these OLC advice documents that would make them *the recipient agencies'* law or policy. CFA asserts that these particular legal questions—*i.e.*, ones that two Executive Branch agencies disagree over—are required to be submitted to OLC for resolution pursuant to an Executive Order. *See* Exec. Order. No. 12,146, 44 Fed. Reg. 42,657, § 1-402 (July 18, 1979). But CFA provides no reason why the submission of those legal questions to OLC pursuant to an Executive Order would nullify any of the principles discussed above. The legal advice issued in this context is functionally the same as other forms of OLC legal advice:

> An opinion issued by OLC to resolve a legal disagreement between two executive branch agencies does not involve the "adjudication of [a] case[]." Rather, it concerns confidential legal advice provided to two agencies within the Executive Branch of the United States. OLC's opinion does not involve an adversarial dispute with a private party, does not determine the ultimate policy decisions facing the agencies requesting OLC's advice, and does not involve any circumstances that would waive the privileges otherwise applicable to OLC's advice.

OLC Resp. Ltr. at 4.

The only difference arising from this context is, at most, the fact that the Executive Order may formally require resolution of the issue by OLC. But that feature again just relates to

whether OLC's legal advice is "binding" on client agencies, and as this Court and the D.C. Circuit have already made clear, the "binding" nature of OLC's advice does not change its status as pre-decisional legal advice. *See* MTD Op. at 32 (discussing "[t]he *EFF* court's conclusion that an OLC opinion does not constitute an agency's 'working law' merely by virtue of being a 'controlling' and 'precedential' statement of the legal constraints on an agency's decision"); *EFF*, 739 F.3d at 9 ("EFF argues that the OLC Opinion must be 'working law' because it is controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn. That the OLC Opinion bears these indicia of a binding legal decision does not overcome the fact that OLC does not speak with authority on the FBI's policy[.]" (internal citation omitted)).

3. CFA mentions two examples of OLC opinions falling within this category that CFA presumably believes were required to be disclosed. *See* Am. Compl. ¶¶ 36-37. But those opinions actually confirm that the general principles governing disclosure of OLC advice likewise apply to OLC opinions resolving disputes between Executive Branch agencies.

First, CFA mentions *Payment of Back Wages to Alien Physicians Hired Under H-IB Visa Program*, 32 Op. O.L.C. 47 (Feb. 11, 2008) (ECF No. 22-8); *see* Am. Compl. ¶ 37. That opinion concluded that there was no waiver of sovereign immunity allowing the Department of Labor to order the Department of Veterans Affairs to pay back-wages under the H-1B visa program. But the issuance of that opinion itself did not determine any private individuals' rights. To the contrary, and as OLC's Response Letter noted, that opinion expressly did not determine the ultimate outcome of the underlying situation:

> [T]he opinion specifically noted that the Department of Veterans Affairs could still voluntarily provide back wages to its former employees, and that the Department of Labor, even if it lacked one form of authority, might have other tools available to ensure that the Department of Veterans Affairs complied with

> the statute in the future. *See* 32 Op. O.L.C. at 54-55. Thus, it remained up to the agencies to determine their ultimate policy positions, consistent with the legal framework articulated by OLC.

OLC Resp. Ltr. at 4.

Second, CFA's Amended Complaint also mentions *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*, 38 Op. O.L.C. __, slip op. (Aug. 13, 2014) (ECF No. 22-7); *see* Am. Compl. ¶ 36. But again, that opinion only addressed the EEOC's jurisdiction to order the Social Security Administration to provide monetary relief for breach of a Title VII settlement agreement. The opinion did not itself "purport to resolve a dispute with a private party, nor did it determine the EEOC's policy" because the opinion in fact "left open the possibility that the EEOC might be able to provide a remedy through alternate means." OLC Resp. Ltr. at 5 (citing slip op. at 14 & n.9).

