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)

PLAINTIFF'S OPPOSITION TO THE GOVERNMENT'S RENEWED MOTION TO DISMISS

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Introduction

This lawsuit challenges the practice of the Office of Legal Counsel ("OLC") of treating its formal written opinions as categorically exempt from reading-room provision of the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(a)(2)(A)–(B). Campaign for Accountability ("CfA") sought a subset of these opinions because of their uniquely authoritative role in determining the law of the executive branch. The OLC's formal written opinions authoritatively construe the powers and obligations of federal agencies, and they often determine the government's interpretation of the scope of individual rights. As one former OLC lawyer has said, the OLC's formal written opinions "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court." Am. Compl. ¶ 27. They are precisely the sort of opinions Congress intended through FOIA's reading-room provision to force into the light of day.

On October 6, 2017, this Court held that the D.C. Circuit's decision in *Electronic Frontier Foundation v. Department of Justice* (*EFF*), 739 F.3d 1 (D.C. Cir. 2014), foreclosed CfA's claim that the OLC's formal written opinions are, as a general matter, subject to FOIA's reading-room provision. It granted CfA leave to amend, however, to identify subcategories of those opinions that constitute working law even under the Court's interpretation of *EFF*. CfA has done so, identifying four subcategories of the OLC's formal written opinions that constitute working law because they determine policy.[1] For instance, CfA has pointed to a subcategory of the OLC's formal written opinions that interpret agencies' non-discretionary legal obligations. Because those opinions authoritatively construe affirmative obligations that an agency has no

[1] The Amended Complaint identified five such subcategories, but, as explained below, this brief concerns only four of them. *See supra* note 11.

discretion to ignore, the OLC's interpretations have the effect of determining agency policy and conduct.

Before addressing those categories, this brief discusses the general principles of the working-law doctrine that has emerged to give effect to FOIA's reading-room provision. *See* 5 U.S.C. § 552(a)(2). In doing so, it provides the legal and factual background necessary to understand CfA's claims with respect to the four subcategories of the OLC's formal written opinions at issue. It also, respectfully, urges this Court to reconsider its prior holding. As explained below, this Court's prior opinion erred by failing to adequately consider two critical points. First, *EFF* is factually distinct because, among other things, it was *retrospective*—that is, it concerned only past conduct and was not intended to lay a legal foundation for future conduct. That is an essential characteristic of working law that was missing in *EFF* but is generally present in the OLC's formal written opinions. Second, interpreting *EFF* as the Court did creates a conflict with the D.C. Circuit's prior panel precedent. The D.C. Circuit has repeatedly held that legal interpretations may constitute working law even if they do not dictate specific policy determinations. What matters is that the legal interpretations are treated as final—and there is no question that the OLC's formal written opinions are treated as final within the executive branch as a whole, including the agencies that request them.

Finally, CfA explains below that requiring the OLC to proactively disclose its formal written opinions would serve important constitutional values. Democracy requires that the public have access to the laws. There is surely room for confidential agency decisionmaking, but the government has no legitimate interest in concealing final legal interpretations that control agency conduct and that articulate the government's view of the scope of individual rights. The public's

interest in the OLC opinions that have this character is substantial and indistinguishable from its interest in the federal courts' precedential interpretations of the law.

CfA respectfully submits that the Court should deny the government's motion to dismiss.

Procedural Background

On March 22, 2016, CfA sent a letter to the OLC requesting that it comply with its obligation 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. On May 26, 2016, the OLC responded by explaining its longstanding legal view that the opinions it issues are generally exempt from disclosure under FOIA and that they constitute neither "final opinions" nor "statements of policy and interpretations" within the meaning of FOIA's reading-room provision. *Id.* Ex. B at 1. The OLC stated that it nonetheless makes "individualized, case-by-case determination[s]" of whether to publish its opinions pursuant to criteria it has developed and set out in a memorandum that then-head of the OLC David Barron issued in 2010. *See id.*; *id.* Ex. C (Memorandum for Att'ys 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* 5–6 (July 16, 2010)).

On June 8, 2016, CfA filed this suit to enforce its request, arguing that the OLC had violated FOIA's reading-room provision by failing to proactively publish its formal written opinions and an index thereof. Am. Compl. ¶ 53. The government moved to dismiss the complaint, defending the OLC's view that its formal written opinions are generally exempt from FOIA, and on October 6, 2017, this Court issued a memorandum opinion granting that motion without prejudice. *See* Mem. Op. The Court interpreted the D.C. Circuit's decision in *EFF* as

foreclosing application of FOIA's reading-room provision to the OLC's formal written opinions based solely on their controlling and precedential nature. *See id.* at 35–36. The Court permitted CfA to amend its complaint, however, to identify specific subcategories of the OLC's opinions that constitute working law notwithstanding the Court's interpretation of *EFF*. *See id.* at 37–38.

On October 27, 2017, CfA filed its Amended Complaint. The Amended Complaint seeks proactive disclosure of a subset of the OLC's formal written opinions—namely, those issued to executive branch agencies or to executive branch officials other than the president—as well an index of those opinions. *See* Am. Compl. ¶¶ 1, 33–49. It also identifies four subcategories of those formal written opinions that constitute working law even under the Court's interpretation of *EFF*: (1) opinions resolving interagency disputes, *id.* ¶¶ 35–38; (2) opinions interpreting non-discretionary legal obligations, *id.* ¶¶ 41–44; (3) opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them, *id.* ¶¶ 45–46; and (4) opinions adjudicating or determining individual rights, *id.* ¶¶ 47–49. As relief, CfA's Amended Complaint requests a declaration that the OLC has failed to comply with its obligations under FOIA's reading-room provision and an injunction requiring the agency to disclose the past and future formal written opinions the complaint describes, as well as an index of those opinions. *Id.* at 23–24.

On this Court's direction, the OLC responded by letter to CfA's Amended Complaint, again arguing that the OLC's formal written opinions are generally exempt from FOIA and, in any event, do not fall within FOIA's reading-room provision. *See* Letter from Curtis E. Gannon, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Messrs. Abdo and Jaffer 1–3, *Re: Campaign for Accountability v. U.S. Dep't of Justice* (Jan. 2, 2018), ECF No. 27-1 [hereinafter "OLC Resp. Ltr."]. The OLC also argued that it need not proactively disclose the

subcategories of the OLC's formal written opinion identified in CfA's Amended Complaint. *Id.* at 4–7. On February 13, 2018, the government filed a renewed motion to dismiss.

Statutory and Factual Background

I. The Freedom of Information Act.

Section 552(a)(2) of Title 5 of the U.S. Code 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, including:

> (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). In addition, § 552(a)(2)(E) requires that agencies publish "current indexes" of, among other things, records encompassed by FOIA's reading-room provision.

FOIA contains nine exemptions to its disclosure mandates. Because "[t]he statute's goal is 'broad disclosure,'" however, the Supreme Court has repeatedly emphasized that its "exemptions must be 'given a narrow compass.'" *Milner v. Dep't of Navy*, 562 U.S. 562, 563 (2011) (quoting *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) ("[D]isclosure, not secrecy, is the dominant objective of the Act. Accordingly, these exemptions must be narrowly construed." (internal citations and quotation marks omitted)). Relevant here is Exemption 5, which exempts "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." 5 U.S.C. § 552(b)(5). Courts have interpreted this exemption to encompass two evidentiary privileges on which the government relies here: the deliberative-process and attorney–client privileges. *See, e.g.*, *Tax Analysts v. IRS* (*Tax Analysts*

II), 294 F.3d 71, 76 (D.C. Cir. 2002). As explained in greater detail below, the Supreme Court and the D.C. Circuit have interpreted Exemption 5 and FOIA's reading-room provision together, generally holding that records subject to the reading-room provision may not be withheld under Exemption 5. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

II. The Office of Legal Counsel.

The OLC is a component of the Department of Justice charged with providing federal officials with various types of legal opinions and advice. *See* Am. Compl. ¶¶ 16–33. Among other types of guidance, the OLC issues informal opinions and advice, advice concerning litigation decisions, reviews of the form and legality of executive orders, advice for the president, and letters concerning the constitutionality of pending legislation. *Id.* ¶ 33. This lawsuit does not concern any of that advice. Rather, it concerns a category of the OLC's opinions that has for decades played a special role within the executive branch: the OLC's "formal written opinions." *Id.* ¶¶ 19–32.

