No. 13-

IN THE

Supreme Court of the United States

ELECTRONIC FRONTIER FOUNDATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires disclosure of agency records when requested by a member of the public, unless those records fall within one of the Act's nine narrow exemptions. One of those exemptions, Exemption 5, 5 U.S.C. § 552(b)(5), protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In *Sears*, this Court determined that Exemption 5, "properly construed," cannot apply to an agency's "effective law" or to documents "expressly" adopted by the agency. *Id.* at 153, 161. The questions presented are:

(1) Under what circumstances do the formal written opinions of the Office of Legal Counsel constitute the "effective law" of the executive branch or an executive agency?

(2) Under what circumstances are the formal written opinions of the Office of Legal Counsel "expressly" adopted by the executive branch or an executive agency?

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Cited Authorities

Page

Statutes

Federal Regulations

Opinions of the Attorney General

Page

Legislative Materials

Page

Other Authorities

Page

Page

PETITION FOR WRIT OF A CERTIORARI

The Electronic Frontier Foundation (EFF) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 3a) is published at 739 F.3d 1. The opinion of the United States District Court for the District of Columbia (Pet. App. 27a) is published at 892 F. Supp. 2d 95.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2014. Pet App. 3a. That court denied a timely petition for rehearing *en banc* on March 11, 2014. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of FOIA, 5 U.S.C. § 552, are reproduced at Pet. App. 47a-48a.

STATEMENT OF THE CASE

Warrantless domestic surveillance, torture, the targeted killing of American citizens abroad—these are among the most controversial government practices of the past fifteen years. And each found its legal authorization in a formal written opinion of the Office of Legal Counsel (OLC).

In light of the significance of OLC's opinions—both within government and without—the public regularly seeks disclosure of these documents under the Freedom of Information Act, (FOIA), 5 U.S.C. § 552. In response to these requests, the government invokes FOIA's Exemption 5 and the deliberative process privilege—a privilege intended to shield recommendations, suggestions, and other documents reflecting an "agency's group thinking," *Sears*, 421 U.S. at 153—to hide these formal opinions from public disclosure. However, as Dawn Johnsen, the former director of OLC, has noted:

> Our system does not work when the executive branch secretly determines not to follow enacted statutes—or interprets them away under extreme constitutional theories. [Facilitating public access to OLC opinions] assure[s] that in our constitutional democracy, where the rule of law is paramount, all branches of government and the American people know what the law is.

Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. (Apr. 30, 2008) (Testimony of Dawn E. Johnsen).

This case squarely presents an important and recurring question of federal law: under what circumstances, if any, may the government withhold the OLC's formal opinions under Exemption 5 and the deliberative process privilege? The question has divided the courts of appeals, and this Court's guidance is necessary.

I. The Formal, Written Opinions of the OLC and the Opinion At Issue Here

1. For over 200 years, the legal opinions of the Attorney General have been "considered as law" within the executive branch. 5 Op. Att'y. Gen. 97 (1849). Indeed, Congress created the office of Attorney General in 1789 to provide "advice and opinion upon questions of law . . . when requested by the heads of any [executive] departments, touching any matters that may concern their departments." Judiciary Act of 1789, Ch. 20, § 35, 1 Stat. 73, 93 (now codified at 28 U.S.C. § 512). The Judiciary Act signaled Congress' intention "that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force." 20 Op. Att'y Gen. 654 (noting Executive branch officers should regard the opinions of the Attorney General "as law until withdrawn by the Attorney-General or overruled by the courts . . . "); *Smith v. Jackson*, 246 U.S. 388, 389 (1918) (Attorney General's ruling on question of law "put[s] the subject at rest" for executive officials).

The authority to issue the formal written opinions of the Attorney General now resides, by delegation, with OLC—an office within the Department of Justice (DOJ). *See* 28 C.F.R. § 0.25(a). The formal opinions of OLC, unless withdrawn by the Attorney General or

President, represent the DOJ's authoritative construction of federal law and the Constitution. Indeed, "OLC's central function is to provide, pursuant to the Attorney General's delegation, *controlling* legal advice to Executive Branch officials . . . ." David Barron, Dep't of Justice, *Memorandum for Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) ("OLC Best Practices") at 1 (emphasis added) [J.A. 44].[1] Taken as a whole, OLC's formal opinions represent "the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters." John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 Cardozo L. Rev. 375, 376 (1993).

In exercising its delegated authority, OLC operates in a quasi-judicial capacity. The formal opinions of OLC seek "to provide an accurate and honest appraisal of applicable law"—"not simply an advocate's defense of the contemplated action." OLC Best Practices at 1 [J.A. 54]. OLC generally issues its formal opinions only "when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies." *Id.* at 3 [J.A. 56]. Because its practice is to "avoid[] opining on questions likely to arise in pending or imminent litigation involving the United States as a party," OLC's formal opinions often address "issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on the controlling law." *Id.* at 1 [J.A. 54]. Prior opinions

1. "J.A." refers to the Joint Appendix filed in the proceedings below, No. 12-5363 (ECF No. 1439951).

are "ordinarily give[n] great weight," but "as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases." *Id.* at 2 [J.A. 55].

OLC, itself, undertakes a "careful and deliberate process" when drafting its formal written opinions. *Id.* at 1 [J.A. 54]. This process includes: evaluating the opinion request; soliciting the views of interested agencies; researching, outlining, and drafting; and reviewing and finalizing opinions. *Id.* at 2-5 [J.A. 55-58]. Once finalized, OLC opinions are printed on bond paper, signed by the OLC official responsible for the opinion, and indexed for reference in future cases. *Id.* at 4-5 [J.A. 57-58].

2. The formal OLC opinion sought in this case (the Opinion) establishes the scope of the executive branch's authority to obtain private communications records without legal process or a qualifying emergency, despite apparent statutory prohibitions to the contrary. *See* Pet. App. 8a. Consistent with OLC's practice, the Opinion was generated to resolve a dispute between the DOJ's Office of Inspector General (OIG) and the FBI concerning the legality of a specific investigative technique. *See* Dep't of Justice, Office of the Inspector Gen., Oversight and Review Div., *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* ("*Exigent Letter Report*") 263-8. [J.A. 46-52]. The Opinion was generated after a lengthy inquiry by the OIG into the use and misuse of various surveillance authorities by the FBI in national security investigations. *See generally id.*

According to the publicly released OIG report, the legal authority provided to the FBI (and other executive branch agencies) by the OLC in the Opinion warranted careful scrutiny. *Id.* at 268 [J.A. 52]. In the OIG's view, the OLC Opinion "create[d] a significant gap in FBI accountability and oversight," warranting "appropriate controls" and close examination "by the FBI, the Department, and Congress." *Id.* Following the OIG's report, the FBI's general counsel testified before Congress concerning the Opinion and its authority, offering to answer questions in a closed-door session. *The Report of the Office of Inspector General Concerning the FBI's use of Exigent Letters and Other Informal Requests for Telephone Records: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 111th Cong. 24 (Apr. 14, 2010) (Statement of Valerie Caproni, General Counsel of the FBI) [J.A. 61]. To date, the government has never provided the public with access to the legal analysis contained within the OLC Opinion.

II. The Proceedings Below

1. In 2011, EFF submitted a FOIA request to OLC for the Opinion. OLC refused disclosure, citing Exemption 5, 5 U.S.C. § 552(b)(5), and Exemption 1, 5 U.S.C. § 552(b)(1), of FOIA. After exhausting its administrative remedies, EFF filed suit in the U.S. District Court for the District of Columbia.

2. Following summary judgment briefing, the district court affirmed OLC's withholding of the Opinion, in its entirety, under Exemption 5. Pet. App. 44a. In reaching its decision, the district court did not address petitioner's primary arguments—that, under this Court's decision

in *Sears*, 421 U.S. 132, 153, the Opinion constituted the executive branch's "effective law," or that the Opinion was adopted by the agency. The district court nonetheless upheld the government's withholding because, in its view, the Opinion "was generated as part of a continuous process of agency decision-making, namely how to respond to the OIG's critique of the FBI's information-gathering methods." Pet. App. 43a. The district court also upheld the government's withholding of "specific portions" of the Opinion under Exemption 1, which protects information validly classified pursuant to executive order.[2] *Id.* at 33a.

3. EFF appealed, seeking review of the district court's determinations concerning Exemptions 1 and 5. At the Court of Appeals, EFF renewed its argument that the OLC Opinion—as a controlling, precedential legal interpretation—constituted the agency's working law and that, under any circumstances, the Opinion had been adopted by the agency.