Both opinions, therefore, did not adjudicate or determine any private parties' rights or obligations. Instead, the OLC opinions resolved a particular legal question, and left it up to the policymaking agencies to determine their ultimate positions on how to address the underlying situations in light of that legal framework. *See* OLC Resp. Ltr. at 3 ("OLC opinions provide legal advice regarding the overall legal framework within which policymakers act as a predecisional part of government deliberative processes, but the opinions do not compel the ultimate policy decision reached or adopted by any agency."). Accordingly, nothing about this category of opinions removes them from the general rule that OLC opinions are privileged and not subject to affirmative disclosure under § 552(a)(2).

B. Opinions Issued to Independent Agencies

CFA's second category is opinions issued to independent agencies. CFA alleges that, in that scenario, "OLC requires independent agencies to adopt the conclusions of the OLC in

advance of receiving any formal written opinion." Am. Compl. ¶ 39.

1. Again, CFA ignores this Court's prior instructions. *See* MTD Op. at 37 n.13 ("[I]f CfA chooses to allege that OLC's withholding of its opinions issued to independent agencies constitutes a violation of section 552(a)(2)(B), CfA should address whether the up-front commitment that OLC demands from the recipient agency amounts to anything more than a promise to treat OLC's opinion just as it would be treated by a non-independent executive agency."). CFA makes no effort to address this issue, which should independently foreclose this claim.

In any event, as OLC's response makes clear, an independent agency's "upfront commitment is indeed nothing more than an agreement by the independent agency to treat OLC's advice as 'binding' in the same way a non-independent executive agency would[.]" OLC Resp. Ltr. at 5. And because "that feature of OLC's advice does not render it subject to section 552(a)(2)" with respect to non-independent agencies, *id.*, the same should be true for independent agencies: the purportedly "binding" nature of OLC's advice on independent agencies does not bring that advice outside the general principles discussed above.

2. CFA alleged that an opinion purportedly falling within this category was non-public. *See* Am. Compl. ¶ 40 & n.38. That particular opinion was part of OLC's discretionary release to CFA, and as that opinion makes clear, it does not even fall within the category as defined by CFA. *See* ECF No. 27-2 at 3 n.1 ("In fact, the Commissioner of Social Security is removable only for cause and the Social Security Administration ('SSA') has not formally agreed to be bound by our views.").[4] Thus, CFA has not even plausibly alleged that there are opinions in this

[4] Notwithstanding SSA's lack of agreement, OLC nonetheless decided the issue because the other agency—the Federal Labor Relations Authority (FLRA)—had "given some indication that SSA should ask for our opinion," and also because the particular legal question at issue involved interpretation of a criminal statute and therefore

category that govern the agency's policies but that OLC has not disclosed.

C. Opinions Interpreting Non-Discretionary Legal Obligations

CFA's third category is when "OLC issues binding interpretations of statutes and other authorities that impose non-discretionary legal obligations on federal agencies." Am. Compl. ¶ 41. In CFA's view, "[t]hese opinions have the effect of directly determining an agency's policies and practices, because the agency is under a nondiscretionary obligation to comply with the authority at issue, and because the OLC's interpretation of that authority is binding on the agency." *Id.*

1. To the extent CFA claims OLC's advice must be disclosed because it is "binding on the agency," Am. Compl. ¶ 41, as discussed above that theory is foreclosed by both *EFF* and this Court's opinion on the motion to dismiss. The purportedly "binding" nature of an OLC opinion does not require its affirmative disclosure. *See, e.g.*, MTD Op. at 30-34; *EFF*, 739 F.3d at 9-10.

As OLC's response noted, moreover, even when an OLC opinion resolves the meaning of a particular statute—even a statute that imposes a legal obligation on the agency—that opinion does not itself constitute the agency's policy, or adjudicate the rights of any private individuals. *See* OLC Resp. Ltr. at 5. The mere issuance of an OLC opinion does not itself entitle a private individual to anything, particularly given OLC's lack of policymaking authority.

2. CFA relies on two published OLC opinions to support its claim, but those examples again demonstrate why this category of opinions need not be affirmatively disclosed.

First, CFA relies on OLC's published opinion *Whether the Defense of Marriage Act*

OLC's opinion would still be meaningful. *See* ECF No. 27-2 at 3 n.1. Of course, the OLC opinion still did not determine any agency's actual policy, as the subsequent opinion relied upon by CFA makes clear. *Cf. Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives*, 29 Op. O.L.C. 179, 187 (Nov. 23, 2005) ("Whether any specific activity amounts to "grass roots" lobbying within the prohibition of section 1913 depends, of course, on the facts of the case, and we cannot determine such issues in the abstract.") (ECF No. 22-11 at 10).

