RECORD NO. 18-5116

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	No. 18-5116

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Court's April 24, 2018 Order, Appellant Citizens for Responsibility and Ethics in Washington ("CREW") certifies as follows:

I. Parties and Amici

Appellant CREW is a registered 501(c)(3) non-profit corporation. Appellee is the United States Department of Justice, a federal agency subject to the Freedom of Information Act ("FOIA"). There were no intervenors or amici.

II. Rulings Under Review

Appellant seeks review of the March 27, 2018 Order of Judge Trevor N. McFadden of the United States District Court for the District of Columbia granting Appellee's motion to dismiss Appellant's complaint, Docket Entry 27.

III. Related Cases

A prior case between the same parties concerning the same requested documents previously was before this Court, *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, No. 16-5110. That case, which appellant submits is not related within the meaning of Circuit Rule 28(1)(1)(C), was decided on a jurisdictional issue, while the present case is before the Court on the merits.

Counsel is aware of one related case within the meaning of Circuit Rule 28(1)(1)(C) currently pending before the U.S. District Court for the District of Columbia, *Campaign for Accountability v. U.S. Department of Justice*, Civil No. 16-cv-1068-KBJ.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, plaintiff-appellant Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principle activities, CREW routinely requests information from government agencies under the Freedom of Information Act ("FOIA") and pursues its rights to information under the FOIA through litigation. CREW disseminates to the public, through its website and other media, documents it receives and information it learns based in part on those documents and information obtained through other administrative processes.

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GLOSSARY

APA – Administrative Procedure Act, 5 U.S.C. §§ 701-706.

CREW – Citizens for Responsibility and Ethics in Washington

DOJ – U.S. Department of Justice

FOIA – Freedom of Information Act, 5 U.S.C. § 552.

OLC – Office of Legal Counsel, U.S. Department of Justice

INTRODUCTION

Plaintiff Citizens for Responsibility and Ethics in Washington formally requested that the Office of Legal Counsel, a component of Appellee U.S. Department of Justice, comply with its obligation to make publicly available all existing and future formal, final written opinions OLC issues that are covered by 5 U.S.C. § 552(a)(2) – the "reading room" provision of the Freedom of Information Act, 5 U.S.C. § 552. Receiving no response, CREW filed this action seeking an order compelling OLC to comply with its affirmative obligations to make those opinions publicly available and to comply with the related requirement of creating a public index of those opinions.

DOJ moved to dismiss the complaint arguing that because this Circuit has previously held that at least one OLC opinion is privileged and not subject to compelled disclosure, all OLC opinions are privileged, including those it designates as "controlling." DOJ further argued that CREW has no remedy under 5 U.S.C. § 552(a)(2) and must instead litigate its claims on an individual, document-by-document basis after filing individual FOIA requests.

The District Court granted DOJ's motion to dismiss, concluding CREW had failed to state a claim upon which relief can be granted. The Court agreed with DOJ that this Court's prior decision in *Electronic Frontier Foundation v. U.S. Dep't of Justice*, 739 F.3d 1 (D.C. Cir. 2014) ("*EFF*"), resolved this case.

According to the court below, because the agency had identified at least one OLC opinion – the one at issue in *EFF* – that was not subject to disclosure, CREW's claims as to all other OLC opinions must fail. In its ruling the District Court committed two fundamental errors: (1) that CREW bears the burden to establish that there in fact exist a significant number of OLC opinions that differ from that in *EFF*, and (2) that the single OLC opinion at issue in *EFF* conclusively establishes the inapplicability of section 552(a)(2) to all OLC opinions simply because OLC says it does.

STATEMENT OF JURISDICTION

This case challenges the withholding of agency records requested under the Freedom of Information Act, 5 U.S.C. § 552. The District Court had jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. It entered final judgment on March 27, 2018. CREW filed a notice of appeal on April 19, 2018, within the 60 days allowed by Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Did the District Court err by placing on CREW the burden to prove the existence of specific unpublished opinions of the OLC that fall within the scope of the reading room provision of the FOIA, rather than requiring defendants to

prove that all or virtually all OLC opinions are categorically exempt from the statute's mandatory disclosure obligations?

(2) Did the District Court err by construing *EFF* as establishing that most, if not all, OLC opinions CREW seeks under the FOIA's reading room provision, 5 U.S.C. § 552(a)(2), are subject to FOIA Exemption 5 as protected by the deliberative process and attorney-client privileges?

RELEVANT STATUTES

Plaintiff's claims for relief are based on 5 U.S.C. § 552(a)(2), which states:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying –
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
>
> . . .
>
> Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph [2] to be made available or published.

Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5), on which the District Court's decision relies in part, provides:

> (b) This section does not apply to matters that are – . . .
>
> (5) 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, provided that the deliberative process privilege shall not apply to records

> created 25 years or more before the date on which the records were requested.

STATEMENT OF THE CASE

Statutory and Regulatory Background

Since the 1946 enactment of the Administrative Procedure Act, Congress has required all federal agencies to publish in the Federal Register or otherwise make publicly available specified categories of records even without a request to do so. As originally enacted, section 3(a) of the APA directed all agencies to publish in the Federal Register "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public."[1] Section 3(b) directed agencies to make publicly available "all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents)." Known as the "Public Information" section, these requirements were described by the Senate as:

> among the most important, far-reaching, and useful provisions of the bill . . . drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few

[1] *See* Attorney General's Manual on the Administrative Procedure Act, Section 3 – Public Information (1947), citing 92 Cong. Rec. 5650 (Sen. Doc. p. 357), *available at* https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf.

> specialists or lobbyists, is entitled to know or have the ready means of knowing with definiteness and assurance.