Through its formal written opinions, the OLC serves as "a centralized and singular voice of executive branch legality." *Id.* ¶ 19 (quoting Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 821 (2017)). Its formal written opinions are binding on the executive branch, and because the OLC generally considers only questions not likely to end up in court, its binding opinions "may effectively be the final word on controlling law." *Id.* ¶ 21. The OLC issues formal written opinions in response to formal requests for authoritative interpretations of the law. *Id.* ¶¶ 21–25. The process it has instituted for considering those requests is adjudicative in nature. It generally will not offer, for example, "abstract legal opinions" or "general survey[s]" of the law. *Id.* ¶ 22. The OLC will accept a request for a formal written opinion only when an agency's policymaking process requires an answer to a concrete legal question. *See id.* ¶ 22 (noting that

the OLC generally "does not offer 'unnecessary advice, such as where it appears that policymakers are likely to move in a different direction'"); *id.* ¶ 25. Moreover, the OLC requires requesters to submit detailed memoranda setting forth their own views; it solicits the views of other potentially interested agencies; in the case of an interagency dispute, the OLC permits each agency to "reply" to the other; and it prints its resulting opinions on bond paper for signature and indexing within its "system of precedent." *Id.* ¶¶ 21, 23–25.

Standard of Review

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court may consider "the facts alleged in the complaint, any documents either attached or incorporated in the complaint and matters of which [it] may take judicial notice." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

Argument

I. The OLC's formal written opinions are subject to FOIA's reading-room provision.

A. The OLC's formal written opinions are working law because they establish a uniform system of precedent, bind the executive branch, and are intended to govern future agency action.

The OLC's formal written opinions are working law that must be proactively published under FOIA because those opinions establish a uniform system of legal precedent, they bind the executive branch, and they are intended to govern future agency action. Agency requests for formal written opinions of the OLC are akin to declaratory judgment actions, and the opinions that result are akin to judicial declarations—precisely the working law that FOIA requires agencies to publish. In its memorandum opinion, this Court resisted that conclusion based on a

distinction—between an agency's legal interpretations and its policy decisions—that would fundamentally reshape the working-*law* doctrine. The Court derived this distinction from several admittedly broad phrases in the D.C. Circuit's decision in *EFF*, but the Court's interpretation of *EFF* is, respectfully, wrong. Interpreting *EFF* as broadly as the Court did creates a conflict with many prior D.C. Circuit decisions, which have emphasized that binding legal interpretations meant to guide agency action and to establish a uniform system of precedent are working law, even when they do not themselves dictate policy.

1. The OLC's formal written opinions constitute the OLC's and the executive branch's working law.

Beginning with the Supreme Court's decision in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Supreme Court and the D.C. Circuit have interpreted FOIA and its reading-room provision to require agencies to disclose their working law. The working-law doctrine that has emerged requires agencies to affirmatively disclose documents that have the "force and effect of law." The test that the D.C. Circuit has established to identify documents with the "force and effect of law" is a functional one. It examines the role that a document plays within the agency and the agency's purpose in issuing it. One constant throughout the D.C. Circuit's caselaw is that legal interpretations may qualify as working law—even when they do not dictate a specific policy decision. That is, the D.C. Circuit has repeatedly held that FOIA requires the disclosure of an agency's working *law*, and not just its working *policy*. The D.C. Circuit has held, for example, that legal memoranda are working law and must be disclosed where they function as an agency's precedent, are treated as binding, are written in conclusive terms, guide agency action prospectively, and flow from those charged with interpreting the law to those charged with implementing it. The D.C. Circuit has generally held that legal memoranda are *not* working law where, instead, they are not treated as precedential or binding, are drafted in

conditional rather than conclusive terms, and flow from a subordinate interpretive authority to a superior one.

The OLC's formal written opinions exhibit all the characteristics of working law.

* * *

The Supreme Court in *Sears* interpreted FOIA's reading-room provision to require agencies to disclose their policy and law. The Court held that the NLRB's Office of General Counsel had to disclose legal memoranda explaining its decisions declining to file unfair-labor-practice complaints because those memoranda constituted "final opinions" within the meaning of 5 U.S.C. § 552(a)(2)(A). *See Sears*, 421 U.S. at 148. The Court interpreted Exemption 5 and FOIA's reading-room provision together. Exemption 5, the Court noted, "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *Id.* (internal quotation marks omitted) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967)). And FOIA's reading-room provision "represents a strong congressional aversion to 'secret (agency) law,'" *id.* at 153 (quoting Davis, *supra*, at 797), embodying "an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law,'" *id.* (quoting H.R. Rep. No. 89-1497, 1966 U.S.C.C.A.N. 2418, 2424 (1966)). *Sears* thus recognized that Congress intended FOIA's reading-room provision to require agencies to disclose documents that have "the force and effect of law."

Since *Sears*, the D.C. Circuit has given that command effect, and it has repeatedly required agencies to disclose legal interpretations that constitute their working law—even when they do not dictate any specific policy decision.

In *Coastal States Gas Corp. v. Department of Energy*, the D.C. Circuit held that legal opinions issued by the Department of Energy's regional counsel to auditors in its field offices constituted working law. 617 F.2d 854, 858 (D.C. Cir. 1980). Auditors, whose job it was to assure compliance with Department regulations, would solicit legal interpretations from the regional counsel on how the regulations applied to particular facts. *Id.* at 858–59. The facts could be "either real or hypothetical," and in response, the regional counsel would "interpret[] any applicable regulations in light of those facts, and often point[] out additional factors which might make a difference in the application of the regulation." *Id.* at 859. Although the interpretations that the regional counsel issued were not "formal" or "binding," *id.* at 859, "the advice was regularly and consistently followed," *id.* at 860. Moreover, the interpretations were "indexed by subject matter," "used as precedent in later cases," "amended" or "rescinded" as appropriate, and on "at least one occasion . . . cited to a member of the public as binding precedent." *Id.*

Based on these factors, the D.C. Circuit concluded that the legal interpretations in *Coastal States* were not deliberative and protected legal advice, but rather secret law that the agency must disclose. *Id.* at 868–69. The court held that it was not determinative that the legal interpretations were not "'final opinions,' absolutely binding on the auditors"; it found more significant that the opinions "were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent." *Id.* at 869. The court analogized the legal interpretations "to trial court decisions in that . . . they ha[d] operative and controlling effect over auditors." *Id.* at 867. And it rejected the Department's argument that the interpretations were predecisional in any meaningful sense, even though they were part of "an ongoing audit process." *Id.* at 868.

In *Tax Analysts I*, the D.C. Circuit relied on similar logic in holding that the Internal Revenue Service's so-called "Field Service Advice Memoranda" must be disclosed because they "constitute agency law." *Tax Analysts v. IRS* (*Tax Analysts I*), 117 F.3d 607, 617 (D.C. Cir. 1997). The IRS's Office of Chief Counsel issued the memos in response to requests by field personnel for guidance, "usually with reference to the situation of a specific taxpayer." *Id.* at 609. Though "not formally binding," the memos "[were] held in high regard and [were] generally followed." *Id.* The court's analysis mirrored its earlier analysis in *Coastal States*, *see id.* at 617–18, but two points bear emphasis. First, the court held that the Field Service Advice Memoranda "constitute agency law, even if those conclusions are not formally binding," in part because the memoranda were issued in an effort "to develop a body of coherent, consistent interpretations of the federal tax laws nationwide." *Id.* at 617. Second, the D.C. Circuit held that the memoranda's legal interpretations were "agency law" even though they did not direct—and might even conflict with—the requesting personnel's policy determinations. The court said:

> FSAs are themselves statements of an agency's legal position and, as such, cannot be viewed as predecisional. Although FSAs *may precede* the field office's decision in a particular taxpayer's case, they do not precede the decision regarding the agency's legal position.

Id.; *see also id.* (observing that the field personnel's "decisions may not necessarily agree with the conclusions contained in FSAs").

Several years later, in *Tax Analysts II*, the D.C. Circuit extended its decision in *Tax Analysts I* to the IRS's "Technical Assistance" memoranda issued to program managers, because they reflected the Office of Chief Counsel's "considered legal conclusions." *Tax Analysts II*, 294 F.3d at 73. Again, two points warrant emphasis. First, the D.C. Circuit held that the memoranda at issue constituted working law even though they did *not* direct final policy determinations. "It is not necessary," the court said, "that the [memos] reflect the final *programmatic* decisions of

the program officers who request them. It is enough that they represent [the Office of Chief Counsel's] final *legal* position concerning the Internal Revenue Code, tax exemptions, and proper procedures." *Id.* at 81. Second, in reaching its decision, the court distinguished between different types of IRS memoranda, determining whether they constituted working law by carefully studying the role each played within the agency and, importantly, the direction in which they flowed. Some IRS memos "travel upward" from the Office of Chief Counsel to the Commissioner of Internal Revenue, "advising him on legal issues," and thus "may still be part of the agency's deliberative process." *Id.* (emphasis omitted). But the memoranda the court ordered disclosed "travel[ed] horizontally." *Id.*

These D.C. Circuit cases span three decades and reflect several consistent principles that the court has applied in determining whether legal memoranda are deliberative or, instead, constitute an agency's working law. First, the court has consistently held that considered legal positions may be working law even when they do not dictate any specific policy decision. Second, the court has focused heavily on an agency's purpose in promulgating legal interpretations. Interpretations treated as precedential, designed to promote uniformity in legal interpretation, and intended to guide future agency action are, generally speaking, working law. Third, and finally, the court has given significant weight to the direction in which legal interpretations flow. Deliberative legal advice tends to flow upward, and working law tends to flow downward (or, as in *Tax Analysts II*, "horizontally").[2]

* * *

[2] *See also Schlefer v. United States*, 702 F.2d 233, 235, 237 (D.C. Cir. 1983) (concluding that legal interpretations are working law because they "are written and received in circumstances that establish them as definitive rulings on the legal questions they decide"); *Taxation With Representation Fund v. IRS*, 646 F.2d 666 (D.C. Cir. 1981) (concluding that binding agency interpretations of the tax laws that flow from superiors to subordinates are working law).