Precludes the Nonbiological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act, 31 Op. O.L.C. 243 (Oct. 16, 2007); *see* Am. Compl. ¶ 42. CFA asserts that "[t]he 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." Am. Compl. ¶ 42.

That allegation is contradicted, however, by the underlying OLC opinion. The OLC opinion simply determined that "[t]he Defense of Marriage Act would not prevent the non-biological child of a partner in a Vermont civil union from receiving child's insurance benefits under the Social Security Act." 31 Op. O.L.C. at 243. The OLC opinion did not itself entitle the child to any particular benefits—nor could it, given OLC's lack of policymaking authority. *See* OLC Resp. Ltr. at 5. After OLC's opinion, "[t]he Social Security Administration was still free to make its own policy decision concerning the child's overall eligibility, provided that the decision did not conflict with OLC's advice." *Id.*

Second, CFA relies on the published opinion of *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*, 36 Op. O.L.C. __, slip op. (Nov. 1, 2011) (ECF No. 22-12). *See* Am. Compl. ¶ 43. That opinion concluded that "OPM may not address the Postal Service's failure to make statutorily required contributions by denying its employees accrued service credit under FERS during their periods of qualifying federal employment." Slip op. at 2. But again, providing advice indicating that one potential policy option was unavailable "did not determine the Office of Personnel Management's ultimate policy regarding how to address the situation." OLC Resp. Ltr. at 6 (citing slip op. at 16 ("We do not

address the propriety of any other action OPM might take to address the Postal Service's failure to make the required contributions to the Fund.")). As the OLC opinion demonstrates, therefore, "[e]ven when an OLC advice document sets the parameters within which policymakers must operate, that does not equate to determining the agency's ultimate policy decision." OLC Resp. Ltr. at 6.

In that respect, this opinion underscores an important point: Executive Branch policymakers do not seek to obtain legal advice for its own sake. Instead, legal advice is sought in connection with an ongoing *policy* decisionmaking process about how to address a particular situation. *Cf. EFF*, 739 F.3d at 8 (discussing the line of "decisions holding that the deliberative process privilege *does* cover legal memoranda that concern the *advisability* of a particular policy, but do not authoritatively state or determine the agency's policy"); MTD Op. at 35. Even when the necessary result of an OLC opinion is to foreclose a particular action or actions, that does not eliminate the need for the agency still to make a policy decision—*i.e.*, to decide how to address the underlying situation. *See* OLC Resp. Ltr. at 3 ("OLC opinions provide legal advice regarding the overall legal framework within which policymakers act as a predecisional part of government deliberative processes, but the opinions do not compel the ultimate policy decision reached or adopted by any agency."). Thus, when OLC informed OPM that a certain policy option was unavailable, OPM still had ultimate responsibility for making a policy decision about how to address the underlying situation. *See* slip op. at 16 ("We do not address the propriety of any other action OPM might take to address the Postal Service's failure to make the required contributions to the Fund."). The OLC opinion, although concluding that one policy option was unavailable, did not establish "the law or policy of the agency to which the opinion is addressed" regarding the actual problem confronting the client agency. MTD Op. at 33.

To be sure, if acting consistently with the legal advice contained within an OLC opinion has the effect of foreclosing or requiring a particular contemplated agency action, that may make it more likely that the policymaking agency will defend its actions by expressly adopting the OLC's conclusion and reasoning as its own. *See supra* note 2. But in that scenario, "any obligation to publish the document would fall on the adopting agency." OLC Resp. Ltr. at 5; *see also id.* at 6 ("[I]f any of the recipient agencies chose to adopt OLC's conclusion and reasoning as their own, that could alter the relevant privileges' applicability to the advice document."). At least as a general matter and in the first instance, however, "OLC advice documents remain privileged and not subject to disclosure under section 552(a)(2) even when they limit an agency's potential range of policy options." *Id.* at 6.