The D.C. Circuit's decision focused entirely on the propriety of the agency's Exemption 5 claim. The panel acknowledged and assumed that OLC opinions were "controlling," "precedential," and establish the "legal parameters of what [an agency] is permitted to do." Pet. App. 18a-19a (emphasis omitted). Nevertheless, the panel held that, "[b]ecause OLC cannot speak authoritatively on the FBI's policy," the Opinion therefore could not constitute the FBI's "law." Pet. App. 17a.

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2. The government also claimed the Opinion was protected by the attorney-client privilege; however, because the district court concluded the deliberative process privilege protected the opinion in its entirety, it did not reach the application of the attorney-client privilege. *See* Pet. App. 44a.

The panel also concluded that the Opinion had not been adopted. The panel reasoned that, because the "FBI never *itself* publicly invoked or relied upon the contents of the OLC Opinion," express adoption had not occurred. Pet. App. 22a (emphasis in original). According to the panel, neither the OIG's multiple references to the Opinion and its legal conclusion, nor Congressional testimony by the FBI's general counsel about the Opinion, altered that determination. Pet. App. 22a-23a.

A timely petition for rehearing *en banc* was denied. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This case provides an appropriate vehicle for authoritatively determining under what circumstances the public can access the formal written opinions of OLC under FOIA.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Toward that end, FOIA's provisions represent "a strong congressional aversion to 'secret (agency) law,' . . . [and] an affirmative congressional purpose to require disclosure of documents which have the force and effect of law." *Sears*, 421 U.S. at 153 (internal citations and quotations omitted).

The legal opinions of the Attorney General have been treated "as law" within the executive branch for nearly 200 years. These opinions, now issued by OLC, provide

legal clearance for a variety of government practices and programs—from the banal to the controversial, the historic to the unremarkable. Given the unique characteristics of OLC's formal opinions and their broad effect, public access to these documents is a question of significant national concern. This significance inevitably results in FOIA litigation—especially from the media and public interest organizations seeking to inform advocacy and the public. The courts of appeals are now divided on the status of these opinions under Exemption 5, and this case is the correct vehicle for resolving this division.

As this Court noted in *Sears*, OLC opinions, like the one at issue here, are "precisely the kind of agency law in which the public is so vitally interested and which Congress," in passing FOIA, "sought to prevent the [government] from keeping secret." *Sears*, 421 U.S. at 156.[3]

I. Public Access to OLC's Formal Written Opinions Is a Question of National Importance.

The public has an unquestionable interest in access to OLC's interpretations of law. OLC opinions often represent the final word on the legality of executive branch action and provide powerful shields of legal immunity to executive officials relying in good faith on their conclusions. It is not surprising then that Congress, the media, and public interest organizations frequently

3. To be clear, it is not petitioner's position that *all* OLC opinions are invariably the "law" of the agency or "adopted," simply by virtue of their issuance. However, given the unique characteristics of these opinions, to come within the privilege, an agency must be required to do more than characterize a formal OLC opinion as "advice."

request access to these opinions. Despite the importance of public access, the DOJ has interpreted the decision of the panel below to authorize a near-categorical shield of privilege for these important documents.

In light of all these factors, this Court's review is necessary to ensure public access to these vitally important documents is not unduly curtailed.

1. OLC opinions have provided the legal authorization for some of the federal government's most controversial practices of the past fifteen years. *See* Editorial, *What Happened to Transparency?*, N.Y. Times (Jan. 7, 2014).[4] OLC opinions have provided legal clearance for: the targeted killing of an American citizen abroad, *see* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times (Oct. 5, 2011);[5] executive branch recess appointments during *pro forma* Senate sessions, *see* Charlie Savage, *Justice Dept. Defends Obama Recess Appointments*, N.Y. Times (Jan. 12, 2012);[6] shielding executive branch documents from Congressional investigative bodies, *see Executive Privilege Claim Opens New Questions for Lawmakers Probing Fast and*

4. *Available at* http://www.nytimes.com/2014/01/08/opinion/what-happened-to-transparency.html.

5. *Available at* http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html.

6. *Available at* http://www.nytimes.com/2012/01/13/us/politics/justice-dept-memo-defends-obama-on-recess-appointments.html.

Furious, Foxnews.com (Jun. 21, 2012);[7] and collecting customer data from telecommunication companies without legal process (the Opinion at issue in this case). *See* Charlie Savage, *Court Grants Secrecy for Memo on Phone Data (*N.Y. Times, Jan. 3 2014).[8] OLC also offers its controlling legal opinions on questions concerning more mundane government programs and practices. *See, e.g.*, Office of Legal Counsel, Competitive Bidding Requirements Under the Federal-Aid Highway Program (Aug. 23, 2013); Office of Legal Counsel, Restrictions on Travel by Voice of America Correspondents (Sept. 10, 1999).

In addition to providing legal authorization for government actions, formal OLC opinions provide a powerful shield of legal immunity for government officials relying in good faith on an opinion's determinations. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 Wake Forest L. Rev. 93, 122-31 (2008) (analyzing effect of OLC opinions under *Harlow*). Indeed, according to former Attorney General Mukasey, "the Justice Department . . . could not investigate or prosecute somebody for acting in reliance" on an OLC opinion. *Oversight Hearing of the Department of Justice: Hearing Before the H. Comm. on the Judiciary,* 110th Cong. (Feb. 7, 2008) (Testimony of Attorney General Michael Mukasey).

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7. *Available at* http://www.foxnews.com/politics/2012/06/21/executive-privilege-claim-opens-new-questions-for-lawmakers-probing-fast-and/.

8. *Available at* http://www.nytimes.com/2014/01/04/us/court-backs-shielding-of-legal-memo-on-phone-records.html.

Because OLC opinions provide the legal authorization for a broad swath of executive branch actions, and because they often work to cloak executive branch officials with immunity for their actions, there is a strong national interest in public access to these opinions.

2. In light of this importance, Congress, the media, and public interest organizations regularly seek access to the opinions of OLC in order to inform the public and to hold the executive branch to account.

Members of Congress stress the importance of access to OLC opinions in ensuring executive branch compliance with the law. As Senator Dianne Feinstein recently noted, access to OLC opinions "isn't just idle curiosity. It's really to understand the direction and rules under which certain programs operate. . . . [T]hese opinions are actually indispensible to effective oversight." *Nomination of Daniel Bennett Smith and Caroline Diane Krass: Open Hearing Before the Sen. Sel. Comm. on Intel.* 113th Cong. (Dec. 17, 2013) (Statement of Sen. Dianne Feinstein, Chair, Sen. Sel. Comm. on Intel.). A bipartisan group of Senators recently reiterated the point. In a letter to President Obama concerning public access to an OLC opinion, the group emphasized that "[i]t is vitally important . . . for Congress and the American public to have a full understanding of how the executive branch interprets the limits and boundaries of [its] authority." Letter from Sen. Ron Wyden, *et al.*, to President Barack Obama (Feb. 4, 2013);[9] *see also* 158 Cong. Rec. S149-S151 (daily ed. Jan. 30, 2012) (Statement of Sen. Grassley) ("The only way to

9. *Available at* http://www.wyden.senate.gov/download/?id=dadf4bfd-1e2b-4a42-b4d2-be3e58cbb82e&download=1.

tell whether the office has given independent advice . . . is to review the arguments and the reasoning the Office of Legal Counsel provides.").

Public interest organizations and good-governance groups regularly seek access to the opinions of OLC as well. Organizations concerned with government ethics and corruption, like Citizens for Responsibility and Ethics in Washington (CREW) and Judicial Watch, have sought OLC opinions under FOIA; organizations concerned with civil liberties, national security matters, and electronic surveillance, like the American Civil Liberties Union, the Brennan Center for Justice, and petitioner, have sought access to OLC opinions; and civil rights and human rights groups, like the National Council of La Raza and Amnesty International, have sought access to OLC opinions. *See, e.g. Judicial Watch v. Dep't of Justice,* No. 12-01350, 2014 WL 794220 (D.D.C. Feb. 28, 2014); *Brennan Ctr. for Justice v. Dep't of Justice*, 697 F.3d 184 (2nd Cir. 2012); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2nd Cir. 2005). In short, to ensure accountability and oversight, public interest organizations from across the political spectrum seek access to OLC opinions through FOIA.

Finally, the country's most prominent media organizations regularly seek access to OLC opinions for reporting purposes. *See, e.g.,* Marisa Taylor, *Obama Assertion: FBI Can Get Phone Records Without Oversight*, McClatchy Newspapers (Feb. 11, 2011) (discussing FOIA request for OLC opinion by McClatchy Newspapers);[10] Savage, *Justice Dept. Defends Obama*

10. *Available at* http://www.mcclatchydc.com/2011/02/11/108562/obama-assertion-fbi-can-get-phone.html.