Applying these principles, the OLC's formal written opinions clearly constitute the OLC's and the executive branch's working law.

First, the OLC's formal written opinions are binding upon the executive branch and on the OLC itself. The OLC has repeatedly described its formal written opinions as such, saying that they provide "controlling" and "authoritative" legal determinations that are "the final word on controlling law" within the executive branch. *See, e.g.*, Am. Compl. ¶¶ 20–21, 25. Numerous former OLC employees, including former heads of the agency, have said the same. A former head of the OLC, now–Judge Randolph Moss, has said that the OLC's "formal, written opinions, constitute[] the legal position" and the "controlling view" of the executive branch. *Id.* ¶ 26. And other former OLC lawyers have described the agency's formal written opinions as "binding" and as "distinctively authoritative inside the executive branch." *Id.* ¶¶ 27–28; *see also id.* ¶¶ 27–28 nn.24–25.

Executive branch agencies also treat the OLC's formal written opinions as binding in practice. In its recent response letter in this case, the OLC concedes that its formal written opinions are "customarily treated as . . . authoritative interpretation[s] of the law within the Executive Branch." OLC Resp. Ltr. 3. The acting head of the OLC in 2014 said at the time that the OLC's legal interpretations are "binding by custom and practice in the executive branch" and that federal agencies "are supposed to and *do* follow [them]." Am. Compl. ¶ 32 (emphasis added). According to now-Judge Moss, executive branch agencies have treated the OLC's formal written opinions and the predecessors of those opinions "as conclusive and binding since at least the time of Attorney General William Wirt," who served in the early 1800s. *Id.* ¶ 26. Other OLC lawyers have said the same, explaining for example that the OLC's formal written opinions are "treated as binding within the Executive Branch until withdrawn or overruled." *Id.* ¶ 27.

To preserve this "longstanding and robust" tradition, the OLC "generally refus[es] to provide advice if there is any doubt about whether the requesting entity will follow it." *Id.* ¶ 3. When asked for formal written opinions by independent agencies, for example, the OLC's practice 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." *Id.*

In short, as one former OLC lawyer and current Harvard Law School professor has observed in her scholarship, the "OLC creates the binding law of the executive." *Id.* ¶ 28.

Second, the OLC's formal written opinions are intended to and do in fact constitute a uniform system of executive-branch precedent. This is by design. Beginning in 1977, Attorney General Griffin Bell responded to the "rise of agency general counsels" by instituting reforms to establish the OLC as "a centralized and singular voice of executive branch legality." *Id.* ¶ 19. The reforms he instituted shaped the OLC into "a singular legal expositor," with the "unique role of . . . issuing legal opinions for the executive branch as a whole." *Id.* Today, the OLC treats its past opinions as binding and precedential, it cites them in future cases, and, although it does "not lightly depart from" past decisions, it will reconsider or withdraw them "in appropriate cases and through appropriate processes." *Id.* Ex. C at 2. In other words, the OLC treats its opinions precisely as its then-head described them in 2010—a "system of precedent." *Id.* ¶ 21.

The OLC also observes strict limitations and procedures meant to preserve the integrity of its formal written opinions as a system of precedent. 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." *Id.* ¶ 22. 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." *Id.* ¶ 23. 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. *Id.* 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." *Id.* The OLC subjects drafts of its formal written opinions to "rigorous review," *id.* ¶ 25, and once it finalizes an opinion, it prints it on bond paper for signature and, if the opinion is unclassified, catalogs it in an electronic database and in its "unclassified Day Books," *id.* ¶ 24.

Third, the OLC's formal written opinions flow downward. Like the opinions at issue in *Coastal States*, *Tax Analysts I*, and *Tax Analysts II*, the OLC's formal written opinions flow from the body charged with interpreting the law to those charged with implementing it. The OLC's role is, of course, distinct, in that it issues its formal written opinions to *other* agencies. But this reflects the uniquely preeminent role of the OLC's legal interpretations. The OLC has been delegated the authority—originally vested in the attorney general, Am. Compl. ¶¶ 16–19—to issue legal interpretations that bind the executive as a whole. With respect to every federal official—save the president and the attorney general—the OLC's authority to interpret the law of the executive branch is superseding.

The OLC is in effect the "Supreme Court of the executive branch," *id.* ¶ 4 & n.4, and its formal written opinions flow downward to and control executive agencies in the same way that the Supreme Court's opinions do.[3] Although the OLC's opinions may be displaced by judicial

[3] Some of the OLC's formal written opinions flow upward to the president, whose interpretive authority of course supersedes that of the OLC, Am. Compl. ¶ 33, but the Amended Complaint

rulings, *id.* ¶ 2, they are frequently sought on issues "unlikely to be resolved by the courts," *id.* Ex. C at 1, and so the OLC's opinions frequently are "the final word on the controlling law."[4] *Id.* One particularly striking consequence of the preeminence of the OLC's formal written opinions is that a determination by the OLC that particular conduct does not violate federal criminal law has the effect of immunizing federal officials from prosecution for engaging in that conduct. *Id.* ¶ 31 (describing effective immunity OLC opinions conferred on those who tortured prisoners).

Fourth, the OLC's formal written opinions address legal questions only *prospectively*. According to the OLC, it "avoids opining on the legality of past conduct" and, instead, "address[es] legal questions prospectively." *Id.* Ex. C at 3. This limits the OLC's conclusive legal interpretations to those that will in fact guide agency conduct in the future. As the Supreme Court and the D.C. Circuit have emphasized, Congress's intent through FOIA was to force the disclosure of records that actually govern or will govern agency conduct, not opinions of a purely abstract or retrospective nature. *See, e.g.*, *Sears*, 421 U.S. at 153; *Coastal States*, 617 F.2d at 867.

Fifth, and finally, the OLC's formal written opinions are written in conclusive terms. The opinions attached as exhibits to the Amended Complaint, *see id.* Exs. E–N, exemplify this. The opening paragraphs of the OLC's formal written 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

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excludes those opinions, *id.* ¶ 1. For ease of reference, however, CfA uses the term "formal written opinions" in this brief to refer to formal written opinions issued to executive branch agencies or to executive branch officials other than the president.

[4] *See also* Am. Compl. ¶ 27 (former OLC lawyer and Deputy Assistant Attorney General stating the OLC's formal written opinions "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court").

is grounded in the OLC's own 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 interpretations and obligations. These are qualities of working law. *See, e.g.*, *Tax Analysts II*, 294 F.3d at 81 (upholding disclosure of documents that used terms "should" and "[w]e conclude"); *Schlefer*, 702 F.2d at 237 (relying on "tone" of documents and use of terms such as "held").

* * *

For these reasons, the OLC's formal written opinions constitute the working law of the executive branch and of the OLC.

2. *EFF* is not to the contrary, and interpreting it to be, as this Court has, creates a conflict with the D.C. Circuit's prior precedent.

This Court and the government interpret the D.C. Circuit's decision in *EFF* to foreclose the argument that the OLC's formal written opinions constitute working law. Respectfully, this Court erred and the government is incorrect for two basic reasons, explained more fully below. First, *EFF* is factually distinct because, among other things, it was *retrospective*—that is, it concerned only past conduct and was not intended to lay a legal foundation for future conduct. By contrast, the OLC's formal written opinions are generally *prospective*—that is, their principal purpose is to set out binding legal interpretations to govern future conduct. Whereas legal determinations meant to guide future agency conduct may constitute working law by virtue of establishing the law of the executive branch going forward, legal advice concerning only past conduct is more likely by its nature to be deliberative. Second, interpreting *EFF* as the Court did (and as the government does) conflicts with the D.C. Circuit's prior panel precedent. The D.C. Circuit has repeatedly held that legal interpretations may constitute working law—even if they

do not dictate specific policy determinations. *EFF* could not have reversed that old and regularly reaffirmed rule. For these reasons, explained at greater length below, *EFF* is not contrary to CfA's position that the OLC's formal written opinions are working law.

First and foremost, the OLC opinion at issue in *EFF* was nothing like the mine-run of formal written opinions that have the character of working law. It is simply implausible that the D.C. Circuit meant to reach beyond the idiosyncratic record of *EFF* to decide the much broader question of whether the OLC's formal written opinions may *ever* constitute working law.