S. Rep. No. 79-752, at 198 (1945).

By 1965, Congress was frustrated with the loopholes in section 3 on which agencies were relying "to deny legitimate information to the public," and the way agencies were using this provision "as an excuse for secrecy." S. Rep. No. 89-813, at 3 (1965). Through newly proposed legislation, Congress sought to clarify that "section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute." *Id.* at 5. Echoing the words of James Madison, supporters of the proposal noted, "[a] popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." *Id.*at 3.

One year later, Congress amended the APA and also included in the newly enacted FOIA the same requirement that all agencies make publicly available, *inter alia*, "all final opinions . . . and all orders made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency." Pub. L. 89-487, Section 3(b). The legislative history of this provision explains that the changes were designed to reconcile perceived conflicts between the public's need to know and the need to protect individual privacy by, among other things, requiring the disclosure of the "thousands of orders, opinions, statements, and instructions issued by hundreds of agencies," which the legislators

characterized as a "form of case law" developed by "the bureaucracy[.]" H. Rep. No. 89-1497, at 28 (1966). The legislative solution

> would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

H. Rep. No. 89-1497, at 28 (1966).

As currently codified, the reading room provision of the FOIA requires every agency to proactively make publicly available "(A) final opinions . . . 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). DOJ has explained that this is an obligation to "affirmatively and continuously disclose records proactively," which plays "a vital role in achieving an 'informed citizenry.'"[2]

The FOIA imposes this obligation in addition to the separate obligation to respond to a specific FOIA request under 5 U.S.C. § 552(a)(3)(A). *See CREW v. Dep't of Justice*, 846 F.3d 1235, 1240 (D.C. Cir. 2017) ("*CREW I*") (ruling in

[2] Department of Justice Guide to the Freedom of Information Act (2009) (quoting *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf#_PAGE6.

predecessor case to this that, because CREW had an adequate remedy under the FOIA, it had no independent APA claim). The reading room provision also imposes on agencies the further requirement to make publicly available without request "current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph [covering final agency opinions] to be made available or published[.]" 5 U.S.C. § 552(a)(2) (final paragraph E). Like the other proactive disclosure provision discussed above, the indexing requirement is not tied to whether a record has been requested or released. By contrast, in 1996, when Congress again amended § 552(a)(2) through the Electronic Freedom of Information Act Amendments to require agencies affirmatively to make a new category of information publicly available through agency reading rooms, it did so only for records already disclosed in response to a FOIA request that likely will be subject to subsequent requests. 5 U.S.C. § 552(a)(2)(D).

Office of Legal Counsel

The OLC is a component of DOJ that performs functions dating back to the Judiciary Act of 1789, making it "nearly as old as the Republic itself." *CREW I*, 846 F.3d at 1238. That Act charged the Attorney General with, *inter alia*, rendering advice and opinions on legal questions at the request of either the President or agency heads "touching any matters that may concern their

departments," Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. It is currently codified at 28 U.S.C. §§ 511-2. *See also* U.S. Constitution, art. 2, § 2, cl 1 (President "may require the opinion, in writing, of the principal officer in each of the executive departments"). Pursuant to 28 U.S.C. § 510, current DOJ regulations define the function of OLC as including the preparation of "the formal opinions of the Attorney General," 28 C.F.R. § 0.25(a), and "rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department." *Id.* at § 0.25(c).

In addition, the President by executive order has directed agency heads to submit inter-agency disputes to the Attorney General "[w]henever two or more Executive agencies are unable to resolve a legal dispute between them." Exec. Order No. 12,146, § 1-401, reprinted as amended in 28 U.S.C. § 509 (1988). Various DOJ components have exercised this authority over the years. In 1934, the Independent Offices Appropriation Act, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307 (1933), created within DOJ a new office of the assistant solicitor general to which the Attorney General delegated the responsibility to draft legal opinions and provide legal advice to other executive branch agencies.[3] The Reorganization Plan

[3] *See* Memorandum for the Office of the Assistant Solicitor General (June 1, 1939), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1939/06/31/op-olc-supp-v001-p0421_0.pdf.

No. 2 of 1950, 64 Stat. 1261, abolished that office and replaced it with the Executive Adjudications Division. In 1953, the Attorney General renamed it the Office of Legal Counsel. Att'y Gen. Order No. 9-53 (Apr. 3, 1953).

Transferring this function to OLC was far from an historical accident. Attorney General Bell, who began the tradition of having OLC compile and publish certain of its opinions,[4] was a fierce advocate for entrusting OLC, as "a dispassionate and detached institutional actor," with developing a "coherent, consistent interpretation of the law[.]"[5] Through its formal written opinions, OLC continues to serve as "a centralized and singular voice of executive branch legality."[6]

A detailed memorandum delineating OLC best practices acknowledges OLC's core function as providing "controlling" legal interpretations to executive branch officials on questions of law that are centrally important to the functioning of the federal government. Memorandum from Acting Assistant Attorney General David J. Barron to Attorneys of the Office, *Best Practices for OLC Legal Advice*

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[4] *See* Foreword, 1 Op. O.L.C. Supp., at vii-viii (2013).
[5] Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 822 (2017) ("Renan"), quoting Griffin B. Bell, U.S. Att'y Gen., Remarks Adapted from the Eighth Annual John F. Sonnett Memorial Lecture at Fordham University School of Law (Mar. 14, 1978), *in* The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L. Rev. 1049, 1064 and 1068 (1978).
[6] Renan at 821.

and Written Opinions, July 16, 2010 ("Best Practices Memo"). JA 17-22. As that Memo recognizes, within the executive branch "OLC has a unique mission[.]" JA 22. Former OLC head Karl R. Thompson also publicly characterized OLC's advice as "authoritative" and "binding by custom and practice in the executive branch. It's the official view of the office. People are supposed to and do follow it." Complaint ¶ 19 JA 9. OLC's formal opinions effectively may be the final word on controlling law. Best Practices Memo JA 17. OLC opinions confer the functional equivalent of immunity from criminal prosecution as DOJ generally does not prosecute individuals who acted in reliance on OLC opinions, even if their actions are later determined to be illegal., Complaint ¶ 21 JA 10.