Recess Appointments, *supra at* 10 (reporting on OLC opinion obtained by the author, Charlie Savage, in response to a FOIA request). Indeed, the editorial boards of both the *New York Times* and *Washington Post*, among other media outlets, have advocated for public access to the specific Opinion at issue here—and to OLC opinions more generally. *See* Editorial, *What Happened to Transparency?,* supra at 10; Editorial, *Open Justice Department's Legal Interpretations to the Public*, Wash. Post (Apr. 1, 2013);[11] *see also* Bruce Fein, *'Rule of Law' Vulnerability*, Wash. Times (Feb. 19, 2008) at A14 (arguing for public access to OLC opinions on interrogation techniques).

3. Despite the broad importance of public access to these documents, DOJ has attempted to employ the decision of the panel below to authorize a near-categorical exemption from FOIA for OLC's formal opinions. For example, in a recent district court filing, the agency characterized the panel's decision in this way:

> Pursuant to [the D.C. Circuit's decision], OLC opinions are not final agency decisions, and therefore need not be disclosed . . . . [I]t is clear that a substantial portion (*if not all*) of OLC's "binding" opinions . . . may be properly withheld as privileged.

Reply Memorandum in Support of Defendant's Motion to Dismiss at 16, 20-21 *CREW v. Dep't of Justice*, No. 13-1291

11. *Available at* http://www.washingtonpost.com/opinions/open-justice-departments-legal-interpretations-to-the-public/2013/04/01/9384041c-9b11-11e2-9bda-edd1a7fb557d_story.html.

(D.D.C. Jan. 30, 2013) (ECF No. 11) (emphasis added). Indeed, a recent district court decision adopted precisely such a sweeping approach: in a case involving ten OLC opinions authorizing various government surveillance programs, the court determined there was "no principled way to distinguish the OLC opinion" at issue there from the Opinion at issue in this case. *EPIC v. Dep't of Justice*, No. 06-0096, 2014 WL 1279280 (D.D.C. Mar. 31, 2014) (ECF No. 91).[12]

4. This broad assertion of the privilege is consistent with recent government practice. The government's invocation of Exemption 5, and the deliberative process privilege more specifically, has steadily expanded over the last several years. According to a study by CREW using FOIA data reported by various federal agencies, eight of the fifteen agencies included in the study increased their use of Exemption 5 between 2008 and 2010, for a cumulative increase of eleven percent across the fifteen agencies included in the study. CREW & Openthegovernment.org, *Measuring Transparency Under the FOIA: The real story behind the numbers*, 28 (December 2011).[13] The rate at which government agencies invoke Exemption 5 has continued to increase from 2010 to the present. According

12. Indeed—in a separate FOIA action involving a separate OLC opinion and an entirely separate government program—DOJ has gone so far as to suggest that EFF is collaterally estopped from arguing that OLC opinions constitute an agency's "law." *See* Reply Memorandum in Support of Defendant's Motion to Dismiss at 15, *EFF v. Dep't of Justice*, No. 11-5221 (N.D. Cal. May 2, 2014) (ECF No. 80).

13. *Available at* http://crew.3cdn.net/5911487fbaaa8cb0f8_9xm6bgari.pdf.

to a more recent analysis of publicly available data by the Associated Press, the government invoked the deliberative process privilege of Exemption 5 a record 81,752 times in 2013. Ted Bridis & Jack Gillum, *US Cites Security More to Censor, Deny Records*, Associated Press (Mar. 16, 2014).[14] Senator Patrick Leahy, addressing statistics showing the government's growing use of Exemption 5, has noted the concerning trend towards relying on Exemption 5 "to withhold large swaths of government information[, which] is hindering the public's right to know." *Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age: Hearing before the S. Comm. on the Judiciary,* 113th Cong. (Mar. 11, 2014) (Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee).

II. The Lower Courts Are Divided on the Appropriate Treatment of OLC's Formal Opinions Under Exemption 5.

Since this Court's decision in *Sears* nearly forty years ago, the courts of appeals have struggled with the "somewhat Delphic" contours of Exemption 5 and the deliberative process privilege, *Dep't of Justice v. Julian*, 486 U.S. 1, 11 (1988)—especially as applied to the formal opinions of OLC. Most notably, the Second and D.C. Circuits have divided on the treatment of these important documents under Exemption 5. This lack of clarity, in turn, has lead to divergent results in the federal district courts, which regularly hear cases seeking these opinions. This Court's review is thus necessary to definitively resolve the status of these important documents under FOIA and Exemption 5.

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14. *Available at* http://bigstory.ap.org/article/us-cites-security-more-censor-deny-records.

1. The source of the division arises from this Court's decision in *Sears*, 421 U.S. 132 (1975), a case concerning documents generated in the course of the NLRB's investigation of unfair labor practice complaints. After reviewing FOIA's purpose of eliminating "secret law," this Court offered two separate—but often blurred—principles governing the application of Exemption 5 and the deliberative process privilege. First, *Sears* teaches that Exemption 5, "properly construed, calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy. . . ." *Id.* at 153. Second, the *Sears* Court held that, "if an agency chooses expressly to adopt or incorporate by reference" a document within a final agency opinion, that document, too, loses the protection of the deliberative process privilege. *Id.* at 161.[15] The Second and D.C. Circuits have

15. In *Renegotiation Board v. Grumman*, a companion case decided the same day as *Sears*, the Court further explored the limits of Exemption 5. 421 U.S. 168 (1975). The case concerned two sets of documents, created by staff for the Renegotiation Board in the course of determining "whether government contractors have earned, and must refund, 'excessive profits.'" *Id.* at 170. There, the Court found that the privilege did apply to the two withheld documents, holding:

> Because only the full Board has the power by law to make the decision[;]. . . because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of the report, we conclude that the reports are not final opinions and do fall within Exemption 5.

divided on the application of these two principles to the opinions of the OLC.

2. First, the circuits have divided on whether OLC opinions constitute an agency's "effective law."

In the proceedings below, the D.C. Circuit determined that the OLC Opinion did not constitute the DOJ's "law" because it did not represent a "conclusive or authoritative statement" of the FBI's "*policy*." Pet. App. 17a (emphasis added). Although the D.C. Circuit acknowledged the OLC opinion was "controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and [could be] withdrawn," the court found these indicia of a binding legal decision did not operate to remove the opinion from the privilege. Pet. App. 18a.

In contrast, the Second Circuit in *Brennan Center* articulated the opposite view. *See Brennan Center*, 697 F.3d at 201. The Second Circuit held that an OLC opinion constitutes an agency's "law" if it is "effectively binding on the agency" or left the agency with "'no decision to make,' as in *Sears*." *Brennan Center*, 697 F.3d at 203.[16]

Id. at 184. As the Second Circuit has noted, "*Grumman* did not explain its reasoning using the same terminology as *Sears*," but did focus on two similar and "somewhat distinct paths through which Exemption 5's protections could be lost." *Brennan Center*, 697 F.3d at 197. The qualities the Court identified in *Grumman*—"operative effect," *id.* at 198; and an "indication that [a report's] reasoning has been adopted," *id.* at 197— largely mimic the agency "law" and "express" adoption principles described in *Sears*.

16. In arriving at this conclusion, the Second Circuit relied upon and reviewed the same cases as the panel below, but it nevertheless reached the opposite result. *Compare Brennan*

Although the Second Circuit ultimately found the opinion at issue did not constitute the agency's "law," it reached that determination only because the plaintiff had failed to offer evidence to the contrary. *Id.* Indeed, the Second Circuit noted that its holding "would be different" if the plaintiff had "adduced evidence that OLC opinions were essentially binding upon the agencies." *Id.* at 204 n.16.

3. The Second and D.C. Circuit's division is even more apparent concerning those circumstances in which an OLC opinion has been "expressly" adopted.

In the decision below, the D.C. Circuit found that repeated and explicit references to the OLC Opinion in a public report of the OIG; Congressional testimony about the Opinion from the FBI's general counsel; and executive branch reliance on the Opinion to ensure intelligence-gathering procedures comply with the law were insufficient to establish that the Opinion had been expressly adopted. *See* Pet. App. 21a-23a.