To begin, it is not clear that the OLC opinion at issue in *EFF* was even a "formal written opinion." *See* Am. Compl. Ex. C. The D.C. Circuit never identifies it as such; the OLC's declarant in that case never identifies it as such[5]; and the government in this case has not characterized it as such. Moreover, in 2010, the year in which the OLC issued that opinion, it issued only 26 formal written opinions out of a total of 612 opinions.[6] This case, of course, concerns only a subset of the OLC's formal written opinions, and so to the extent that *EFF* concerned something else, its relevance is even more limited than the government has let on.

Even if the OLC opinion at issue in *EFF* was a formal written opinion, it was one entirely unlike the formal written opinions that CfA contends constitute working law. The OLC opinion at issue in *EFF* was unusual. The Federal Bureau of Investigation ("FBI") solicited the opinion

[5] *See generally* Decl. of Paul Colborn, *Elec. Frontier Found. v. Dep't of Justice*, 892 F. Supp. 2d 95 (D.D.C. 2012) (No. 1:11-cv-939), ECF No. 11-4.

[6] The OLC included these statistics in a letter to the Committee on Oversight and Government Reform sent on April 1, 2016. The letter is cited in Renan, *supra*, at 843 n.169 [hereinafter Kadzik Letter], and is attached hereto as **Exhibit A** as an example of the evidence CfA would adduce in support of its allegation that "[t]he vast majority of [the OLC's] advice is provided informally." Am. Compl. ¶ 33 n.31 (quoting Renan, *supra*, at 847 n.177). The Court may take judicial notice of the letter. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 85 (D.C. Cir. 2015) ("[J]udicial notice may be taken of . . . government documents available from reliable sources.").

in determining how to respond to an inspector-general investigation of a practice the FBI had abandoned years earlier. *EFF*, 739 F.3d at 4 ("requested by the FBI in response to the OIG's investigation"). That is, the FBI did not request a conclusive legal ruling meant to provide a legal foundation for ongoing or future conduct, but rather to help it respond to an inquest into conduct it had halted. *See, e.g.*, *id.* at 5 ("the OLC opinion did not in any way factor into the FBI's flawed practice of using exigent letters from 2003 and 2006" (quoting FBI General Counsel Valerie Caproni)). According to the D.C. Circuit, the opinion appears to have offered policy advice. *Id.* at 10 ("It merely examine[d] policy options available to the FBI."). In other words, the OLC opinion at issue in *EFF* analyzed past conduct, and "examine[d] policy options," to aid the FBI in responding to an investigation into an abandoned practice. It was neither sought nor issued to guide future agency action.

The formal written opinions at issue here are wholly different. CfA seeks the formal written opinions as described by the Barron memo, which explains that the OLC "avoids opining on the legality of past conduct," and instead "addresses legal questions *prospectively*." Am. Compl. Ex. C at 3 (emphasis added). Those formal written opinions address a "concrete" and "practical need," rather than a speculative and "unnecessary" one, such as "where it appears that policymakers are likely to move in a different direction." *Id.* And, rather than "examin[ing] policy options," *EFF*, 739 F.3d at 10, the OLC's formal written opinions typically provide "controlling legal advice," Am. Compl. Ex. C at 3.

These factual distinctions between *EFF* and this case are critical because the working-law analysis is fact specific.[7] CfA does not contend that all of the OLC's opinions are working law.

[7] *See, e.g.*, *Sears*, 421 U.S. at 157–58 ("Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them.").

Rather, it contends that the OLC's formal written opinions are working law to the extent they exhibit the characteristics set out in Part I.A.1 of this brief. CfA's understanding is that essentially all of the OLC's formal written opinions issued to agencies or officials other than the president *do* exhibit these characteristics. But the opinion at issue in *EFF* does not.

Legal advice concerning past conduct, as contained in the opinion in *EFF*, is far less likely to constitute working law. Unlike advice sought to guide ongoing or future conduct—that is, working law—legal analysis of past conduct is far more likely to be deliberative and, therefore, exempt under FOIA. As a logical matter, an agency would seek advice about past conduct not to establish its working law going forward, but to defend past conduct, reflect on past decisions, or prepare for litigation challenging those decisions. That sort of legal advice, even if it is controlling in some sense by virtue of having been issued by the OLC, is nonetheless more akin to legal advice sought in an attorney–client relationship or a deliberative capacity. This distinction can be seen in *Tax Analysts II*, in which the D.C. Circuit held that legal memos that represent "the final legal position" of the Office of Chief Counsel *are* working law when they travel "horizontally" to field personnel, but *are not* working law when they travel "upward" to the Commissioner of Internal Revenue. *Tax Analysts II*, 294 F.3d at 81. That is, otherwise identical opinions may be working law or not by virtue of the circumstances of their issuance. As the D.C. Circuit went on to say, "[t]he distinction between deliberative [opinions] and [opinions] that represent the [Office of Chief Counsel's] considered legal conclusions is not amenable to a categorical formula. It can turn on the subject matter of the [memo], on its recipient, on its place in the decisionmaking process, and even on its tone." *Id.* at 82.

A similar distinction exists between the opinion at issue in *EFF* and the OLC's typical formal written opinions. The latter generally are working law, even as the former, because of the circumstances of its issuance, was not.

The Court was, respectfully, wrong to focus almost exclusively on the D.C. Circuit's holding that the OLC opinion at issue was deliberative notwithstanding the controlling and precedential nature of OLC opinions. *See EFF*, 739 F.3d at 9–10; Mem. Op. at 32 ("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"). This argument, which was central to the Court's analysis, misunderstands CfA's position. CfA does not argue that every opinion—legal or otherwise—constitutes working law. Context matters. The reason that the opinion in *EFF* was exempt was that, even if it had the "indicia of a binding legal decision," *EFF*, 739 F.3d at 10, it did not have the *other* characteristics of working law (identified above). And, critically, the context in *EFF* that overcame the "controlling" and "precedential" nature of that particular opinion—i.e., the fact that it examined policy options concerning *past* conduct—is not present here. The OLC's formal written opinions generally establish working law because they are binding, form a system of precedent, establish the law prospectively, and flow downward. It may be that a small subset of those opinions, like the opinion in *EFF*, does not exhibit these characteristics. But that must be determined after further fact finding, not on the government's motion to dismiss.

Second, this Court's and the government's interpretations of *EFF* conflict with the D.C. Circuit's prior panel precedent. The D.C. Circuit has repeatedly held that legal interpretations may constitute working law even when they do not dictate any policy determination—so long as the legal interpretation is final. *See* Part I.A.1 (discussing *Coastal States*, *Tax Analysts I*, and *Tax*

Analysts II). *EFF* cannot therefore be interpreted as holding, as the Court and the government suggest, that the OLC's opinions may not constitute working law because they do not dictate policy. *See* Mem. Op. 34; Gov't Br. 14–15.

The Court rejected CfA's reliance on the D.C. Circuit's prior precedent for two reasons, but respectfully, the Court erred. The Court first said that the D.C. Circuit's prior cases were inapt because those cases "determined that [the legal interpretations at issue] reflected the position of *the agency* itself." Mem. Op. 34. Respectfully, that is not a basis for distinguishing the D.C. Circuit's prior cases, because the OLC's formal written opinions reflect the considered legal interpretations of the executive branch *as a whole*. *See* Part I.A.1. The explicit function of the OLC's formal written opinions is to standardize legal interpretation across every agency. *See* Am. Compl. ¶ 19. In issuing those opinions, the OLC is "a singular legal expositor," with the "unique role of . . . issuing legal opinions for the executive branch as a whole." *Id.* In other words, the OLC's formal written opinions supersede those of an agency's general counsel and even those of an agency's head. The OLC sits, in a sense, as an appellate review board. Its opinions are preeminent and necessarily reflect the law of *every* agency.

It is true, as the Court notes, that while the OLC's formal written opinions establish the *law* of the executive branch, they do not always determine *policy*. *See* Mem. Op. 34.[8] But this argument collapses back into the one that the D.C. Circuit has already rejected—the false notion that the working-*law* doctrine is limited to policy.

The proper way to reconcile this tension between the D.C. Circuit's prior precedent and *EFF* is to focus on the *facts* of *EFF*. The D.C. Circuit appropriately limited its holding to "the record before [it]," *EFF*, 739 F.3d at 4, and that record reveals an unusual OLC opinion that

[8] As explained in Part I.B, the OLC's formal written opinions frequently *do* determine policy.

analyzed past conduct and "merely examine[d] policy options," *Id.* at 10. On *that* record, it may have been relevant that the OLC does not have the general authority to determine the FBI's policy, because the OLC's opinion amounted to *policy advice*. But the D.C. Circuit did not have before it the OLC's typical formal written opinions, which conclusively determine the law to guide ongoing or future agency conduct.