One category of OLC opinions, which OLC has designated as "formal" opinions, carries particular significance to plaintiff's claims. According to the Best Practices Memo, these opinions, which appear to be the most substantively significant, bear certain objective signs that make them easy to identify for purposes of complying with section 552(a)(2). They are personally signed by the individual who heads OLC at the time they are approved, by two deputies, and by any attorney advisers who worked on them. They are prepared on bond paper; they go through additional clearance processes, including the preparation of an opinion control sheet; and they are separately filed and indexed. Best Practice Memo JA 20-21. In addition, as the Memo notes, "A written opinion is most likely to be

necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies." JA 19. Unless the Best Practices Memo is inaccurate, these formal opinions almost certainly fall within section 552(a)(2). Some other legal opinions issued by OLC (such as those given orally or over email) may also meet the requirements of section 552(a)(2), but CREW does not seek them in this action.[7]

This Court has described OLC as "[f]or decades . . . the most significant and centralized source of legal advice in the Executive Branch." *CREW I*, 846 F.3d at 1238. Executive branch officials have sought OLC opinions "on some of the weightiest matters in our public life: from the president's authority to direct the use of military force without congressional approval, to the standards governing military interrogation of 'alien unlawful combatants,' to the president's power to institute a blockade of Cuba." *Id.* OLC opinions have a profound effect on federal officers and employees, and therefore on members of the public affected by their actions, by determining the lawfulness of a range of conduct. Complaint ¶ 21 JA 10. *See also CREW I*, 846 F.3d at 1238.

[7] CREW also does not seek opinions or portions of opinions that are classified, nor does CREW seek memoranda prepared for the President.

Factual Background

Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. JA 6, ¶ 5. CREW is committed to protecting the rights of citizens to be informed about the actions of government officials; determining for the public what the executive branch considers to be binding law; ensuring the integrity of government officials and their actions; and protecting our democracy from corruption and deceit. *Id.* To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about government officials and their actions. *Id.* ¶ 6.

CREW has repeatedly and unsuccessfully sought access to OLC opinions through individual FOIA requests for specific categories of OLC opinions and broader requests for all formal written opinions and indices of those opinions. *Id.* ¶ 7. By a letter dated February 3, 2017, CREW requested that OLC "comply immediately with its obligations under 5 U.S.C. § 552(a)(2) by providing CREW with copies of all formal written opinions issued by OLC, all additional formal written opinions formalized in the future, and all existing indices of OLC's formal written opinions." JA 15-16. OLC neither responded to this letter nor made the requested disclosures.

CREW had previously requested that OLC comply with its reading room obligations and filed suit under the APA when OLC refused to do so. That lawsuit was the subject of this Court's opinion in *CREW I*, where it dismissed the lawsuit based on its conclusion CREW had an adequate remedy under the FOIA. Throughout these cases, OLC has raised a variety of procedural objections, arguing that the courts should not reach the merits of plaintiff's claim. On the merits, the government has made no showing that OLC opinions are not the kind of records covered by 5 U.S.C. § 552(a)(2), but claims that none of them must be disclosed because they all are either predecisional documents or contain attorney-client material and thus are exempt from disclosure under Exemption 5. Thus, the heart of the differences between the parties is whether the government is correct, largely based on this Court's opinion in *EFF,* that virtually all OLC opinions are covered by that exemption.

Proceedings Below

On March 10, 2017, CREW filed a complaint for injunctive and declaratory relief challenging the failure of DOJ to comply with its mandatory, non-discretionary duty under 5 U.S.C. § 552(a)(2) to make available to CREW, on an ongoing basis, the formal, written opinions issued by OLC and current indices of such opinions. CREW pointed to the Best Practices Memo as describing the kind of formal, written opinions CREW seeks. Specifically, CREW has requested OLC

opinions that, as described in that Memo, "provide…controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government," and "may effectively be the final word on controlling law." JA 11 ¶ 27; JA 17.

DOJ moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, mischaracterizing CREW's complaint as demanding that all formal, written opinions be produced, despite CREW's express request for those OLC opinions that have been formalized and finalized (and therefore not overturned by either the Attorney General or the President). JA 5, ¶ 2; JA 11 ¶ 27. In support, DOJ pointed to the *EFF* decision, which it argued held that even final, formal OLC opinions are always privileged and therefore outside the scope of the reading room provision in section 552(a)(2). DOJ also included as an exhibit to its motion an August 20, 2013 letter from then-Deputy Assistant Attorney General John E. Bies to CREW's counsel explaining why OLC does not believe it is subject to the mandatory disclosure provision in 5 U.S.C. § 552(a)(2). That letter asserted that the confidential legal advice OLC provides is privileged as predecisional or involves attorney-client communications and for that reason does not fall within the categories of opinions and policy statements the reading room provision requires be disclosed. JA 16. DOJ also moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) arguing to the extent CREW is challenging OLC's failure

to publish some of its opinions, such claim was neither ripe nor adequately pleaded.

In opposing this motion, CREW drew a sharp line between the advice documents DOJ argues are privileged and need not be disclosed, and the controlling legal opinions CREW seeks here. In a sur-reply, CREW identified specific opinions OLC has made public as a matter of discretion (described more fully below) that bear the attributes of opinions that must be disclosed to CREW under the FOIA reading room provision and the Best Practices Memo.