In contrast, the Second Circuit's decision in *Brennan Center* found that an OLC opinion had been expressly adopted under far more relaxed circumstances. The court found that a single reference to an OLC opinion's conclusion—in a footnote of a public document—and Congressional testimony referencing that conclusion, "taken together," established "express adoption or

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Center, 697 F.3d at 200-02 (reviewing *Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2010), *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), and *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980)) *with* Pet. App. 14a-19a (reviewing those cases, among others).

incorporation by reference." *Brennan Center*, 697 F.3d at 204.[17]

The Second Circuit's recent decision in *N.Y. Times v. Dep't of Justice* further complicates the application of the adoption doctrine[18] to the opinions of OLC. Nos. 13-422(L), 13-445 (Con.), 2014 WL 1569514 (2nd Cir. Apr. 21, 2014).[19]

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17. The panel below mistakenly characterized the facts giving rise to the Second Circuit's finding of adoption in *Brennan Center*. The panel stated a "director of the agency explained that he changed positions 'following' advice of OLC, and described that advice." Pet. App. at 23a (citing *Brennan Center*, 697 F.3d at 192). However, in *Brennan Center*, two OLC opinions were at issue: one tentative opinion, and a later draft opinion that reached a different conclusion. *Brennan Center*, 697 F.3d at 190-91. The "advice" the director in *Brennan Center* testified about "following" was not the OLC opinion the Second Circuit ordered disclosed. Instead, it was a letter from OLC officials notifying the agency it was withdrawing its previous tentative opinion. But it was that tentative opinion, which was merely mentioned in Congressional testimony, that the Second Circuit ordered disclosed. *Brennan Center*, 697 F.3d at 204. Indeed, the *Brennan Center* court characterized the evidence of adoption as "two public statements referencing" the OLC opinion. *Id.* at 204.

18. The *N.Y Times* court's decision was couched in terms of "waiver" of the deliberative process privilege, but the courts of appeals have often used "adoption" and "waiver" of the privilege interchangeably. *See* Pet. App. 19a-23a (analyzing "adoption" under heading of "Waiver by Public Adoption or Reliance").

19. On June 5, 2014, the government filed a petition for panel rehearing or rehearing *en banc*. No. 13-422 (ECF No. 217). The petition, however, does not appear to challenge the Second Circuit's determination that the OLC opinion was unprotected by the deliberative process privilege. *See id.* at 9-10 (challenging disclosure of specific information).

There, the Second Circuit determined that, when OLC's opinions establish "the legal boundaries" within which an agency can operate and the agency assures the public its practices are "lawful," the government cannot "then shield [the legal analysis] from public view." *N.Y. Times*, 2014 WL 1569514 at *12 (internal citations and quotations omitted); *but see* Pet. App. 19a (finding that, even where an OLC opinion describes "the legal parameters" of an agency's authority and countenances an agency's action as legal, adoption has not occurred).[20]

Indeed, beyond the particular context of OLC opinions, the standard for express adoption of other legal memoranda is confused still further. In *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977), the Seventh Circuit found that a legal opinion—sent to the Watergate Special Prosecutor, written by its counsel, and quoted and relied upon in the Special Prosecutor's letter explaining its decision not to seek a criminal indictment of President Nixon—had been "expressly adopted." *Id.* at 972-73. Although only part of the document had been publicly quoted, the court found that "[m]ore than the mere quotation of a legal memorandum is involved here." *Id.* at 973. The quotation in the public report, combined with the statement that the "decision was consistent with the conclusions reached" in

20. The *N.Y. Times* court also placed some significance on the disclosure of a "16-page, single-spaced DOJ White Paper" that "explains why targeted killings" do not violate various statutes and the Constitution. 2014 WL 1569514 at *12. Although the opinion suggests the White Paper may have parroted much of the content of the OLC opinion at issue, because portions of the court's opinion remain redacted, the full import of the White Paper on the court's analysis remains unclear. *Id.* at *1 n. 1.

the counsel's opinion, rendered the document adopted. *Id.*; *but see* Pet. App. 22a-23a (where opinion is quoted and consistent with the FBI's interpretation, OLC opinion is not adopted).

And, even within the Second Circuit, the adoption principle is inconsistently applied. In *Tigue v. Dep't of Justice*, 312 F.3d 70 (2nd Cir. 2002), the Second Circuit considered the application of Exemption 5 to a document that outlined "the Southern District [of New York's] opinions and recommendations as to how the Internal Revenue Service should conduct criminal tax investigations." *Id.* at 73. Although the document was cited and quoted in an independent task force's final published report, the Court held this was insufficient to establish adoption. *Id.* at 81; *but see, Brennan Center*, 697 F.3d at 204 (finding "two public statements referencing" an OLC opinion sufficient to establish adoption). *See also Wood v. FBI*, 432 F.3d 78, 84 (2nd Cir. 2005).

4. This lack of clarity, particularly concerning the status of OLC opinions, has led to unpredictable and disparate results in the lower courts. For example, while the Second Circuit determined the OLC opinion at issue in *N.Y Times* had been adopted, a district court in the Northern District of California determined that same OLC opinion was deliberative and exempt from disclosure. *Compare N.Y. Times*, 2014 WL 1569514, *with First Amendment Coalition v. Dep't of Justice*, No. 12-1013, 2014 WL 1411333 (N.D. Cal. Apr. 11, 2014) (ECF No. 86). Conversely, and as noted above, the D.C. Circuit's decision in this case has been asserted to afford separate OLC opinions—created in different contexts, for different programs, and concerning different topics—

near-categorical exemption from disclosure. *See supra* at 15. Although *Sears* counsels that an understanding of the particular documents at issue and the context "which generated them" is "crucial" to determining the application of the privilege, the D.C. Circuit's decision—as interpreted and applied by the government—all but dispenses with that particularized approach. *See Sears,* 421 U.S. at 138.

In sum, this Court's guidance is necessary to assist the lower federal courts in determining when a controlling legal opinion, like the OLC Opinion at issue here, is exempt from disclosure under the deliberative process privilege.

III. This Is an Appropriate Case in Which to Definitively Resolve the Status of OLC Opinions Under Exemption 5.

For two reasons, this case presents the right opportunity for the Court to address the application of Exemption 5 and the deliberative process privilege to OLC opinions.

1. The panel below squarely addressed the two questions presented in this petition. *See* Pet. App. 13a-19a. (addressing status of OLC Opinion as agency "law"); *see* Pet. App. 19a-23a (addressing adoption of OLC Opinion). Additionally, the panel's resolution of these two questions formed the sole basis for its decision. Pet. App. 26a. The status of OLC opinions under Exemption 5 is thus squarely presented for this Court's review.

2. Additionally, the circumstances in this case are typical of other cases of this type. In every FOIA case

seeking an OLC opinion of which petitioner is aware, the government has relied on Exemption 5, and the deliberative process privilege, to justify its withholding. *See, e.g., N.Y Times*, 2014 WL 1569514; *EPIC*, 2014 WL 1279280; *Judicial Watch*, 2014 WL 794220; *Samahon v. Dep't of Justice*, No. 13-06462 (E.D. Pa. *filed* Nov. 6, 2013). Thus, the resolution of this case will provide clarity for the lower courts in a number of current, and future, similarly situated lawsuits.

IV. The D.C. Circuit's Decision Is Inconsistent with this Court's Precedent and the Requirements of FOIA.

The decision of the panel below was incorrect: the OLC Opinion constitutes the DOJ's "law" and it was adopted by the DOJ. The decision therefore conflicts with *Sears* and undercuts one of the primary purposes animating FOIA—the elimination of agency "secret law." *See Sears*, 421 U.S. at 153.

As described above, *Sears* teaches that "Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody" both an "agency's effective law" and an agency's "policy." *Id.* (internal citations and quotations omitted). While the decision below recognized that an agency's "policy" must be disclosed, the decision ignored the disclosure requirements applicable to an agency's "law." Indeed, the panel's decision assumed that the OLC Opinion "describes the legal parameters of what the FBI is permitted to do," Pet. App. 19a (emphasis omitted)—that is, the Opinion establishes the "effective law" of the agency. *Sears*, 421 U.S. at 153. Yet the panel then upheld the application of Exemption 5 because the OLC Opinion did not establish FBI *policy*. Pet. App. 18a.

("That the OLC Opinion bears these indicia of a binding legal decision does not overcome the fact that OLC does not speak with authority on the FBI's policy[.]"). However, the distinction is unsupported by this Court's precedent: *Sears* requires disclosure for *both* definitive statements of "law *and* policy." *Sears*, 421 U.S. at 153 (emphasis added).

The distinction—between permissibly withholding an agency's "effective law," and requiring disclosure only of an agency's "policy"—finds no support in the text of FOIA, either. Indeed, the statute affirmatively calls for the disclosure of *both* "those statements of policy *and* interpretations which have been adopted by the agency." 5 U.S.C. § 552(a)(2)(B) (emphasis added). The panel's decision thus conflicts with *Sears* and the primary tenets of FOIA: as a controlling legal interpretation constituting the agency's "effective law," the OLC Opinion may not be withheld under the deliberative process privilege.