The Court next said that *EFF* is not distinguishable from this case because "*all* of the OLC's opinions constitute 'the opinion of the Attorney General on questions of law,'" Mem. Op. 35 (quoting 28 U.S.C. § 512), but this, too, misapprehends CfA's position. It is not CfA's position that the OLC's formal written opinions constitute working law by virtue of being "the opinion[s] of the Attorney General." Even conclusive legal determinations may, in a given context, be deliberative under Exemption 5. *See Tax Analysts II*, 294 F.3d at 81–82. But the context that made the opinion in *EFF* deliberative—namely, the fact that it considered past conduct and examined policy options—is vastly different than the context of the OLC's typical formal written opinions.

For these reasons, *EFF* is far narrower than the Court believed, and its interpretation of that decision creates a conflict with the D.C. Circuit's prior panel precedent.

3. The working-law doctrine is not limited to opinions issued in adversarial disputes involving private parties

As a general matter, the OLC's formal written opinions constitute both "final opinions" within the meaning of § 552(a)(2)(A) and "statements of policy and interpretations" within the meaning of § 552(a)(2)(B). The government disagrees, arguing primarily that the OLC's formal written opinions do not constitute "final opinions." *See* Gov't Br. 15–18. As explained below, the government is wrong, but before explaining why, CfA notes that the dispute over the meaning of

the term "final opinions" is ultimately a distraction, because all of the formal written opinions that CfA seeks also constitute "statements of policy and interpretations."

The OLC's formal written opinions constitute "statements of policy and interpretations" under § 552(a)(2)(B) because they are interpretations of law that are binding on the agencies that request them. *See* Am. Compl. ¶¶ 16–32. They are not equivocal explorations of what the law might mean, but conclusive determinations of what it does in fact mean. The agencies that solicit the OLC's formal written opinions have treated them as binding interpretations of law for decades, *id.*, and they are just as binding on an agency as any conclusive legal interpretations issued by its general counsel. The government argues that the OLC's formal written opinions are not "statements of policy and interpretations" because the OLC "does not have the authority to act on or implement matters of policy." Gov't Br. 19. That isn't true, as explained elsewhere in this brief, *see* Part I.B, but it is also irrelevant, as the D.C. Circuit made clear in *Schlefer*. There, the D.C. Circuit held that the Maritime Administration's chief counsel opinions fell under § 552(a)(2)(B) even though the officials requesting them had ultimate policymaking authority. What mattered, the court held, is that the chief counsel's office had "ultimate decisionmaking authority on matters of statutory construction." *Schlefer*, 702 F.2d at 241. The opinions were "statements of policy and interpretations" because they were authoritative and precedential determinations of the law. *Id.* at 244. The same is true of the OLC's formal written opinions.

The government cites one case that it believes to be to the contrary, but it isn't. Gov't Br. 19. In *Vietnam Veterans of America v. Department of Navy*, 876 F.2d 164 (D.C. Cir. 1989), the D.C. Circuit held that certain legal opinions of the Judge Advocate Generals of the Navy and the Army did not contain "statements of policy and interpretations." Although the D.C. Circuit's analysis is brief, it clearly supports CfA's analysis above. The D.C. Circuit distinguished the

opinions before it from those in *Coastal States* by observing that the latter involved "agency counsel opinions [that] operated as law because an auditor requesting an opinion was not empowered to disregard it." *Id.* at 165. Again, the same is true here.

The OLC's formal written opinions also constitute "final opinions . . . made in the adjudication of cases" under § 552(a)(2)(A) because the OLC's process for issuing formal written opinions is an adjudicative one and because its opinions are final with respect to the questions presented for review. The Administrative Procedure Act ("APA"), of which FOIA is a part, does not fully define the terms in § 552(a)(2)(A). It defines "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). And it defines "order," in turn, as "the whole or a part of a final disposition . . . in a matter other than rule making." *Id.* § 551(6) But the APA does not define "cases" or "final opinions." A relatively recent decision of the D.C. Circuit, however, sheds light on the meaning of those terms and of § 552(a)(2)(A) as a whole. In *American Immigration Lawyers Association v. Executive Office for Immigration Review*, the D.C. Circuit held that § 552(a)(2)(A) encompasses "final opinions resulting from proceedings in which a party has a right to set the agency decision-making process in motion and obtain a determination concerning the statute or other laws the agency is charged with interpreting and administering." 830 F.3d 667, 679 (D.C. Cir. 2016) (internal quotation marks omitted).

This definition comfortably includes the OLC's formal written opinions because the OLC's process for issuing those opinions is a proceeding that outside parties—namely, federal agencies—have a right to set in motion. The OLC considers requests for its formal written opinions pursuant to the Attorney General's delegation of his obligation to issue opinions at the request of other agencies. *See* 28 U.S.C. § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of

his department."); Am. Compl. ¶ 18. Separately, an executive order directs agencies to submit interagency disputes to the OLC for resolution. *See* Exec. Order No. 12,146, § 1-4, 44 F.R. 42,657 (1979); Am. Compl. ¶ 18. Once an agency triggers the OLC's process for issuing formal written opinions, what follows is an "adjudication." It is, to use the terms of the APA, a "process" for formulating a "final disposition" in a matter "other than rulemaking." Indeed, as explained above and in the Amended Complaint, it is a highly regularized and court-like process that involves detailed legal submissions, adversarial and other interested agencies, and, in the case of interagency disputes, "reply" memoranda. *See supra* p. 6; Am. Compl. ¶ 21–25. Finally, federal agencies qualify as "parties" for purposes of the APA.[9]

The government does not grapple with the actual text of § 552(a)(2)(A); instead, it proposes an extra-textual limitation of its own, arguing that the subsection applies only to "adversarial disputes involving private parties." *See* Gov't Br. 15–18. That phrase does not appear anywhere in the text of § 552(a)(2)(A). A similar phrase appears in a different subsection of the reading-room provision, *see* 5 U.S.C. § 552(a)(2)(C) (limited to records "that affect a member of the public"), but its absence in subsection (A) is notable. For support, the government points instead to other language in FOIA that precludes agencies from citing "against a party other than an agency" material that is subject to the reading-room provision but that has not been published. *See* Gov't Br. 16 (quoting 5 U.S.C. § 552(a)(2)). But that language doesn't purport to limit the requirements of § 552(a)(2)(A). And in any event, the government's logic fails because

[9] 5 U.S.C. § 551(3) ("'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes").

that language applies to all of the reading-room provision's subsections,[10] including the one directing the publication of "staff manuals and instructions," which clearly do not arise from "adversarial disputes involving private parties." The same is true of the corresponding legislative history the government cites. *See* Gov't Br. 16. The caselaw the government relies upon is also unhelpful, *see* Gov't Br. 16–17, because none of it actually purports to limit § 552(a)(2)(A). The government ignores more relevant caselaw recognizing that the working-law doctrine assuredly does apply to an agency's law even if does not affect private rights. *See, e.g.*, *Pub. Citizen v. Office of Mgmt. and Budget*, 598 F.3d 865, 867 (D.C. Cir. 2010) (internal Office of Management and Budget memoranda concerning "legislative and budgetary clearance policies"). Finally, even if § 552(a)(2)(A) were limited to disputes involving private parties, many of the OLC's formal written opinions do. *See* Part I.B.3.

The government also argues that the OLC's formal written opinions are not "final" because they do not "dispose of agency action," Gov't Br. 17–18, but that is not what the statute requires. The OLC's formal written opinions are "final" because they conclusively resolve legal disputes presented to the OLC. That is, they are "final" with respect to the adjudications the OLC engages in. This is precisely the way in which the Supreme Court's opinions, even if concerning only legal questions, are "final." *See also Tax Analysts II*, 294 F.3d at 81 (requiring disclosure of an agency's final legal position even though they do not dictate "final *programmatic* decisions" (emphasis in original)).

[10] 5 U.S.C. § 552(a)(2) ("A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if . . . .").

4. The OLC's formal written opinions are not, as a general matter, exempt from disclosure pursuant to the deliberative-process and attorney–client privileges.

The fact that the OLC's formal written opinions generally constitute working law overcomes Exemption 5's deliberative-process and attorney–client privileges. The working-law doctrine is the flip side of the deliberative-process privilege, and so "statements of an agency's legal position . . . cannot be viewed as predecisional," *Tax Analysts I*, 117 F.3d at 617, as they must to be exempt. *See also Sears*, 421 U.S. at 153 (explaining that courts "should be reluctant . . . to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)," and holding that "with respect at least to 'final opinions'" under § 552(a)(2)(A), "Exemption 5 can never apply"). The working-law doctrine also generally overcomes the attorney–client privilege. *See, e.g.*, *Tax Analysts I*, 117 F.3d at 619 ("FOIA exemption 5 and the attorney–client privilege may not be used to protect this growing body of agency law from disclosure to the public."). The fact that the OLC's formal written opinions constitute working law is thus reason enough to reject the government's categorical invocation of Exemptions 5's privileges. At most, the government might argue that portions of the OLC's formal written opinions are not working law and thus susceptible to a claim of privilege, but it may not do so on a motion to dismiss before it has processed those opinions for release and attempted to justify any claims of exemption.