On February 28, 2018, the District Court issued a nine-page opinion granting DOJ's motion to dismiss for failure to state a claim upon which relief can be granted. The Court characterized CREW's claim as an all or nothing proposition, *i.e.*, one that seeks *all* OLC opinions and therefore must fail if even one OLC opinion is exempt from disclosure. The District Court construed *EFF* as therefore "doom[ing] CREW's complaint," JA 28, because it held the OLC opinion at issue there was subject to withholding under FOIA Exemption 5. To support that conclusion, it characterized the opinion at issue in *EFF* to be representative of all OLC opinions, even those described as formal in the Best Practices Memo. *Id.* From this error the Court placed on CREW the burden to identify "some specific subset of OLC's formal, written opinions [that] are being unlawfully withheld," JA

29, and that are *not* privileged, rather than following the FOIA and placing the opposite burden on the withholding agency. JA 30.

SUMMARY OF ARGUMENT

First, the District Court erred by misconstruing CREW's complaint as seeking *all* OLC opinions, and from this erroneous construction further erred by placing on CREW the burden to identify specific unpublished secret opinions of the OLC that fall within the scope of the reading room provision of the FOIA. Under the express terms of section 552(a)(2)(A), DOJ – not CREW – bears the burden to affirmatively identify and "make available for public inspection . . . final opinions . . . as well as orders, made in the adjudication of cases[.]" This obligation exists separately and independently from the obligation to produce non-exempt records upon request pursuant to 5 U.S.C. § 552(a)(3).

Second, the District Court erred by construing *EFF* as establishing that most, if not all, OLC opinions CREW seeks are protected by the deliberative process and attorney-client privileges. This construction conflicts directly with a body of this Court's opinions interpreting 5 U.S.C. § 552(a)(2) to encompass the very type of documents at issue here. Accepting this construction, especially in conjunction with the proposition that CREW, not the government, bears the burden of proof here would render the reading room provision a nullity, at least as to OLC,

defeating Congress' primary goal of preventing the accretion of a body of secret law.

The District Court compounded its error by denying CREW leave to conduct limited discovery, and instead concluding, based on no factual support, that all the opinions CREW seeks fall within the attorney-client and deliberative process privileges. Binding case law makes clear that determining whether opinions like those at issue here are either working law or privileged requires an understanding of the role they play in the agency's processes, and a demonstration of the existence of an attorney-client relationship or the predecisional and deliberative nature of the requested documents. Those facts, which are absent here, are required for a proper determination of plaintiff's claim.

ARGUMENT

I. THE DISTRICT COURT ERRED IN PLACING ON CREW THE BURDEN TO IDENTIFY SPECIFIC UNPUBLISHED SECRET OPINIONS OF THE OLC THAT FALL WITHIN THE SCOPE OF FOIA'S READING ROOM PROVISION.

When ruling on a Rule 12(b)(6) motion, a district court is required to construe the plaintiff's complaint liberally, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). Here, the District Court ignored the express language of CREW's complaint and drew all inferences in the government's favor to misconstrue CREW's claims as seeking all OLC

opinions without exception. From this misconstruction the Court improperly imposed on CREW a pleading burden completely at odds with the express language of the FOIA, including the affirmative disclosure obligations of section 552(a)(2).

First, while CREW was entitled to a liberal construction of its complaint by the District Court, even a strict construction exposes the fundamental error in the District Court's analysis. As expressly pleaded in the complaint, CREW seeks the "formal written opinions" OLC issues as "described in the Best Practice Memo[.]" JA 11, ¶ 27. That Memo describes OLC's formal written opinions as "*one* particularly important form of controlling legal advice the Office conveys." JA 17 (emphasis added). Thus, by definition, the OLC opinions at issue are a subset of the opinions OLC issues.

The District Court, however, mischaracterized the Complaint as premised on a claim for *all* OLC opinions that is both "universal" and "sweeping," and also accepted the government's all or nothing argument that CREW's claim fails "if the DOJ can identify any formal written opinions that are *not* subject to FOIA disclosure[.]" JA 27 and n.3 (emphasis in the original). From this the Court concluded that the mere existence of a privileged OLC opinion that the *EFF* court found was exempt from disclosure "squarely forecloses CREW's all-inclusive claim." JA 27.

Not only did the District Court err in its construction of the fundamental nature of CREW's claims, but that error formed the basis for the Court's ruling that CREW had not met its burden of proof. In so ruling, however, the District Court committed another fundamental error.

The FOIA expressly and unequivocally places the burden of proof on the agency, once in litigation, "to sustain its action," 5 U.S.C. § 552(a)(4)(B), "*not the requester to disprove*, that the materials sought . . . have not been 'improperly'' withheld.'" *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citation omitted) (emphasis added). *See also Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, No. 16-5339 (D.C. Cir. July 17, 2018), slip op. at 9 (Pillard, concurring); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) ("Unlike the review of other agency action . . . the FOIA expressly places the burden 'on the agency to sustain its action'"). As Congress recognized in enacting the FOIA, "[p]lacing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it." *U.S. Dep't of Justice v. Tax Analysts*, *id.*, quoting S. Rep. No. 813, 89th Cong., 2d Sess., 8 (1965).

This burden shifting reflects the asymmetrical relationship between a FOIA requester, who lacks knowledge of what responsive documents the agency possesses and for what purpose, and the agency that created them. *See Vaughn v.*

Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) ("In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information"). As the Supreme Court observed in *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975), in rejecting a similar broad brush refusal to disclose the agency legal opinions sought there: "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."