In addition, the OLC Opinion has been expressly adopted by DOJ, which also operates to waive the privilege. The panel below determined that, in the absence of "public references to the OLC Opinion" from "the FBI itself," the Opinion had not been expressly adopted. Pet. App. 22a. But the panel's determination conflates *Sears*' requirement of "express" adoption with "public" adoption: a document may be expressly adopted *within* an agency without that adoption having publicly observable traits. Indeed, FOIA's purpose of eliminating "secret law" is ill-served by a rule, like the one articulated below, that permits agencies to circumvent the Act's disclosure requirements, simply by avoiding public reference to a document—especially when that document governs agency conduct internally.

Accordingly, when taken together—the public references to the Opinion in the OIG's report; the fact that the OLC Opinion is controlling on executive agencies; the willingness of the FBI's general counsel to discuss the contents of the OLC Opinion with Members of Congress; and the executive branch's admitted use of the Opinion to "ensure its investigative practices comply with the law," Decl. of Paul Colborn, ¶ 13 [J.A. 23]—the circumstances evidence an express adoption of the OLC Opinion by the DOJ and operate to waive the privilege.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: June 9, 2014

Respectfully Submitted,

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APPENDIX

APPENDIX A — DENIAL OF PETITION FOR REHEARING *EN BANC* OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, FILED MARCH 11, 2014

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5363

September Term, 2013
1:11-cv-00939-RJL

Filed On: March 11, 2014

Electronic Frontier Foundation,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Edwards and Sentelle, Senior Circuit Judges

Appendix A

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JANUARY 3, 2014

United States Court of Appeals
For The District of Columbia Circuit

Argued November 26, 2013 Decided January 3, 2014

No. 12-5363

ELECTRONIC FRONTIER FOUNDATION,

APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00939)

Before: SRINIVASAN, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: Electronic Frontier Foundation ("EFF") appeals the District Court's denial

of its request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, for disclosure of a legal opinion (the "OLC Opinion") prepared for the Federal Bureau of Investigation (the "FBI") by the Office of Legal Counsel ("OLC") in the Department of Justice. *Elec. Frontier Found. v. Dep't of Justice*, 892 F. Supp. 2d 95 (D.D.C. 2012). The District Court held that the OLC Opinion, in its entirety, is exempt from FOIA disclosure for two reasons. First, the District Court held that the OLC Opinion is covered by the "deliberative process privilege" in FOIA Exemption 5, which "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)); 5 U.S.C. § 552(b)(5). Second, the District Court concluded that portions of the OLC Opinion are exempt from disclosure under FOIA Exemption 1 because they are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." *Elec. Frontier Found.*, 982 F. Supp. 2d at 91-101 (citing 5 U.S.C. § 552(b)(1)).

EFF contests the District Court's holding that the OLC Opinion is covered by the deliberative process privilege. Br. of Appellant at 19-34. EFF argues further that, even if the OLC Opinion might have been covered by the deliberative process privilege, the FBI waived the privilege by relying on the OLC Opinion in dealings with

Congress and the Office of the Inspector General (the "OIG"). *Id.* at 34-37. Finally, EFF claims that the District Court erred in failing to require the agency "to specify in detail which portions of the document are disclosable and which are allegedly exempt" under Exemption 1. *Id.* at 46 (quoting *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 950 (D.C. Cir. 1998)), and that it also "erred by failing to determine whether there was unclassified, factual information . . . that was 'reasonably segregable' from the [OLC] Opinion's other content." *Id.* at 50 (quoting 5 U.S.C. § 552(b)).

On the record before us, we hold that the OLC Opinion, which was requested by the FBI in response to the OIG's investigation into its information-gathering techniques, is an "advisory opinion[], recommendation[] and deliberation[] comprising part of a process by which governmental decisions and policies are formulated," and is therefore covered by the deliberative process privilege. *Klamath Water Users*, 532 U.S. at 8 (quotation omitted). We also hold that the FBI did not "adopt" the OLC Opinion and thereby waive the deliberative process privilege. The OIG mentioned the OLC Opinion in its report, and a congressional committee inquired about the OLC Opinion, but the FBI never itself adopted the OLC Opinion's reasoning as *its* own. Finally, because the entire OLC Opinion is exempt from disclosure under the deliberative process privilege, we need not decide whether particular sections were properly withheld as classified, or whether some material is reasonably segregable from the material properly withheld.

Appendix B

I. BACKGROUND

A. Statutory Framework

FOIA requires government agencies to make available "final opinions . . . as well as orders," "statements of policy and interpretations which have been adopted by the agency," and "administrative staff manuals and instructions . . . that affect a member of the public." 5 U.S.C. § 552(a)(2). FOIA exemptions allow agencies to withhold information from disclosure if it has been properly classified under criteria established by Executive order "to be kept secret in the interest of national defense or foreign policy," *id.* § 552(b)(1) (Exemption 1), and "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," *id.* § 552(b)(5) (Exemption 5). Exemption 5 covers material that would be protected from disclosure in litigation under one of the recognized evidentiary or discovery privileges, such as the attorney-client privilege. *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (citing *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 862 (D.C. Cir. 1980)). The deliberative process privilege is one of the litigation privileges incorporated into Exemption 5. It allows an agency to withhold "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Sears*, 421 U.S. at 153 (quotations omitted).

Appendix B

B. Procedural History

Several statutes permit the FBI to use "national security letters" to subpoena telephone and financial records that it certifies are connected to an authorized national security investigation. *See* Br. for Appellee at 4 (citing 12 U.S.C. § 3414(a)(5)(A); 18 U.S.C. § 2709; 15 U.S.C. § 1681u(a)-(b); 50 U.S.C. § 436(a)(1) (transferred to 50 U.S.C. § 3162)). The USA Patriot Improvement and Reauthorization Act of 2005 directed the OIG to audit the "effectiveness and use, including any improper or illegal use," of these national security letters. Pub. L. No. 109-177, § 119, 120 Stat. 192 (2006). The OIG's initial report found that the FBI had issued "exigent letters" to request records from telephone companies in cases in which FBI officials had not certified that the records were part of an authorized national security investigation, as required for a bona fide national security letter. U.S. Dep't of Justice, Office of the Inspector General, A Review of the Federal Bureau of Investigation's Use of National Security Letters 92 (March 2007), http://www.justice.gov/oig/special/s0703b/final.pdf.

Following these findings, the OIG conducted a second investigation into the FBI's use of exigent letters for requesting telephone records. Dep't of Justice, Office of the Inspector General, A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records (January 2010) ("OIG Report"), www.justice.gov/oig/special/s1001r.pdf, *reprinted in part in* Joint Appendix ("J.A.") 46. The OIG provided the FBI with a draft of this report. Valerie

Caproni, General Counsel of the FBI, then sought legal advice from OLC about the investigative tactics at issue. Decl. of Paul P. Colborn, Special Counsel in the Office of Legal Counsel at 4-5, *reprinted in* J.A. 21-22 ("Colborn Decl.").

The OIG Report, which has been publicly disclosed, explains that:

> [A]fter reviewing a draft of the OIG report the FBI asked the Office of Legal Counsel (OLC) for a legal opinion on this issue. . . . [T]he OLC agreed with the FBI that under certain circumstances [redacted authority] allows the FBI to ask for and obtain these records on a voluntary basis from the providers, without legal process or a qualifying emergency. . . . [T]he FBI acknowledged in its July 2009 comments to a draft of this report that it had never considered or relied upon [redacted authority] when it obtained any of the telephone records at issue in this report. Moreover it cannot be known at this point whether any provider would have divulged such records based on [redacted authority] alone, and without the FBI's representation that a[] [national security letter] or other compulsory legal process would be served.

OIG Report at 264-65, *reprinted in* J.A. 48-49. The OIG Report concluded that "the potential use of [redacted authority] by the FBI has important policy implications"

and "creates a significant gap in FBI accountability and oversight that should be examined closely by the FBI, the Department, and Congress." *Id.* at 268, *reprinted in* J.A. 52. However, the OIG Report also acknowledged that "[t]he FBI has stated that it does not intend to rely on [redacted authority]." *Id.* at 265 n.283, *reprinted in* J.A. 49.