For instance, the government has yet to introduce any evidence supporting its claim that the OLC has an attorney–client relationship with agencies seeking formal written opinions, and there are very good reasons to doubt that it does. To start, the OLC's obligation is not to the agencies soliciting its formal written opinions, but to the promotion of a uniform understanding of law throughout the executive branch. Am. Compl. Ex. C at 1. So, for example, the OLC might reject one plausible interpretation of law even if it would advance the interests of a supposed

"client" agency, to ensure uniformity with interpretations provided to other agencies. Relatedly, unlike in virtually every other attorney–client relationship, the OLC is not bound to respect the confidentiality of its "clients." The OLC "operates from the presumption that it should make its significant opinions fully and promptly available to the public." *Id.* at 5. And, beyond that, Barron's memo makes clear that the OLC—and the OLC alone—makes the ultimate determination of whether to publish its formal written opinions. *Id.* at 5–6. By contrast, clients in an actual attorney–client relationship "own" the privilege and have ultimate say over the public disclosure of their confidences. *See, e.g.*, *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (noting that "the privilege is held by clients"). Indeed, lawyers in an attorney–client relationship have an ethical obligation to protect their client's confidences, but clearly the OLC does not view itself as subject to that obligation. There are many other ways, too, in which the OLC acts inconsistently with its claim of privilege. It routinely cites legal determinations made in one formal written opinion in other formal written opinions, even though doing so exposes supposedly confidential information in one opinion to the requesters of the other. It also routinely adjudicates disputes between two agencies whose interests are adverse, during which time it necessarily shares supposed confidences between the adverse agencies and advises adverse parties at the same time on the subject matter of their ongoing dispute. The problem with the government's theory is that, in issuing formal written opinions, the OLC is an arbiter, not an advocate, and it would stretch the attorney–client privilege beyond all recognition to apply it to the OLC's relationship with agencies seeking its formal written opinions.

As CfA noted in its opposition to the government's first motion to dismiss, CfA's MTD Opp'n 37, it may be that certain of the OLC's formal written opinions or portions of them are in fact privileged, but the government's blanket claims of privilege are insupportable.

B. Even under this Court's interpretation of *EFF*, at least four subcategories of the OLC's formal written opinions are working law because they determine policy.

Even under this Court's interpretation of *EFF*, at least four subcategories of the OLC's formal written opinions are working law because they determine policy. As explained in Part I.A.3, these opinions must be disclosed pursuant to both 5 U.S.C. § 552(a)(2)(A) and (B), and as explained in Part I.A.4, they may not be withheld pursuant to either the deliberative-process or attorney–client privilege.[11]

Before addressing those categories, the government raises two threshold complaints, but neither has merit. First, the government says that the Amended Complaint is "defect[ive]" because, in its view, CfA did not adequately explain its legal theory as to why opinions in several of the subcategories determine policy. *See* Gov't Br. 26, 29, 34. In its memorandum opinion, the Court said that CfA should address or clarify several aspects of its legal theory, *see* Mem. Op. 37, but CfA did not understand the Court to intend—or, respectfully, to have the power—to impose pleading requirements beyond those set out in the Federal Rules of Civil Procedure and so omitted from the Amended Complaint the lengthy legal analysis below.

Second, the government argues that CfA has not "plausibly alleged that there are opinions . . . that OLC has not disclosed" in several of the subcategories discussed below. *See* Gov't Br. 29–30, 33, 35. The government is wrong because it cannot credibly dispute (and, with

[11] The OLC has now confirmed that the express agreement that independent agencies make to be bound by the OLC's formal written opinions is no different than the implied agreement of non-independent agencies to be bound by those opinions. *See* Gov't Br. 29. If any additional evidence were necessary that the OLC's formal written opinions bind the agencies requesting them, this surely settles the question. As a result, however, it has become clear that there is no distinction for purposes of the working-law analysis between formal written opinions issued to independent agencies and those issued to any other agency. CfA therefore no longer contends that those opinions constitute working law under this Court's interpretation of *EFF*.

one exception, it does not deny, *see* Gov't Br. 36): that the OLC produces formal written opinions in each of the categories below, that the OLC has published only a "fraction" of its formal written opinions, Am. Compl. ¶ 6, and that the OLC views its formal written opinions as generally exempt from the reading-room provision of FOIA. That showing is sufficient for the Court to exercise jurisdiction over CfA's claims. *See Sears*, 421 U.S. at 146 (describing lower court's exercise of jurisdiction based on claims "that the [agency] had a longstanding policy of nondisclosure and that it still maintained that the policy was lawful").[12] Additionally, the government's argument is beside the point because CfA seeks *prospective* relief. That is, CfA seeks the proactive disclosure of opinions that the OLC has yet to issue or withhold. *See* Am. Compl. ¶ 59. For the Court to exercise jurisdiction over that claim, it is enough that CfA has plausibly alleged that the OLC issues formal written opinions in the subcategories discussed below and that the OLC applies its own standards in determining whether to disclose those opinions rather than the standards set out in the reading-room provision of FOIA. *See Sears*, 421 U.S. at 146 ("The [lower] court noted that it had jurisdiction to enjoin the withholding of documents prospectively . . . ."); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) ("[R]elief as to a *specific request* under the FOIA . . . will not moot a claim that an agency *policy or practice* will impair . . . access to information in the future."). Below, CfA addresses the government's specific claims about the OLC's unpublished opinions.

1. Opinions resolving interagency disputes.

A substantial percentage of the OLC's formal written opinions adjudicate concrete and ongoing disputes between federal agencies. *See* Am. Compl. ¶ 35–38. Even accepting this

[12] Indeed, it is more than sufficient. Courts routinely hear FOIA claims where the requester has no proof whatsoever that the records sought exist. *See, e.g.*, *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006) (suit filed after requester "[r]eceiv[ed] no response").

Court's interpretation of *EFF*, these OLC opinions constitute working law because the legal interpretations within them determine agency policy. *See* Mem. Op. at 33. David Barron's memo makes clear that formal written opinions resolving interagency disputes generally address a "concrete and ongoing dispute between two or more executive agencies." Am. Compl. ¶ 35 & Ex. C. In other words, agencies turn to the OLC when an interagency dispute over policy turns on a dispute over law, with the OLC's authoritative interpretation of the law resolving both the question of law *and* the question of policy. In resolving interagency disputes, the OLC plays a court-like role, adjudicating legal disputes with the effect of determining policy.

Two published OLC opinions in this category, both dealing with an agency's authority to enforce a monetary award, illustrate the point. First, in February 2008, the OLC issued an opinion resolving a dispute between the Department of Labor ("DOL") and the Department of Veterans Affairs ("VA"). *See* Am. Compl. Ex. G (Payment of Back Wages to Alien Physicians Hired Under the H-1B Visa Program, 32 Op. O.L.C. 47 (Feb. 11, 2008)). The opinion concerned eleven physicians in the United States on H-1B visas, who sought an award of back wages from the VA, arguing that the VA had underpaid them. *See id.* Ex. G at 1. The DOL, charged with investigating labor practices under the Immigration and Nationality Act, determined that the VA had, in fact, underpaid the physicians; as a remedy, it sought to enforce an award of monetary relief against the VA on the physicians' behalf. *See id.* The VA objected and requested an opinion from the OLC to determine whether the DOL had authority to order the award. The OLC determined that sovereign immunity, which had not been waived, "bar[red] the award of such monetary relief in an administrative proceeding." The OLC concluded that "the award of back wages [was] therefore barred." *Id.*

Through this legal interpretation, the OLC's opinion effectively determined agency policy. Before the OLC's opinion, the DOL had made the policy decision to enforce awards of damages for violations of the Immigration and Nationality Act and to do so in a specific case. The OLC's authoritative opinion on the matter, however, forced upon the DOL the opposite policy. Put simply: The DOL's policy was "X"; the OLC said "X" was prohibited; and the DOL was forced to change its policy to "not X." The DOL's policy changed, by necessity, to reflect the fact that it did not have the authority to enforce an award of damages for violations of the Act, and that it would not enforce an award in the specific case in dispute.

Similarly, in August 2014, the OLC resolved a dispute between the Equal Opportunity Employment Commission ("EEOC") and the Social Security Administration ("SSA") over an award of monetary damages. *See* Am. Compl. Ex. F (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. 1 (Aug. 13, 2014)). As in the opinion above, the OLC determined that sovereign immunity barred the EEOC from enforcing an award against the SSA for having violated an agreement settling discrimination claims brought by specific employees. *Id.* Ex. F at 2–4. The OLC's opinion had the effect of rejecting—and thereby determining—the EEOC's policy with respect to its authority to enforce the monetary award and its policy with respect to doing so in a particular case.