Here, CREW is challenging OLC's failure to disclose OLC opinions whose identities and descriptions are known only to DOJ, especially given its refusal to publish an index of its opinions as required by paragraph (E) of the reading room provision. By placing the burden on CREW as the requester to identify the specific OLC opinions that fall within the category of records subject to the FOIA's reading room provision, the District Court disregarded the express statutory command that the government bear that burden and instead tasked CREW with identifying a "specific subset of OLC's formal, written opinions [that] are being unlawfully withheld" and doing so with "adequate detail" that shows they fit within the categories of documents subject to section 552(a)(2). JA 29. This directive contravenes the animating principle of the FOIA and especially the affirmative disclosure requirements behind the reading room requirements.

Placing this burden on CREW also defies logic and commonsense, as CREW seeks OLC's compliance with provisions that, at their core, were enacted to eliminate the secret law that the requested OLC opinions represent. *See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 n.20. (FOIA's "primary objective is the elimination of 'secret law'") (citation omitted). In summarizing its opinions on the issue of secret law, this Court has stressed that they share "[a] strong theme . . . that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and its dealings with the public" and accordingly the FOIA will require agencies "to disclose 'orders and interpretations which it applies to cases before it[.]'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 876 (D.C. Cir. 1980) (citation omitted). To now hold, as the District Court did, that CREW bears the burden of identifying opinions that make up the "secret law" OLC has created, especially in light of DOJ's complete failure to provide indexes of its opinions, imposes a burden of proof that is almost impossible for CREW to meet. *See Irons v. Schuyler*, 321 F. Supp. 628, 629 (D.D.C. 1970), *affirmed in part & remanded in part,* 465 F.2d 608 (D.C. Cir 1972) (emphasizing importance of indexes "so that the public will have an adequate basis on which to make reasonable specific requests of the Patent Office.").

Nevertheless, CREW did outline the parameters of what it seeks, a difficult task given OLC's long history of making public only a subset of its formal opinions. Pursuant to an internal practice, memorialized in the Best Practices Memo, OLC exercises unbridled discretion as to whether and when to publish its formal opinions. Indeed, OLC has never even identified the total number of formal written opinions it has issued, let alone made publicly available indices of those opinions as required by paragraph (E). Yet despite this critical missing information, CREW identified attributes of a number of OLC opinions that fall within the reading room provision.

First and foremost, the OLC opinions CREW seeks are grounded in the Best Practices Memo. JA 5, ¶ 2; 9, ¶ 18; 11, ¶ 27. CREW seeks the formal written legal *opinions* of OLC, *id.*, but not its *advice* documents. Such documents "provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." JA 17. Moreover, OLC's analysis "may also reflect the institutional traditions and competencies" of the entire executive branch. *Id.* 18. The OLC opinions CREW seeks include those prepared at the request of both non-independent and independent agencies. Under the Best Practices Memo, OLC issues opinions to independent agencies only after receiving in writing from the requesting agency "an agreement that it will conform its conduct to our conclusion." JA 19. OLC

needs no such agreement from non-independent agencies, whose heads are subject to the direction of the President and the Attorney General when exercising statutory authority conferred by 28 U.S.C. §§ 511-13. CREW's request also includes those OLC opinions that dictate the outcome of disputes between agencies or affecting private individuals. Plaintiff's Sur-Reply in Opposition to Defendant's Motion to Dismiss at 5-6.

Nor is there any doubt such opinions exist as shown by the OLC opinions DOJ has chosen, in its discretion, to release. For example, then-Office of Management and Budget Director Joshua B. Bolten, in circulating to the heads of all departments and agencies an OLC memorandum on the use of government funds for video news releases that conflicted with the conclusions of the Government Accountability Office, stressed that "it is OLC (subject to the authority of the Attorney General and the President), and not the GAO, that provides the controlling interpretations of law for the Executive Branch." *Use of Government Funds for Video News Releases*, Mar. 11, 2005, *available at* https://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2005/m05-10.pdf. The "controlling interpretation" OLC offered in that case went well beyond offering an "advisory opinion," *EFF*, 739 F.3d at 10 (quotation omitted). Rather, it dictated that agencies may not follow GAO guidance, but instead must adhere to "the definitive Executive Branch position" OLC had spelled out on using

appropriated funds to prepare prepackaged news stories. *Whether Appropriations May Be Used for Informational Video News Releases,* 29 Op. O.L.C. 74 (2005), *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/03/15/op-olc-v029-p0074.pdf.

OLC affirmed the primacy of its opinions over those of GAO in another opinion concerning regulations of the Small Business Administration governing the interplay of three programs for specified small businesses that answered the question of whether GAO had the authority to invalidate SBA's regulations. *Permissibility of Small Business Regulations Implementing the Historically Underutilized Business Zone, 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs*, 33 Op. O.L.C. 1 (2009), 2009 WL 2870163 (O.L.C.). OLC concluded that SBA's regulations not only were reasonable, but also were "binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary." *Id.* at *11. In each of these opinions OLC did more than merely offer "advice" the requesting agency was free to accept or ignore, in contrast to *EFF*.

Further evidence of OLC's role in providing legal interpretations that the executive branch is not free to ignore is found in an OLC memorandum from October 16, 2007, in which OLC was asked to resolve the question of whether the Defense of Marriage Act ("DOMA") would prevent the Social Security

Administration from providing social security benefits to the non-biological child of a same-sex couple. *Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act*. 31 Op. O.L.C. 243 (2007), *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0243.pdf. OLC concluded DOMA would *not* have that effect in an opinion that went far beyond merely offering legal advice. Instead, it stated definitively that DOMA does not bar the child of a same-sex couple from qualifying for Social Security Act benefits, *id.* at 247, a conclusion that the Social Security Administration was not free to ignore.