On April 14, 2010, the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing concerning the OIG Report. As relevant to the OLC Opinion, FBI General Counsel Caproni testified:

> The OIG's 2010 report discusses a January 8, 2010 opinion issued by [OLC], which concluded that [the Electronic Communications Privacy Act] does not forbid electronic communications service providers, in certain circumstances, from disclosing certain call detail records to the FBI on a voluntary basis without legal process or a qualifying emergency. Many members of Congress have asked questions about this OLC opinion, which is classified. It is my understanding that it has been shared with our oversight committees, including this Committee, at the appropriate security level. Because of the classified nature of the OLC opinion, I cannot address it in this forum, but am available to discuss it in a secure setting. I can, however, state that the OLC opinion did not in any way factor into the FBI's flawed practice of using exigent letters between 2003 and 2006 nor did it

> affect in any way the records-retention decisions made by the FBI as part of the reconciliation project discussed above.

The Report of the Dep't of Justice, OIG, Concerning the FBI's use of Exigent Letters and Other Informal Requests for Telephone Records: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 111th Cong. (April 14, 2010) at 10, *reprinted in* J.A. 60, 70 (Statement of Valerie E. Caproni, General Counsel, FBI) ("Caproni Testimony").

On February 15, 2011, EFF submitted a FOIA request for the OLC Opinion. Relying on FOIA Exemptions 1 and 5, the Department of Justice denied EFF's request because the OLC Opinion contains classified information and is covered by the deliberative process privilege. Letter from Paul P. Colborn, Special Counsel in OLC, to David L. Sobel (Feb. 25, 2011), *reprinted in* J.A. 30. EFF filed suit in District Court seeking disclosure of the OLC Opinion. The Department of Justice submitted two affidavits in support of its motion for summary judgment: Paul Colborn, Special Counsel in OLC, declared that the OLC Opinion is "pre-decisional and deliberative" in nature, and "disclosure . . . would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective decision-making." Colborn Decl. at 6, *reprinted in* J.A. 23. Colborn further declared that the OLC Opinion is also exempt from disclosure insofar as it contains "content derived from confidential and classified communications made by the FBI to OLC." *Id.* at 5, *reprinted in* J.A. 22.

Appendix B

David Hardy, Section Chief of the Record/ Information Dissemination Classified National Security Information, § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009)). Hardy explained that the information contained in the OLC Opinion is "highly specific in nature and known to very few individuals," it describes intelligence gathering techniques that the FBI presently uses, and disclosure "would allow hostile entities to discover the current methods and activities used and . . . then develop countermeasures which could severely disrupt the FBI's intelligence-gathering capabilities." *Id.* at 9, *reprinted in* J.A. 41.

The District Court concluded that the OLC Opinion is covered by the deliberative process privilege because it "contains inter-agency material that was generated as a continuous process of agency decision-making, namely how to respond to the OIG's critique of the FBI's information-gathering methods." 892 F. Supp. 2d at 103. The District Court declined to rule on whether attorney-client privilege also exempts the OLC Opinion from disclosure because the deliberative process privilege applies to all portions of the document that would be subject to the attorney-client privilege. *Id.* The District Court noted that the Department of Justice is "asserting Exemption 1 only as to certain paragraphs of the OLC Opinion which have been marked as classified in accordance with the classification markings included in the FBI's two letters to OLC requesting legal advice," and it found the Department of Justice's declarations sufficiently specific "to identify the records referenced and understand the basic reasoning behind the claimed exemptions." *Id.* at 101

(quoting *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007)). The District Court concluded that "no portion of the OLC Opinion is reasonably segregable and releasable" because "the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in redacted format." *Id.* at 104.

II. ANALYSIS

A. Standard of Review

We review decisions granting summary judgment in FOIA cases *de novo*. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007). The agency bears the burden of showing that a claimed exemption applies. *Pub. Citizen*, 598 F.3d at 869 (citing *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008)). Summary judgment is warranted when the agency's affidavits "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984) (quotations omitted); *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." (quotations omitted)).

B. Deliberative Process Privilege

The deliberative process privilege protects agencies from being "forced to operate in a fishbowl." *EPA v. Mink*,

410 U.S. 73, 87 (1973) (quotations omitted). And it applies when "production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects." *Id.* (quotations omitted). The privilege "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Sears*, 421 U.S. at 153 (quotations omitted). The privilege is limited to documents that are "predecisional" and "deliberative," meaning "they 'reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency's adoption of a policy.'" *Pub. Citizen,* 598 F.3d at 875 (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981)).

Importantly, the Supreme Court's decision in *Sears* explained that, under FOIA, agencies must disclose their "working law," i.e. the "reasons which [supplied] the basis for an agency policy actually adopted." 421 U.S. at 152-53. In other words, an agency is not permitted to develop "a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (quoting *Coastal States*, 617 F.2d at 867). Therefore, an agency must disclose "binding agency opinions and interpretations" that the agency

"actually applies in cases before it." *Id.* (quoting *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)).

In *Sterling Drug,* we required disclosure of memoranda prepared by the Federal Trade Commission to the extent that they contained "orders and interpretations" that the Commission actually applied in a particular acquisition case. 450 F.2d at 708. We explained that the deliberative process privilege's policy "of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged." *Id.* In *Coastal States*, we followed this principle to hold that memoranda from regional counsel to auditors in field offices must be disclosed because the memoranda "represent[ed] interpretations of established policy on which the agency relies in discharging its regulatory responsibilities." 617 F.2d at 869. Such interpretations "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." *Id.* at 868 (quoting *Sterling Drug*, 450 F.2d at 708); *accord Schlefer*, 702 F.2d at 244 (holding that the privilege does not extend to opinions of the Chief Counsel of the Maritime Administration interpreting statutes the agency administers because they "are authoritative Agency decisions in the cases to which they are addressed and . . . also guide subsequent Agency rulings").

The same principle applied in *Tax Analysts v. IRS,* 117 F.3d 607 (D.C. Cir. 1997) *(Tax Analysts I)*, where we held that the privilege did not cover advice memoranda from the Office of the Chief Counsel to field personnel

providing legal guidance with respect to the situations of specific tax payers. *Id.* at 609, 618. We explained that the "structure and purposes" of the system of issuing advisory memoranda to field personnel "reveal that the national office, in issuing these memoranda, is attempting to develop a body of coherent, consistent interpretations of federal tax laws nationwide." *Id.* at 617. Hence, even though the memoranda are "nominally non-binding," they are "considered statements of the agency's legal position." *Id.* Reaching the same conclusion with respect to similar advice memoranda in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002) *(Tax Analysts II)*, we noted that the memoranda used language such as "[i]t is the position of the Treasury Department that . . ." and "[w]e conclude." *Id.* at 81. We explained that the "tone of these [memoranda] indicates that they 'simply explain and apply established policy.'" *Id.* (quoting *Coastal States*, 617 F.2d at 869).

In *Public Citizen*, we found that the deliberative process privilege did not cover Office of Management and Budget ("OMB") memoranda describing which agencies were permitted, by statute or by prior OMB practice, to submit their budgetary materials to Congress without first clearing them with OMB. 598 F.3d at 868. We found that these documents "determine OMB's interaction with outsiders" and had "real-world effects on the behavior of . . . agencies," *id.* at 872; the documents thus "reflect[ed] OMB's formal or informal policy" and "fit comfortably within the working law framework," *id.* at 875.

None of the foregoing authorities is dispositive here, however, because OLC did not have the authority to

establish the "working law" of the FBI. OLC therefore did not "explain and apply established policy." *Tax Analysts II*, 294 F.3d at 81 (quoting *Coastal States*, 617 F.2d at 869). The OLC Opinion instead amounts to advice offered by OLC for consideration by officials of the FBI. Such a memorandum is not the law of an agency unless the agency adopts it. *See* Part C. *infra*.

The authorities that control the disposition of this case are the decisions holding that the deliberative process privilege *does* cover legal memoranda that concern the *advisability* of a particular policy, but do not authoritatively state or determine the agency's policy. For example, we have held exempt from disclosure memoranda containing legal advice from the Legal Adviser to the Secretary of State "concerning United States policy on issues involving" affairs in the Middle East. *Brinton v. Dep't of State*, 636 F.2d 600, 602 (D.C. Cir. 1980). The court explained that "[t]here can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5." *Id.* at 604. The Legal Adviser's "role is to give advice to those in the State Department who do make the policy decisions," and, thus, the "flow of advisory material is exactly opposite of the paradigm of 'final opinions,' which typically flow from a superior with policy-making authority to a subordinate who carries out the policy." *Id.* at 605 (citation omitted). In *Murphy v. Dep't of Army*, 613 F.2d 1151, 1154 (1979), this court held that the privilege covers a memorandum from the Army General Counsel to Assistant Secretary providing advice on whether to enter a contract, because

"[t]he Assistant Secretary *who had decision-making power* . . . sought *advice* from the general counsel . . . on the legal questions raised." (citations omitted) (emphasis added).