3. OLC has now disclosed (with limited redactions) the particular opinion that CFA alleged fell within this category but was not already public. *See* Am. Compl. ¶ 44 n.41; *see Payment of Attorney's Fees* (ECF No. 27-2 at 1-2). As that document makes clear, however, it is not a formal OLC opinion and does not "interpret a federal agency's non-discretionary legal obligation." Am. Compl. ¶ 44; *see Payment of Attorney's Fees*, ECF No. 27-2 at 1 (OLC memorandum not deciding anything, and instead requesting the Justice Management Division's "assistance in determining which Department funds should be used to satisfy this award"). Thus, CFA has not plausibly alleged any such opinions in this category are being withheld.[5]

D. Opinions Finding that Particular Statutes are Unconstitutional and that Agencies Therefore Need Not Comply with Them

CFA next alleges that OLC must affirmatively disclose "opinions determin[ing] that a

[5] The limited redactions on the memorandum based on the attorney work-product privilege, *see* OLC Resp. Ltr. at 7, also demonstrate why, even if this lawsuit were to proceed, CFA's requested relief is overbroad—*i.e.*, because it would effectively compel OLC to waive other privileges applicable to its advice documents. *See* Am. Compl., Prayer for Relief ¶ 2 (requesting an order requiring "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").

congressional enactment is unconstitutional and that federal agencies may therefore decline to give the statute effect." Am. Compl. ¶ 45.

1. As an initial matter, CFA provides no reason why OLC opinions discussing constitutional matters should be treated differently than OLC opinions resolving statutory questions. Although there may be practical reasons why OLC is particularly inclined to voluntarily make opinions in this category public, *see* Best Practices Memo at 5, CFA provides no reason why such opinions, as a legal matter, should be treated differently under §§ 552(a)(2)(A) or (B). *See* OLC Resp. Ltr. at 6 ("To the extent that OLC advises that the Constitution, rather than a statute, provides the operative legal principle, OLC is not providing any different kind of legal advice than when it seeks to reconcile a statute with the Constitution, or whether when it provides advice concerning a conflict between two particular statutes.").

2. This category of opinions also does not constitute a "set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed[.]" MTD Op. at 33. Even when OLC "opines that a particular statute conflicts with a particular constitutional provision, that advice does not dictate how the agency governed by the statute should address the situation; the agency might voluntarily comply with the statute, decline to comply with it on different grounds, or pursue a strategy of seeking repeal of the statute." OLC Resp. Ltr. at 6. Thus, regardless of "the legal advice . . . provided by OLC," the "ultimate policy decision remains the province of the client agency." *Id.*; *cf.* Am. Compl. ¶ 45 (describing the opinions as "determin[ing] that a congressional enactment is unconstitutional and that federal agencies *may* therefore decline to give the statute effect" (emphasis added)).

As an example of an opinion in this category, CFA relies on OLC's published opinion, *Constitutionality of the Direct Reporting Requirement in Section 802(e)(l) of the Implementing*

Recommendations of the 9/11 Commission Act of 2007, 32 Op. O.L.C. 27 (Jan. 29, 2008) (ECF No. 22-14). *See* Am. Compl. ¶ 45. In that opinion, OLC concluded that statutory reporting requirements "must yield to the extent their application would interfere with the President's constitutional authority to comment upon or amend, through his subordinates at DHS or OMB, a . . . report before the report is transmitted to Congress." 32 Op. O.L.C. at 28. A footnote attached to that conclusion makes clear, however, that the recipient agency—the Department of Homeland Security—still retained ultimate responsibility for the final policy decision. *See id.* at 28 n.2 ("*If DHS establishes a policy* of declining to enforce [the reporting requirement] on the constitutional grounds set forth in this opinion, DHS should report that decision to Congress as required by statute." (emphasis added)). Thus, that example "belies the assertion that opinions of this type must be disclosed under FOIA." OLC Resp. Ltr. at 6.