Equally clear is the existence of OLC opinions that have a significant impact on private individuals by dictating the outcome of disputes to which private parties are or would otherwise be beneficiaries. For example, OLC issued a memorandum opinion concluding sovereign immunity barred VA hospitals from making back payments to VA physicians hired under the H-1B visa program, an opinion with a direct financial impact on those physicians. *Payment of Back Wages to Alien Physicians Hired Under H-1B Visa* Program, 32 Op. O.L.C. 47 (2008), *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/23/op-olc-v032-p0047.pdf. Similarly, OLC issued an opinion dictating the amount of retirement annuities certain Postal Service workers were entitled to receive.

Whether Postal Service Employees Are Entitled to Receive Service Credit, for Purposes of Their Retirement Annuity Under the Federal Employees' Retirement System, for Periods of Employment During Which the United States Postal Service Has Not Made its Required Employer Contributions, 36 Op. O.L.C. 1 (2011), 2011 WL 7431070 (O.L.C.).

These are just some of the OLC opinions CREW pointed to in its sur-reply as proof that OLC creates opinions falling within the reading room provision. Eventual publication of these opinions, of course, does not satisfy the affirmative obligation of prompt publication of formal OLC opinions that section 552(a)(2) imposes. As an exercise of OLC's self-proclaimed discretion, the selective publication of OLC opinions is by definition under-inclusive. Moreover, the cited opinions were not published in a timely manner as section 552(a)(2) requires, as OLC typically waits years before publishing its opinions. And OLC has yet to publish an index of any kind, further underscoring the need for the relief CREW requests here.

Taken as a whole, the record demonstrates the clear error of the District Court when it placed on CREW the burden to identify with specificity those OLC final written opinions DOJ has kept secret along with indices of its opinions and ignored the evidence CREW offered that OLC has failed to make public opinions that fall within section 552(a)(2). In its unquestioning acceptance of DOJ's claims,

the District Court essentially eliminated the affirmative obligations section 552(a)(2) imposes on all agencies, making all OLC opinions only available on a record-by-record basis, on request pursuant to 5 U.S.C. § 552(a)(3)(A), and only for those records that a requester can identify and describe as required by that provision.

II. THE DISTRICT COURT ERRED IN CONSTRUING THE *EFF* DECISION AS ESTABLISHING THAT ALL OR VIRTUALLY ALL OLC OPINIONS CREW SEEKS ARE PRIVILEGED AND THEREFORE NOT SUBJECT TO FOIA's READING ROOM PROVISION.

The District Court's decision rests on a single opinion from this Circuit that the court below construed as "doom[ing] CREW's complaint . . . because it establishes that at least one of OLC's formal written opinions . . . is exempt from FOIA" and because "more broadly, the opinion *suggests* that *many* of OLC's formal written opinions would be subject to the same deliberative process privilege." JA 28 emphasis added). In reaching this conclusion, the Court ignored the key factual distinctions between the opinion at issue in *EFF* and the opinions CREW seeks here and ascribed to *EFF* a sweeping impact for which there is no basis in that decision.

EFF was litigated under 5 U.S.C. § 552(a)(3)(A) based on the plaintiff's request for a single OLC opinion that this Court concluded did no more than give advice to another agency, and that the requesting agency was free to accept or

reject. *EFF*, 739 F.3d at 9-10. Nothing in the record in that case supports the District Court's characterization of the opinion at issue in *EFF* as a "formal written opinion" as the term is used in the Best Practices Memo. To the contrary, drawing from a description offered by the FBI's general counsel in congressional testimony, the *EFF* court repeatedly used the term "OLC opinion" to describe a document that "merely examines policy options available to the FBI," *id.* at 10, and "amounts to advice offered by OLC for consideration by officials of the FBI." *Id.* at 8.

Significantly, the opinion at issue in *EFF* concerned only past conduct, namely the legality of investigative tactics under review by the FBI's inspector general. The FBI sought the OLC opinion to assist it in determining how to respond to the IG's investigation of a practice the FBI had abandoned years earlier. *EFF*, 739 F.3d at 4. Thus, far from an opinion that would provide a conclusive legal analysis for *ongoing* or *future* conduct, the opinion in *EFF* analyzed past conduct and "examine[d] policy options," *id.* at 10, that the FBI had no intention of implementing in the future. Under OLC's best practices this kind of opinion would fall outside the formal written opinions the office issues, as OLC "avoids opining on the legality of past conduct," but instead will only "address legal questions prospectively[.]" JA 19.

Here, by contrast, CREW seeks formal written opinions that are prospective, that address "a concrete and ongoing dispute," and that OLC issues to meet "a practical need," rather than a speculative and "unnecessary" one. *Id.* Further, they provide "controlling legal advice," *id.* at 17, 18, rather than simply "examin[ing] policy options[.]" *EFF*, 739 F.3d at 10. These facts played a critical role in determining whether the requested OLC opinion in *EFF* fell within section 552(a)(2), as "the function of the documents in issue in the context of the administrative process which generated them" is "[c]rucial" in determining whether they are subject to withholding under FOIA Exemption 5, and therefore their relation to the reading room provision. *Sears,* 421 U.S. at 138. This Court has explained that the difference between deliberative opinions and those that are "legal conclusions . . . can turn on the subject matter of the [memo], on its recipient, on its place in the decisionmaking process, and even on its tone." *Tax Analysts v. IRS*, 294 F.3d 71, 82 (D.C. Cir. 2002) ("*Tax Analysts II*").