The government argues that these OLC opinions are inapposite because, in each, the losing agencies could seek to provide an alternative remedy, *see* Gov't Br. 27–28, but that argument is meritless. Even under this Court's interpretation of *EFF*, the OLC's opinions need not settle every potential policy question to be considered working law; it is enough that they settle the policy question at hand. Defining the relevant policy question more broadly as the

government does would effectively cast every decision that an agency makes as preamble to some distant policy goal. *See Pub. Citizen*, 598 F.3d at 875 ("[A]n agency's application of a policy to guide further decision-making does not render the policy itself predecisional."); *cf. id.* ("Otherwise it would be hard to imagine any government policy document that would be sufficiently final to qualify as non-predecisional and thus subject to disclosure under FOIA."). To accept the government's argument would be to say that the Supreme Court's denial of Lilly Ledbetter's claim under Title VII of the Civil Rights Act did not have a policy consequence (or, in the government's words, affect private rights) because Goodyear Tire Company might nonetheless reimburse Ms. Ledbetter's lost income. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

2. Opinions interpreting non-discretionary legal obligations.

The OLC's formal written opinions interpreting an agency's non-discretionary legal obligations are working law because they have the effect of directly determining an agency's policies. When an agency is under a non-discretionary obligation to comply with some legal authority, and the OLC conclusively interprets that legal authority, the OLC's opinion directly determines how an agency *must act*. The opinions are indistinguishable in effect from a congressional statute directly commanding a particular agency to take particular action. Opinions in this category do not offer advice but compel conduct with the "force and effect of law." *Sears*, 421 U.S. at 154 (further quotation and citation omitted). They are, therefore, working law even under this Court's interpretation of *EFF*.

Two of the OLC's published formal written opinions illustrate the point. In 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. *See* Am. Compl. Ex. I (Whether the Defense of Marriage Act Precludes the Non-biological 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)). The OLC held that the Defense of Marriage Act did not interfere with the SSA's legal obligation to provide social security benefits. *Id.* The opinion directly decided the policy of the SSA: it conclusively determined that the SSA must treat the children of same-sex couples equally in determining their statutorily mandated social-security benefits. Following issuance of that opinion, the SSA had no choice but to afford otherwise-eligible children of same-sex unions benefits under the Social Security Act. Moreover, the OLC's opinion resolved that question in the context of the SSA's adjudication of the benefits of a specific child—Elijah, the son of Karen and Monique, who had entered into a civil union under Vermont law in 2002.

The government argues that the opinion did not determine any policy because the SSA "was still free to make its own policy decision concerning the child's overall eligibility," Gov't Br. 31, but this misses the mark. The OLC's opinion directly determined policy. If a particular child of a same-sex marriage were otherwise eligible for benefits, the OLC's opinion mandated the provision of benefits. That is, it effectively mandated that the SSA accord the children of same-sex couples benefits on equal terms with other children. In this respect, the OLC's opinion is similar to the regional-counsel memos in *Coastal States*. Those memos interpreted the law applicable to factual scenarios—"either real or hypothetical"—posed by agency auditors, *Coastal States*, 617 F.2d at 858–59, who then relied on the memos "as guidance in conducting their audits." *Id.* 859. Here, too, the OLC determined the SSA's policy in a particular factual scenario, and the SSA was bound to apply that policy to future social-security claims.

In 2011, the OLC similarly decided agency policy when it issued an opinion requiring the Office of Personnel Management ("OPM") to award service credit for retirement purposes to U.S. Postal Service employees for the periods during which the Postal Service had suspended its contributions to its employee retirement fund. *See* Am. Compl. Ex. K at 1, 5, 15–16 (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 Requirement Employer Contributions, 36 Op. O.L.C. 1 (Nov. 1, 2011)). The question arose when the Postal Service, in light of a severe financial crisis, suspended its contributions to a retirement and disability fund for certain employees. *Id.* In an apparent effort to pressure the Postal Service to make the required contributions, the OPM sought to enforce a regulation it interpreted to deny employees service credits for the periods in which their agencies failed to make contributions. *Id.* at 1–2. The Postal Service argued that its employees should nonetheless receive credit, *id.*, and the OLC resolved the dispute through its legal interpretation of the statutory framework that governs a federal employee's entitlement to retirement and disability benefits under the statute at issue. The OLC rejected the OPM's regulatory construction of the statute, thereby prohibiting the OPM from "denying postal employees coverage or creditable service." *Id.* at 15–16. In other words, the OLC determined the OPM's policy with respect to employee service credits during periods in which an agency fails to contribute to its benefits fund.

The government, once again, argues that this policy determination does not count because the OLC's opinion did not address other policies the OPM might consider, *see* Gov't Br. 32–33, but again, that is beside the point. What matters for purposes of the working-law doctrine and the deliberative-process privilege is that the OLC's opinion had the effect of determining OPM

policy. Put another way: the OPM had no choice but to "adopt[] what OLC offered," *EFF*, 739 F.3d at 10, and to continue to credit postal employees for their service. The government argues that the OPM might later respond in other ways to "the underlying situation." Gov't Br. 32. If so, then future deliberations relating to that "underlying situation" might very well be protected from disclosure under FOIA. But at least with respect to the policy question presented to the OLC for resolution—whether the OPM must continue to award service credit to Postal Service employees—the policy question has been decided. There is nothing deliberative, moreover, about the fact that, following issuance of the OLC's opinion, the OPM had no choice but to credit Postal Service employees for their work. The OLC's legal interpretation, imposing a non-discretionary legal obligation, settled this particular policy question. In this category, then, the OLC's formal written opinions are more than mere "advice . . . for consideration by officials." *EFF*, 739 F.3d at 8. Rather, they constitute the agency's working law.

The government has disclosed the opinion that CfA pointed to as a potentially unpublished opinion in this category, noting that it is not in fact a formal written opinion. *See* Gov't Br. 33. As explained above, *see* Part I.B, it is not CfA's obligation under FOIA to point to information the government has withheld, particularly given CfA's claims for prospective relief. FOIA permits requesters to enforce requests for information without more, so as to prevent the sort of one-sided gamesmanship that would flow from forcing them to obtain proof of what only the government can know. In any event, the government does not dispute that there are other unpublished opinions in this category, and there certainly appear to be.[13]

[13] *See, e.g.*, Potential Conflict Presented by the Participation of Stephen J. Friedman on the Settlement Policy Committee, __ Op. O.L.C. __ (1978) (unpublished opinion apparently interpreting 18 U.S.C. § 208 to require disqualification of a federal employee under certain circumstances), *cited in* Ethical Issues Raised by Retention and Use of Flight Privileges by FAA

3. Opinions adjudicating or determining private rights.

The OLC's formal written opinions that concern the adjudication or determination of private rights are working law because they directly determine policy as well as the private rights of individuals. 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." Am. Compl. ¶ 47 (quoting Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 509–10 (1993)). OLC opinions in this category conclusively resolve discrete legal questions that have the effect of resolving an agency's adjudication of private rights. Opinions in this category resemble judicial determinations of certified questions of law. When, for instance, a federal court adjudicating private rights certifies a question of law to a state supreme court, the state court's legal determination has the effect of adjudicating or determining private rights. While the federal court ultimately issues the judgment in the case, the state court's interpretation of law is an essential component of that judgment. So, too, with this subcategory of the OLC's formal written opinions.

Agencies adjudicating private rights often turn to the OLC for an authoritative determination of the scope of those rights. For example, one of the OLC opinions discussed above determined that children of same-sex couples are eligible to receive certain insurance benefits, notwithstanding the Defense of Marriage Act. *See* Part I.B.2. Although the Social Security Administration—like the field officers in *Tax Analysts I*, *Tax Analysts II*, and *Coastal States*—had primary responsibility for adjudicating private rights, it turned to a higher authority for an authoritative determination of the scope of those rights. Also as in those D.C. Circuit

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Employees, 28 Op. O.L.C. 237 (2004), https://www.justice.gov/file/18826/download [https://perma.cc/CX4S-EM9P].

cases, the legal determination issued in response to the request constituted the agency's final legal position with respect to the private rights of a class of individuals, even though the determination of that legal position "precede[d]," *Tax Analysts I*, 117 F.3d at 617, its application to a specific dispute. *See also* Part I.B.1 (discussing OLC opinion determining that the Department of Labor could not enforce an award of monetary damages to eleven physicians present on H-1B visas); Part I.B.2 (discussing OLC opinion determining that the Office of Personnel Management could not deny Postal Service employees service credits).