3. As for the opinion that CFA alleges has been withheld, *see* Am. Compl. ¶ 46 n.43, CFA does not plausibly allege that this opinion even falls within the identified category. The opinion is titled "Legal Authority to Withhold Information from Congress," and the publicly available discussion of that opinion quotes it as establishing 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.'" 32 Op. O.L.C. at 45 (modifications in original). Acknowledgment of that general legal principle does not plausibly establish that the underlying opinion "determine[d] that a congressional enactment is unconstitutional and that federal agencies may therefore decline to give the statute effect." Am. Compl. ¶ 45. Thus, CFA has not plausibly alleged that "that the agency has failed to make publicly available" any opinions in this category. MTD Op. at 29.

E. Opinions Adjudicating or Determining Private Rights

Finally, CFA alleges that "[s]ome OLC opinions directly or indirectly determine private rights," and "define, at least in the first instance, the rights and liabilities of private individuals vis-à-vis the government." Am. Compl. ¶ 47. As examples, CFA relies on "[m]any of the opinions discussed above," such as "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." *Id.* ¶ 48.

As discussed above, the fundamental premise of this argument is wrong: "OLC does not purport—nor does it have authority—to adjudicate or determine any private rights." OLC Resp. Ltr. at 6; *see also supra* Part I. There are clearly policymaking agencies that, after receiving OLC's advice, make decisions that adjudicate or determine private individuals' rights. *See* OLC Resp. Ltr. at 6 ("Client agencies may rely upon OLC advice to assist *their* determinations about private rights."). But OLC "does not have any authority itself to make a decision determining private rights, and the client agencies bear responsibility for their decisions." *Id.*

The examples identified by CFA demonstrate the point. The mere issuance of an OLC opinion does not, by itself, determine or adjudicate anyone's rights. The child of a same-sex couple is not entitled to social-security benefits until the Social Security Administration takes some act adjudicating or determining that entitlement. The Social Security Administration's action may be informed by OLC's legal advice, but that does not itself mean that OLC has determined the agency's policy. *See supra* Part II.C; MTD Op. at 34 (noting that *EFF* "specifically held that an OLC opinion does *not* necessarily reflect the adopted policy of the agency that requests it"). Similarly, OLC's issuance of an opinion to OPM does not itself

determine anyone's "entitlement to service credit under a federal retirement and disability plan[.]" Am. Compl. ¶ 48. That determination is not made until OPM actually decides or adjudicates someone's rights. OPM's decision may be informed by OLC's analysis, but ultimately OPM "bear[s] responsibility for" its decision. OLC Resp. Ltr. at 6. Thus, OLC does not adjudicate or determine private rights because it lacks authority to do so.

* * * *

In short, none of the five claimed categories of OLC opinions must be affirmatively disclosed pursuant to § 552(a)(2). OLC opinions are generally privileged and outside the scope of § 552(a)(2), *see supra* Part I, and nothing about the five identified categories brings those particular opinions outside the general rule. CFA's Amended Complaint thus fails "to identify an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of the agency to which the opinion is addressed[.]" MTD Op. at 33.

III. ACCEPTING CFA'S THEORY WOULD UNDERMINE IMPORTANT VALUES AND RAISE SIGNIFICANT CONSTITUTIONAL CONCERNS

CFA's Amended Complaint, while narrower than its initial Complaint, still presents a claim that, if accepted, would undermine important values within the Government and raise significant constitutional concerns. Indeed, CFA's claim still seeks to compel disclosure of a significant amount of confidential legal advice—five particular categories of documents, one of which CFA asserts "constitute[s] at least 25% of opinions rendered to outside agencies." Am. Compl. ¶ 35. The compelled disclosure of such a significant amount of confidential, pre-decisional legal advice would undermine important rule-of-law values within the Executive Branch, and would also raise constitutional concerns.

A. CFA's Claim Would Undermine Rule-of-Law Interests

As CFA acknowledges, OLC's advice-giving function is longstanding and serves

important values. *See* Am. Compl. ¶¶ 16-32; Best Practices Memo at 1-4. The consolidation of the Executive's advice-giving function within a single office in the Department of Justice serves important rule-of-law values, including by allowing the office to create certain norms governing the provision of legal advice. *See, e.g.*, Best Practices Memo at 1 ("OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in all of their work[.]").