The District Court avoided considering any of these facts by adopting an overly broad interpretation of CREW's claims, which it construed as "premised on a universal claim" that OLC must disclose "all existing and future OLC formal written opinions" and indices of those opinions. JA 27. This construction ignores CREW's express request for access to formal written opinions setting forth "*controlling legal interpretations*," JA 5, ¶ 2 (emphasis added), including those

described by former OLC head Karl R. Thompson as "'authoritative' and 'binding by custom and practice in the executive branch.'" *Id.* 9, ¶ 19. The complaint makes clear the requested "formal written opinions" consist of those formal opinions "described in the Best Practice Memo" and that "fall within the categories of records that 5 U.S.C. § 552(a)(2) requires be made publicly and prospectively available[.]" JA 11, ¶ 27. Significantly, the Best Practices Memo limits its application to only a subset of "controlling legal advice the Office conveys: formal written opinions." JA 17.

Thus, contrary to the District Court's construction, CREW is not claiming *every* OLC opinion falls within the reading room provision, but only those formal opinions produced by the process the Best Practices Memo outlines. This context matters; the Best Practices Memo describes opinions that are the product of a system of binding precedent and that establish what the law means prospectively – all characteristics of "working law" that must be disclosed. *Tax Analysts II*, 294 F.3d at 810.

Moreover, the District Court's construction of the *EFF* decision conflicts with prior precedent of this Circuit interpreting what constitutes "working law" that must be disclosed under the FOIA's reading room provision, which the *EFF*

court decidedly did not, and in the case of *Sears*, could not overrule.[8] That precedent builds on the Supreme Court's recognition in *Sears* that the reading room provision "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy," 421 U.S. at 153, meaning those that have "the force and effect of law." *Id.* at 153 (quotation omitted).

Sears, like this case, involved legal memoranda that the defendant claimed were all entirely exempt under the deliberative process privilege. In the end, the Court concluded that some were exempt and others were not, based on their function in the adjudicative process that had been fleshed out in the District Court. Plaintiff does not claim that every opinion OLC ever issued is within section 552(a)(2) and outside section 552(b)(5), but only that a significant portion, in particular those that OLC designates as formal under the Best Practices Memo, are covered by section 552(a)(2). It is these opinions that must be made publicly available without a request and be described in a public index that defendants are required to prepare. How the lines will be drawn can be determined only after a full record is prepared, like the one that the Court had in *Sears*. That is directly

[8] The *EFF* court found this precedent was not dispositive in the case before it where the OLC had merely offered "advice . . . for consideration by officials of the FBI." 739 F.3d at 8. As discussed *supra*, prior OLC opinions make clear OLC does issue memoranda that go well beyond offering advice an agency is free to ignore and instead provide controlling interpretations of law, definitively resolve inter-agency disputes, rule on the rights of private parties, and clarify or resolve key questions concerning the legal authority of entities within the Executive Branch.

contrary to the District Court's ruling here that the opinion at issue in *EFF* conclusively represented all OLC opinions, formal or otherwise, unless plaintiff could prove the contrary.

This Court's opinion in *Coastal States Gas Corp. v. Dep't of Energy* likewise concluded that memoranda from agency regional counsel to field offices interpreting that agency's regulations constituted the working law of the agency. 617 F.3d at 858. Although those memoranda were much less "formal" or "binding" than are OLC formal opinions, those memoranda, like OLC opinions, were "regularly and consistently followed[.]" *Id.* at 859-60. Further, they were "indexed by subject matter," "used as precedent in later cases," "amended" or "rescinded" when necessary, and "on at least one occasion . . . cited to a member of the public as binding precedent." *Id*. at 860. From those facts, this Court concluded the memoranda were neither deliberative nor protected legal advice, but instead constituted "secret law" that the agency was required to disclose. *Id.* at 868-69. Carrying particular force, the memoranda "were retained and referred to as precedent. If this occurs, the agency has promulgated a body of secret law[.]" 617 F.3d at 869. *Coastal States* conforms with two early FOIA cases from this Court involving Exemption 5 that make it clear the exemption cannot be used to cover up the working law of an agency. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969), and *Irons*, 465 F.2d 608.

This Court revisited the relationship of secret law to Exemption 5 in *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997) ("*Tax Analysts I*"), when it was asked to consider whether IRS Field Service Advice Memoranda ("FSAs") constituted "agency law" that must be disclosed. As with the memoranda at issue in *Coastal States*, the government argued the FSAs were "not formally binding," but conceded they were "generally followed," 117 F.3d at 609, and as such, the Court concluded they were "agency law" that must be disclosed. *Id.* at 617. Key to the Court's analysis was the function of the FSAs to "'promot[e] . . . uniformity' throughout the country on significant questions of tax law." *Id.* As "statements of an agency's legal position" the Court held, the FSAs "cannot be viewed as predecisional" and subject to withholding under FOIA Exemption 5. *Id.* Like the advice memoranda at issue in *Coastal States*, the FSAs "reflect the law the government is actually applying in its dealings with the taxpaying public." *Id.* at 618.

This Court again considered this issue several years later in *Tax Analysts II*, when it addressed the status of certain Technical Assistance memoranda ("TAs") the IRS issued to program managers, typically in response to inquiries about how to deal with particular taxpayers. 294 F.3d at 80. The IRS argued they fell within the deliberative process privilege because "while the TAs to program managers may be the final word of OCC [Office of Chief Counsel], they are issued to

program officers who make the final decisions about their programs." *Id.* at 81. The Court rejected this factor as outcome determinative, ruling the disputed memoranda constituted "working law" that must be disclosed because "they represent OCC's final *legal* position," and "travel[led] horizontally from the OCC to program officers." *Id.* (emphasis in original). That the memoranda did not direct "final programmatic decisions of the program officers who request them" did not change their character as "working law" of the IRS. *Id.*

These nearly five decades of Circuit and Supreme Court precedent establish several key principles in determining whether legal memoranda are deliberative and therefore exempt from compelled disclosure or constitute an agency's working law that must be disclosed. First, key attributes of working law include having a precedential effect, promoting uniformity in legal interpretations, and guiding future agency action. Second, agency working law may include legal positions that do not dictate any specific policy decision. And third, legal advice typically flows upward to the agency decisionmaker, while working law typically flows downward or, as in *Tax Analysts II*, "horizontally." 294 F.3d at 81.