The government argues that the "mere issuance" of an OLC opinion does not adjudicate private rights, because another agency must apply the OLC's legal determinations. Gov't Br. 36. This argument makes two mistakes. First, as with the examples above, the OLC's opinions in this subcategory often concern specific individuals. The opinion concerning child insurance benefits, for example, concerned a specific child—Elijah—whose legal rights the OLC determined. There is no meaningful distinction for purpose of the working-law doctrine between the OLC's opinion in Elijah's case and a Supreme Court opinion that authoritatively settles the scope of the individual rights at stake but remands for the application of its ruling to the facts of the case. Second, and as explained with respect to the subcategories above, the working-law doctrine applies to those who implement policy as well as to those who *determine* policy. The OLC's opinions in this category effectively determine policy and private rights, even though the requesting agencies themselves must implement that policy. *See Tax Analysts I*, 117 F.3d at 617 ("[Although the documents] may precede the field office's decision in a particular taxpayer's case, they do not precede the decision regarding the agency's legal position."); *Schlefer*, 702 F.2d at 237 (similar).

In fact, even under the government's narrow conception of the working-law doctrine, the OLC's formal written opinions concerning private rights are at the core of what Congress sought to expose. One of Congress's concerns in enacting FOIA was the agency practice of amassing "a body of secret law which [the agency] is actually applying in its dealings with the public but which it is attempting to protect behind a label." *Coastal States*, 617 F.2d at 869.[14] That is what the OLC is attempting here. Its opinions in this subcategory indisputably determine the legal scope of private rights, and federal agencies indisputably apply those legal determinations in their "dealings with the public." The government's formalistic distinction between the determination of policy and the implementation of it is precisely the distinction Congress through FOIA meant to reject.

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

The OLC's formal written opinions finding that particular statutes are unconstitutional and that agencies need not comply with them are working law because they determine policy. *See* Am. Compl. ¶¶ 45–46. Opinions in this subcategory have the unique effect of freeing agencies from congressional commands, and of essentially editing the text of the U.S. Code itself. In a sense, they are the OLC's purest expressions of policy, akin to legislative repeals or judicial invalidations of the law.

In 2009, for example, the OLC issued a formal written opinion holding that a particular section of an appropriations bill was unconstitutional and that "the State Department may

[14] *See also Sterling Drug v. Fed. Trade Comm'n*, 450 F.2d 698, 708 (D.C. Cir. 1971) ("[P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public.").

disregard it." *See* Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1 (June 1, 2009), https://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054_0.pdf [https://perma.cc/7E54-5CDD].[15] Specifically, the OLC considered Section 7054 of the Foreign Appropriations Act of Fiscal Year 2009, which prohibited the Department of State from using funds to support any U.S. delegation to any United Nations body chaired by a country determined to "support[] international terrorism." *Id.* at 1. The OLC concluded that the statute's prohibition "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it." *Id.*

This opinion had the effect of explicitly rejecting a policy determination that Congress had expressed through public law. It freed the Department of State from a legal constraint on its policymaking authority, and it reconfirmed long-standing executive-branch policy not to comply with congressional mandates akin to the one in Section 7054. *See generally id.* at 7–10. Importantly, the constitutionality of congressional efforts to constrain the power of the executive branch rarely end up in court, and so the OLC's determination that a statutory command is unconstitutional and may be ignored is effectively final.

The government disputes the policy implications of this type of OLC opinion, arguing that an agency "might voluntarily comply with the statute, decline to comply with it on different grounds, or pursue a strategy of seeking repeal," Gov't Br. 34 (internal quotation marks omitted), but these possibilities ignore that the OLC's formal written opinions effectively invalidating

[15] CfA did not cite this OLC opinion as an example in its Amended Complaint, but it does so here because the opinion more clearly illustrates the subcategory.

congressional enactments determine policy at that point in time, even if an agency later adopts a related policy.

The government also questions whether the unpublished opinion that CfA cites in its Amended Complaint falls into this subcategory of the OLC's formal written opinions. *See* Gov't Br. 35; Am. Compl. ¶ 45 n.43. As explained above, CfA need not prove the existence of records in these subcategories before seeking judicial review. *See* Part I.B. But in any event, the opinion CfA cites certainly appears to determine that a statute or an application of a statute would be unconstitutional and that, therefore, the agency requesting the opinion need not comply with it or a particular application of it. The opinion is cited in another OLC opinion concerning the constitutionality of congressional reporting requirements on the executive branch, *see* Am. Compl. Ex. M at 17–20; the opinion is quoted for the proposition that the application of an unspecified reporting requirement "is limited by a constitutional restraint," *id.* at 19; and the opinion bears the title "Legal Authority to Withhold Information from Congress," *id.* It is telling, moreover, that the government, which presumably has a copy of the opinion, argues only that CfA's allegation about the content of the opinion is implausible based on what has been disclosed from it so far. That is, the government conspicuously stops short of saying that CfA's allegation is untrue. *See* Gov't Br. 35.[16]

[16] In any event, there appear to be other examples of unpublished opinions in this category. *See, e.g.*, Re: WTO Dispute Settlement Review Commission Act, __ Op. O.L.C.__ , 3 (Feb. 9, 1995) (unpublished opinion), *cited in* Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1, 8 (June 1, 2009) (quoting the unpublished opinion as follows: "[T]his Office has 'repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations,' including in the context of potential engagement with international fora.").

C. The OLC must provide an index of formal written opinions subject to affirmative disclosure.

Because the OLC's formal written opinions, or at least the subcategories of them identified above, fall within FOIA's reading-room provision, the government is obligated to proactively disclose an index of those opinions. *See* 5 U.S.C. § 552(a).

II. Requiring the disclosure of the OLC's formal written opinions would serve, not threaten, important constitutional values.

Requiring the OLC to disclose its formal written opinions would serve important constitutional values. The OLC has a singular role in interpreting laws and agency obligations that affect millions of individuals. Pursuant to past OLC formal written opinions, our government has tortured prisoners, determined whether to accord insurance benefits to the children of same-sex couples, and prioritized the removal of some aliens from the country while deferring the removal of others. The public has an overriding interest in understanding the law as interpreted and practiced by its government, particularly when that law is conclusive and affects so many. The government claims that forcing the disclosure of the OLC's formal written opinions would undermine rule-of-law interests and implicate constitutional concerns, *see* Gov't Br. 37–42, but it grossly mischaracterizes the effect that a ruling in CfA's favor would have on those interests.

Recognizing that the OLC's formal written opinions are working law would not impair the ability of government officials to seek confidential legal advice. Though important for many reasons, the OLC's formal written opinions are a tiny portion of the OLC's output. From 2010 to 2015, the OLC issued 63 formal written opinions. *See* Kadzik Letter 2. During the same period, it issued 2,942 other forms of legal advice. *Id.* at 10. CfA does not argue that those almost 3,000

other opinions—nearly 50 times the number of formal written opinions over the same period—constitute working law.

The reality that the government does not acknowledge is that the decision of whether to seek formal written opinions or, instead, informal OLC advice rests with the agency. Agencies have complete control over whether to seek opinions that have the character of working law. The reasons that agencies at times prefer formal written opinions are not reasons that justify the confidentiality the government demands. Agencies seek formal written opinions precisely because of their authoritative nature. Because they are akin to judicial determinations, formal written opinions insulate agency decisionmaking from legal and public scrutiny in a way that deliberative advice does not. When an agency wishes to engage in potentially unlawful conduct, for example, a formal written opinion approving of the conduct is effectively a "golden shield" from prosecution. Am. Compl. ¶ 31. Again, the point is that agencies seeking the OLC's formal written opinions have ultimate control over their decision to seek opinions that, properly understood, constitute working law.[17]

The government is also wrong to suggest that the relief CfA requests would implicate constitutional concerns. Gov't Br. 40–42. CfA does not seek OLC formal written opinions that flow up the chain of command to the president. To the extent that forcing the disclosure of formal written opinions to the president's closest advisors would implicate the same concerns, *see* Gov't Br. 41, the government may argue that those opinions are exempt on summary

[17] Additionally, although it is not fully developed in the record at this stage in the proceedings, CfA's understanding from former OLC lawyers is that the OLC typically tells an agency in advance of issuing a formal written opinion if it plans on ruling against the agency, so that the agency has an opportunity to withdraw its request. *Cf.* Am. Compl. Ex. K at 1–2 (an OLC formal written opinion memorializing one agency's withdrawal of an issue from "the scope of [OLC's] review").

judgment after developing the record to support that claim. Beyond those narrow categories of opinions, however, CfA's legal theory here no more implicates constitutional concerns than does FOIA itself in commanding that agencies disclose working law and other agency records that reveal final decisions or final interpretations made by agency officials.

It is important to acknowledge, of course, that the ability to obtain confidential legal advice may improve government decisionmaking. But that general principle cannot justify the blanket secrecy the government requests. Congress recognized through FOIA that transparency also improves the functioning of our government. It enables democratic self-governance, it tempers overzealous executive officials, and it fosters accountability. The transparency that CfA seeks is the transparency that Congress commanded through FOIA. If the government believes that Congress got the balance wrong, then its complaint is properly addressed to Congress, not to this Court.

Conclusion

For these reasons, the Court should deny the government's motion to dismiss.

Respectfully submitted,

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