Prior Attorneys General and former OLC officials have recognized that the Department of Justice's advice-giving function—with that advice generally being treated as authoritative throughout the Executive Branch—is necessary for the government's orderly administration:

> Although the [Judiciary Act of 1789], requiring this [advice-giving] duty of the Attorney General, does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.

Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 334 (1854); *see also Opinions of Attorneys General and Decisions of Auditors*, 5 Op. Att'y Gen. 97, 97 (1849); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1309-11 (2000).

Here, accepting CFA's claim would compel disclosure of a significant amount of OLC's confidential legal advice. As OLC has previously explained, however, such compelled disclosure would undermine the privileges that are necessary to preserve the Office's proper functioning within the Executive Branch. *See* OLC Resp. Ltr. at 3 ("In order to ensure the candor of internal deliberations, so that executive branch officials may continue to request and

rely on legal advice from OLC about such sensitive matters, it is essential that those giving and receiving legal advice not be inhibited by concerns about public disclosure."); *id.* ("Protecting [the attorney-client] relationship of trust is especially important in the governmental context, where a free and candid flow of information between agency decision-makers and their outside legal advisers promotes broad public interests in the rule of law and the administration of justice."); *see also* Best Practices Memo at 5-6.

CFA attempts to portray OLC's advice-giving function as unique, because its "formal written opinions continue to establish the binding law of the executive branch." Am. Compl. ¶ 20. But that feature of OLC's advice does not undermine its privileged nature. For one thing, the *EFF* decision expressly rejected the argument that the "precedential" nature of OLC's legal advice made it any less privileged. *See* 739 F.3d at 9; *see* MTD Op. at 30-35. Indeed, many agencies receive similarly controlling or precedential legal advice from their in-house general counsels or chief counsels. *See* OLC Resp. Ltr. at 3 ("[T]he authoritative nature of OLC's legal advice is not unique. In our experience, many agencies treat legal advice from their Offices of General Counsel as 'binding,' at least as a matter of custom and practice.").[6] And those agencies' general counsels likewise provide legal advice in the types of categories described by CFA—*e.g.*, interpreting non-discretionary legal obligations, opining on the constitutionality of statutes, and in connection with agencies' determinations of private rights. Thus, the controlling nature of OLC's legal advice, even in the scenarios described by CFA, is not unique within Executive Branch attorney-client relationships. Accepting CFA's claim would thus threaten to undermine

[6] In many cases, individual agencies' general counsels or chief counsels will provide controlling legal advice, in the sense that their legal opinions are customarily followed within the agency. In some cases, moreover, the general counsels' or chief counsels' legal advice may even be formally controlling. *See, e.g.*, 49 C.F.R. § 1.26 (Department of Transportation regulation stating that "[t]he General Counsel is the chief legal officer of the Department, legal advisor to the Secretary, and final authority within the Department on questions of law").

the Executive Branch's ability to receive confidential legal advice from *any* of its lawyers.

Accordingly, § 552(a)(2) and the relevant privileges should not be construed to require broad swaths of OLC advice documents to be disclosed. The fact that OLC provides authoritative legal advice for the Executive Branch—or that OLC may approach its advice-giving function in a somewhat different way than private lawyers would—does not prevent OLC from invoking the relevant privileges. That is particularly true with respect to the deliberative process privilege, which is a uniquely governmental privilege.

Congress has intended, since 1789, that the Attorney General (and, by extension, OLC) provide objective, authoritative legal advice to the rest of the Executive Branch. *See* Moss, *Executive Branch Legal Interpretation*, 52 Admin. L. Rev. at 1306-16. Construing FOIA as CFA proposes—to require the automatic disclosure of entire categories of OLC opinions—would undermine this long-settled and important role for OLC and the Department of Justice in our nation's government, and, by undermining the confidentiality of Executive Branch legal advice, threaten the rule of law.

B. CFA's Claim Also Implicates Significant Constitutional Concerns

OLC's advice-giving function plays a critical role in assisting the President in "fulfill[ing] his or her constitutional duties to preserve, protect, and defend the Constitution, and to 'take Care that the Laws be faithfully executed.'" Best Practices Memo at 1 (quoting U.S. Const. art. II, § 3). CFA's claim and its accompanying prayer for relief—seeking a judicial order compelling the public disclosure of, at a minimum, five types of OLC opinions—would significantly interfere with the President's constitutional duties under Article II.