EFF argues that the OLC Opinion constituted the "working law" of the FBI because it "constituted 'guidance' used by [the agency] in [its] dealings with the public." Br. of Appellant at 29 (quoting *Coastal States*, 617 F.2d at 869). The Government counters that the FBI's "[c]onsultation with legal advisers at the Department of Justice constitutes precisely the sort of 'give-and-take of the consultative process' that the deliberative process privilege was designed to protect." Br. for Appellee at 15 (quotations omitted). According to the Government, OLC's Opinion is not the FBI's "final decision about how, if at all, to alter its investigatory techniques," because "th[is] decision was the FBI's to make after consulting with OLC and any other parts of the government it chose to involve in its policy-making process." *Id.* (quotations omitted).

Because OLC cannot speak authoritatively on the FBI's policy, the OLC Opinion differs from memoranda we have found to constitute the "working law" of an agency. In each of these cases, to avoid the development of "secret law," the agency was required to disclose a document that represented a conclusive or authoritative statement of its policy, usually a higher authority instructing a subordinate on how the agency's general policy applies to a particular case, or a document that determined policy or applied established policy. In contrast, the OLC Opinion is more similar to the advice from the Legal Adviser to the

Secretary of State pertaining to policy in the Middle East in *Brinton*, or the advice from the Army's General Counsel pertaining to the advisability of a certain contract in *Murphy*. OLC is not authorized to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy. *See* Colborn Decl. at 1-2, *reprinted in* J.A. 18-19 ("OLC does not purport, and in fact lacks authority, to make policy decisions. OLC's legal advice and analysis may inform the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.").

EFF argues that the OLC Opinion must be "working law" because it is controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn. Br. of Appellant at 22-24, 30-34. That the OLC Opinion bears these indicia of a binding legal decision does not overcome the fact that OLC does not speak with authority on the FBI's policy; therefore, the OLC Opinion could not be the "working law" of the FBI unless the FBI "adopted" what OLC offered. In *Brinton*, we rejected the appellant's claim that memoranda must be released because they constituted the "final opinions" of the Department of State. We explained that while the privilege does not protect final decisions or authoritative statements on agency policy, the "final opinions" of the Department of State's Legal Adviser, "who has no authority to make final decisions concerning United States policy in the Middle East," are not final decisions of the Department of State. 636 F.2d at 605. The same is true of the OLC Opinion in this case.

Even if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy. The FBI was free to decline to adopt the investigative tactics deemed legally permissible in the OLC Opinion. Indeed, the OIG's report acknowledged that the FBI had "declined, for the time being, to rely on the authority discussed in the OLC Opinion." Br. for Appellee at 15-16 (citing OIG Report at 265 n.283, *reprinted in* J.A. 49). The OLC Opinion does not provide an authoritative statement of the FBI's policy. It merely examines policy options available to the FBI. Therefore, the OLC Opinion is not the "working law" of the FBI.

On this record, we hold that the OLC Opinion reflects precisely the sort of "advisory opinion . . . comprising part of a process by which governmental decisions and policies are formulated" that is covered by the deliberative process privilege. *Pub. Citizen*, 598 F.3d at 875 (quotations omitted); *accord Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 203 (2d Cir. 2012) ("The [OLC] Memorandum does not constitute working law, or the agency's effective law and policy." (quotations omitted)); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 n.4 (2d Cir. 2005) (presuming OLC memorandum satisfies requirements of deliberative process privilege).

C. Waiver by Public Adoption or Reliance

In *Sears*, the Court explained that Exemption 5 does not apply "if an agency chooses *expressly* to adopt

or incorporate by reference" a memorandum that would have otherwise been protected by the privilege. 421 U.S. at 161 ("[W]hen adopted, the reasoning becomes that of the agency and becomes *its* responsibility to defend."). The same day *Sears* was decided, the Court also held in *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, that the "adoption" exception to Exemption 5 did not apply to reports addressing whether government contractors were required to refund excessive profits under their contracts, even though the agency's decision agreed with the reports' conclusion. The decision clarified that in order for the exception to apply, it must be evident that "the reasoning in the report is adopted by the [agency] as *its* reasoning, even when [the agency's decision] agrees with the conclusion of a report." 421 U.S. 168, 184 (1975).

We have thus recognized that "the Court has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (a department head's "confused statement" in testimony before a Senate committee that might be read as a reference to the privileged document "fell far short of the *express* adoption required by *Sears*"); *Common Cause v. IRS*, 646 F.2d 656, 660 (D.C. Cir. 1981) ("[C]asual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda is not the express adoption or incorporation by reference which . . . would remove the protection of Exemption 5."). These decisions stand in contrast to *Afshar v. Dep't of State*, 702 F.2d 1125, 1140 (D.C. Cir. 1983), where the court held that when "predecisional

recommendations . . . are expressly adopted in [a] final, nonexempt memorandum, . . . 'the reasoning becomes that of the agency and becomes *its* responsibility to defend.'" *Id.* at 1142 (quoting *Sears*, 421 U.S. at 161) (emphasis in *Sears*). In this case, EFF cannot point to any evidence supporting its claim that the FBI expressly adopted the OLC Opinion as its reasoning.

EFF argues that the FBI "adopted" the OLC Opinion by "approving[] public references in non-privileged agency documents (like the OIG report) and reliance in congressional testimony." Br. of Appellant at 36. EFF relies on two decisions in which the Second Circuit held that an agency waived the privilege by referencing an OLC memorandum in its dealings with the public. *Id.* (citing *Brennan Ctr.*, 697 F.3d at 204; *La Raza*, 411 F.3d at 357). But these cases are inapposite because, in each one, the agency *itself* publicly invoked the reasoning of the OLC memorandum *to justify* its new position.

In *La Raza*, the court found that the "Attorney General and his high-level staff made a practice of using the OLC Memorandum to justify and explain the Department [of Justice]'s policy and to assure the public and the very state and local government officials who would be asked to implement the new policy that the policy was legally sound." 411 F.3d at 358. In *Brennan Center*, a U.S. Agency for International Development guidance document referenced an OLC Opinion as a basis for exempting U.S. non-governmental organizations from a requirement to pledge to oppose sex trafficking in order to receive aid. 697 F.3d at 191. And when the agency changed this

policy, a director explained during Congressional hearings that OLC had changed its position, and he was "simply following . . . the advice" of OLC. *Id.* at 192 (quotations omitted).

This case differs from the cases cited by EFF because the public references to the OLC Opinion did not come from the FBI itself. Rather, the public references originated from the OIG and Congress. The OIG mentioned the OLC Opinion in its Report and Caproni was asked about it by members of Congress. However, the FBI never *itself* publicly invoked or relied upon the contents of the OLC Opinion. *Grumman* explained that the adoption exception only applies if "the reasoning in the [privileged document] is adopted by the [agency] as *its* reasoning." 421 U.S. at 184 (emphasis added). The OIG's references to the OLC Opinion do not establish that *the FBI* adopted the OLC Opinion as *its own* reasoning. Nor does Caproni's response to inquiries from members of Congress establish that the FBI adopted the OLC Opinion's reasoning as *its own*. Colborn explained that the OLC Opinion "has not been made public, and to the extent that it has been shared with others in the Government, these individuals would . . . only have been persons with an appropriate security clearance and a need to know—that is, individuals whose job responsibilities related to national security." Colborn Decl. at 6, *reprinted in* J.A. 23. Colborn made it clear that anyone who viewed the OLC Opinion "would have understood the need for confidentiality." *Id.*

When Caproni mentioned the OLC Opinion during congressional rather than affirmatively raising it to justify

the FBI's policy. Caproni's testimony thus differs from the communications in *Afshar*, the congressional testimony in *Brennan Center*, and the statements in *La Raza*. In *Afshar*, the court found that the disputed memoranda in that case were predecisional when written, but the recommendations that they contained were not protected by the deliberative process privilege once they were "expressly adopted as the basis for agency action." 702 F.2d at 1140. In *Brennan Center*, a director of the agency explained that he changed positions "following" advice of OLC, and described that advice. 697 F.3d at 192. In *La Raza*, the District Court found that the Department of Justice had, "through the public statements of its representatives, incorporated the OLC Memorandum into Department policy." 411 F.3d at 355. In contrast, Caproni never claimed that the FBI's investigative tactics were justified by the OLC Opinion. To the contrary, she actually disavowed reliance on the OLC Opinion, stating that it "did not in any way factor into the FBI's flawed practice of using exigent letters between 2003 and 2006 nor did it affect in any way the records-retention decisions made by the FBI as part of the reconciliation project." Caproni Testimony at 10, *reprinted in* J.A. 70. Far from publicly using the OLC Opinion to justify the FBI's position, Caproni's testimony indicates that the OLC Opinion *did not* determine the FBI's actions or policy.