Here, the District Court ignored this precedent, instead relying exclusively on *EFF* to find CREW had failed to allege "a plausible claim to relief" as to all formal OLC opinions, no matter how controlling they were or what function they performed for the agencies affected by them. JA 30. But this across-the-board

conclusion ignores the attributes the requested OLC opinions share with the legal memoranda this Court has found constitute working law. The OLC opinions CREW seeks constitute a uniform system with precedential effect. The Best Practices Memo directs the office to "consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office," and cautions against "lightly depart[ing] from such past decisions[.]" JA 18. The evolution of the OLC dating back to the Judiciary Act of 1789 reflects a conscious decision to centralize in one body within DOJ the authority to decide for the executive branch what the law means.

The OLC opinions CREW seeks provide "controlling legal advice to Executive Branch officials" that may "*constrain* the Administration's or an agency's pursuit of desired practices or policy objectives." JA 17 (emphasis added). By operating as a potential constraint, OLC opinions clearly determine future agency actions by explaining "what the law is" and "what is not the law" for the government as a whole. *Tax Analysts I*, 117 F.3d at 617. Further, "OLC's advice may effectively be the *final* word on the controlling law." JA 17 (emphasis added). That OLC may not have the authority to dictate or implement an agency's policy as the District Court noted, *see* JA 28, does not, as in *Tax Analysts II*, change the fundamental character of its formal written opinions as the final legal position of the executive branch that travels either downward or horizontally from

OLC to the requesting agency, except in those instances where the President or Attorney General declines to adopt them.

The District Court erroneously believed that *EFF* compelled it to dismiss CREW's complaint. While prior precedent from this Circuit may at first blush appear to be in tension with *EFF*, that tension is best resolved by taking the *EFF* court at its word that its holding was limited to "the record before [it]." 739 F.3d at 4. That record focused on an OLC opinion that analyzed past conduct and "merely examine[d] policy opinions," *id*. at 10, unlike the formal written opinions CREW seeks, which conclusively determine the law to guide ongoing or future agency conduct.

In the District Court, plaintiff decided not to move for summary judgment, even though the Best Practices Memo directly supported its claim under section 552(a)(2). If that were all the record that exists, a court would be more than justified in concluding that (1) there are a substantial number of formal OLC opinions that are required to be published under section 552(a)(2); (2) OLC is not complying with its affirmative obligation to make such opinions promptly available without a specific request for them; and (3) OLC is not publishing an index of such opinions on a regular basis as required by law.

CREW, however, took seriously the admonition in *Sears* where the Court spent four pages discussing how the legal memoranda at issue there were used in

the NLRB adjudication process. 421 U.S. at 160-63. With none of those facts present here, CREW requested the opportunity to conduct limited discovery to be able to assure the Court that the factual assertions about the method of preparation and functions of the formal OLC opinions are as represented in the Best Practices Memo. Properly answering those factual questions and thereby understanding the function the OLC opinions play in "the context of the administrative process which generated them" is "crucial." *Id*. at 138.

The District Court, undeterred by the complete absence of a factual predicate, denied this request and concluded, again with no factual support, that "both the deliberative process privilege and the attorney-client privilege preclude CREW's requested relief under FOIA Exemption 5[.]" JA 30. By denying CREW the opportunity to develop through discovery facts that would better explain the role of the requested documents and the nature of the relationship between OLC and the requesting agencies, the District Court erred. For these reasons, a remand for plaintiff to take limited discovery, followed by cross motions for summary judgment, will put this case in a proper posture for this Court to review on the merits, as it surely will be requested by the party that loses on remand.

For all these reasons, the District Court erred when it relied exclusively on *EFF* to dismiss CREW's complaint. Accepting the District Court's crabbed

interpretation would defeat Congress' primary goal in enacting the reading room provision of preventing the accretion of a body of secret law.

* * *

The District Court improperly placed on CREW an evidentiary burden properly borne by the government under the FOIA. Nevertheless, and despite OLC's additional failure to make available an index of those opinions, CREW did establish the existence of opinions that share all the characteristics of "working law" as defined by nearly five decades of Supreme Court and Circuit precedent and that are presumptively covered by section 552(a)(2). The existence of one or even some privileged OLC opinions like that in *EFF* does not negate the secret law OLC has created over the course of years and refused to make public because the functions and other characteristics of the *EFF* opinion are not co-extensive with those of many if not most OLC formal opinions. The Best Practices Memo goes a long way toward establishing plaintiff's right to relief, but the interests of all parties would be best served by a remand to allow limited discovery that would dispel any lingering questions about the scope of this secret law and the applicability of section 552(a)(2) to OLC's formal opinions. On the other hand, if the decision below is upheld, it would render the affirmative disclosure requirements of section 552(a)(2) a nullity, certainly as to OLC, and perhaps for all agency legal opinions.

CONCLUSION

For the foregoing reasons, the judgment of the District Court dismissing this action should be reversed, and the case remanded for further proceedings on the merits of plaintiff's claims.

Respectfully submitted,

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Dated: August 8, 2018

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Dated: August 8, 2018

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I hereby certify that on this 8th day of August, 2018, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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