Courts and government officials have consistently recognized that, for a President to effectively execute his duties under Article II, he must be able to obtain confidential and candid legal advice. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (discussing the

President's need for confidentiality "in the exercise of Art. II powers," noting that "the importance of this confidentiality is too plain to require further discussion"); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. Without it, the President's performance of any of his duties—textually explicit or implicit in Article II's grant of executive power—would be made more difficult."); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 50-51 (D.D.C. 2002) ("[T]he Supreme Court has repeatedly recognized that the importance to the Presidency of receiving candid, honest, and when necessary, unpopular, advice from high Government officials and those who advise and assist them in the performance of their manifold duties is paramount."); Letter from Michael B. Mukasey, Att'y Gen., to Harry Reid, Sen. Maj. Leader, *Re: The OLC Reporting Act of 2008* (Nov. 14, 2008) at 3-4 (discussing how "[a]dministrations of both political parties have long recognized the importance of protecting the Executive branch's confidential legal advice" and citing examples).[7]

Here, CFA's Amended Complaint describes this lawsuit as "concern[ing] only a single type" of OLC advice documents: "formal written opinions issued to executive branch agencies or to executive branch officials other than the president." Am. Compl. ¶ 33. Excluding only the President does not resolve the significant constitutional concerns, however, given that OLC also provides legal advice to the President's closest advisors and CFA's claim would nonetheless compel disclosure of those opinions. *See, e.g.*, ECF No. 22-15 (memorandum for the Counsel to the President); *Elec. Privacy Info. Ctr.*, 584 F. Supp. 2d at 80-81 (upholding assertion of presidential communications privilege with respect to OLC memorandum addressed to the

[7] This letter is available online at http://www.justice.gov/archive/ola/views-letters/110-2/11-14-08-ag-ltr-re-s3501-olc-reporting-act.pdf, and also on Westlaw at 2008 WL 5533799.

Counsel to the President).

Moreover, CFA's claim here would threaten the President's exercise of his Article II responsibilities not only by preventing the President's closest advisors from receiving such advice, but also by preventing the President from ensuring that agencies faithfully execute the laws by receiving confidential legal advice directly. For example, the President's Article II responsibilities include the discretion to encourage (and sometimes direct) agencies to submit disputed legal questions to the Department of Justice for resolution. CFA's claim, however, would require that all such legal advice be affirmatively disclosed. *See supra* Part II.A.

Construing FOIA to permit CFA to obtain its requested relief would therefore raise significant constitutional concerns, and in similar circumstances, the Supreme Court has construed statutes in a manner that avoided such constitutional problems. *See Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 465-68 (1989) (construing Federal Advisory Committee Act (FACA) so as to avoid encroaching on President's Article II authority) (citing, *inter alia*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also id.* at 488-89 (Kennedy, J., concurring) (concluding that FACA was unconstitutional as applied, because "[t]he mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act"). These significant constitutional concerns, by themselves, caution against CFA's extremely broad reading of the FOIA statute.

IV. THE INDEXING CLAIM SHOULD BE DISMISSED

As this Court previously recognized, CFA's second claim regarding indexing is entirely derivative of its first claim—*i.e.*, if CFA has not plausibly alleged a violation of FOIA's reading-room requirements in Count One, then by definition CFA has also failed to plausibly allege a viable indexing claim in Count Two:

> [T]he Court agrees with the government that [the indexing] claim is "entirely derivative" of CfA's primary FOIA claim. That is, just as CfA's complaint fails to identify records that OLC was plausibly required to (but did not) make available to the public, so too has CfA failed to identify records that OLC was plausibly required to (but did not) index.

MTD Op. at 29-30 n.11 (citations omitted). Accordingly, because CFA has not plausibly alleged a claim in Count One, CFA's Count Two must also be dismissed. Thus, both claims in CFA's Amended Complaint are properly subject to dismissal.

CONCLUSION

For the foregoing reasons, CFA's Amended Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

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Respectfully Submitted,

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