D. Segregability

It is undisputed that under FOIA non-exempt information that is "reasonably segregable" from exempt information must be disclosed. 5 U.S.C. § 552(b). EFF contends that the District Court "erred by failing to

determine whether there was unclassified, factual information within the OLC Opinion that was 'reasonably segregable' from the Opinion's other content." Br. for Appellant at 50. We disagree. In a section entitled "Segregability," the District Court specifically held that "the Department has sufficiently established that no portion of the OLC Opinion is reasonably segregable and releasable." 892 F. Supp. 2d at 104. This holding is supported by the record. *See* Colborn Decl. at 5-7, *reprinted in* J.A. 22-24.

In pressing its claim for segregability, EFF relies on *Loving v. Dep't of Defense* for the proposition that "the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." 550 F.3d 32, 38 (D.C. Cir. 2008) (citing *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993)). In response, the Government points out that:

> The OLC declarant explained that "[t]hose portions of the Opinion that are marked unclassified reflect other confidential factual as well as confidential legal communications provided by the FBI to OLC *for the purpose of obtaining legal advice.*" This statement confirms that the entire document reflects the full and frank exchange of ideas between the FBI and OLC, and that revealing portions of the document would reveal the substance of those privileged communications.

Br. for Appellee at 40 (quoting Colborn Decl. at 5-6, *reprinted in* J.A. 22-23 (emphasis added)).

We agree with the Government that EFF has "ignor[ed] the context in which factual statements were made [in asserting] that 'factual material cannot generally be withheld under the deliberative process privilege.'" *Id.* (quoting Br. for Appellant at 51). In other words, because context matters, the proposition advanced by EFF is not inviolate. This point was made clear by the en banc court in *Wolfe v. Dep't of Health and Human Serv.*, 839 F.2d 768 (D.C. Cir. 1988). In *Wolfe*, we explained that

> [i]n some circumstances, even material that could be characterized as "factual" would so expose the deliberative process that it must be covered by the privilege. We know of no case in which a court has used the fact/opinion distinction to support disclosure of facts about the inner workings of the deliberative process itself.

Id. at 774 (citation omitted); *accord In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield . . . material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.").

Based on the declarations provided by the Government, the District Court correctly concluded that "the unclassified

portions of the OLC Opinion could not be released without harming the deliberative processes of the government by chilling the candid and frank communications necessary for effective governmental decision-making." 892 F. Supp. 2d at 104 (citation, quotations, and alterations omitted). The reasoning in *Wolfe* is thus controlling here.

E. Exemption 1

Because we find that the entire OLC Opinion is exempt from disclosure under the deliberative process privilege, there is no need for this court to determine whether certain portions of the OLC Opinion were properly withheld as classified under Exemption 1.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the District Court.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED SEPTEMBER 21, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 11-939 (RJL)

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

September 21, 2012, Decided

MEMORANDUM OPINION
(September 21, 2012) [#11, #14]

Plaintiff Electronic Frontier Foundation ("EFF" or "plaintiff") brings this action against the U.S. Department of Justice ("the Department", "DOJ" or "defendant") for failure to disclose information pursuant to the Freedom of Information Act ("FOIA"). Plaintiff seeks material from DOJ's Office of Legal Counsel ("OLC") that interprets the scope of certain areas of the Federal Bureau of Investigation's ("FBI") authority under federal surveillance law. Before the Court are the parties' cross-

motions for summary judgment. Upon consideration of the parties' pleadings, relevant law, and the entire record herein, the defendant's motion is GRANTED and the plaintiff's cross-motion is DENIED.

BACKGROUND

Plaintiff is a non-profit organization concerned with technology-related civil liberty issues. Compl. ¶ 3, ECF No. 1. In February 2011, plaintiff submitted a FOIA request for a January 8, 2010 memorandum prepared by OLC (hereinafter, "OLC Opinion") for the FBI. *Id.* ¶ 9. The requested OLC Opinion was generated in the context of an internal executive branch examination of some of the FBI's information-gathering techniques. *Id.* ¶¶ 5-6. More specifically, pursuant to the reauthorization of the USA PATRIOT Act, DOJ's Office of the Inspector General ("OIG") examined the FBI's practice of requesting and receiving telephone records from major companies by using secret administrative subpoenas known as National Security Letters ("NSLs"). *Id.* The OIG found that the FBI was sometimes requesting immediate disclosure of telephone records using exigent letters, rather than or prior to providing NSL subpoenas, and subsequently initiated a study of the FBI's use of these exigent letters to obtain telecommunications records. *Id.* ¶ 5.

While the OIG study was still in progress, the FBI sought OLC's legal advice on whether, in national security investigations, the FBI's obtainment of certain types of telephone records without the use of NSLs or any other process complied with the law. *Id.* ¶ 6. On January 8, 2010,

OLC provided the FBI with a memorandum of its legal analysis and advice. *Id.* Pursuant to the FOIA, plaintiff requested a copy of the OLC Opinion on February 15, 2011. *Id.* ¶ 9. Ten days later, on February 25, 2011, OLC denied plaintiff's FOIA request, explaining that the OLC Opinion was being withheld under FOIA Exemptions 1 and 5. *Id.* ¶ 10. Plaintiff formally appealed OLC's decision to DOJ's Office of Information Policy ("OIP") on March 18, 2011, but received no response. *Id.* ¶¶ 11-13.

Two months later, on May 19, 2011, plaintiff filed a complaint in this Court, seeking an order to compel disclosure of the OLC Opinion. *See generally id.* On November 10, 2011, the Department moved for summary judgment, contending that the OLC Opinion was justifiably withheld under FOIA Exemptions 1 and 5. Def.'s Mot. for Summ. J. ("Def.'s Mot.") at 1, ECF No. 11. The Department supported its motion with two affidavits, one from the FBI Section Chief responsible for FOIA requests and the other from OLC Special Counsel. *See* Corrected Decl. of David M. Hardy ("Hardy Decl."), ECF No. 12-1; Decl. of Paul P. Colborn ("Colborn Decl."), ECF No. 11-4. On December 13, 2011, plaintiff also moved for summary judgment, asserting that the DOJ is not entitled to summary judgment because it failed to carry its burden to withhold the OLC Opinion under Exemptions 1 and 5. Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. and in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Mem.") at 11-12, ECF No. 14. For the reasons set forth below, I disagree and GRANT summary judgment in favor of the defendant.

Appendix C

ANALYSIS

Both parties have moved for summary judgment in this case. FOIA cases are "typically and appropriately" decided on motions for summary judgment. *Defenders of Wildlife v. U.S. Border Patrol,* 623 F. Supp. 2d 83, 87 (D.D.C. 2009). "When assessing a motion for summary judgment under FOIA, the Court shall determine the matter *de novo.*" *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.,* 598 F. Supp. 2d 93, 95 (D.D.C. 2009) (citing 5 U.S.C. § 552(a)(4)(B)).

Summary judgment is appropriate when the record demonstrates that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). With respect to an agency's non-disclosure decisions in a FOIA action, the court may rely on affidavits or declarations if they describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey,* 656 F.2d 724, 738, 211 U.S. App. D.C. 135 (D.C. Cir. 1981); *see also SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991) (affidavits and declarations are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents") (internal citation and quotation marks omitted).

Appendix C

"Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Larson v. Dep't of State,* 565 F.3d 857, 862, 385 U.S. App. D.C. 394 (D.C. Cir. 2009) (quoting *Wolf v. CIA,* 473 F.3d 370, 374-75, 374 U.S. App. D.C. 230 (D.C. Cir. 2007)). In assessing the logic and plausibility of an agency assertion of an exemption, "reviewing courts [should] respect the expertise of an agency" and avoid "overstep[ping] the proper limits of the judicial role in FOIA review." *Hayden v. NSA,* 608 F.2d 1381, 1388, 197 U.S. App. D.C. 224 (D.C. Cir. 1979); *see also Military Audit Project,* 656 F.2d at 753; *Halperin v. CIA*, 629 F.2d 144, 148, 203 U.S. App. D.C. 110 & n.20 (D.C. Cir. 1980). For the following reasons, the Court finds there are no genuine issues of material fact as to the validity of each exemption invoked in this case.

I. Exemption 1

Information can be withheld under Exemption 1 if it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The Department asserts that the withheld information contained within the OLC Opinion was properly classified pursuant to Executive Order ("E.O.") 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), which exempts from disclosure information pertaining to "intelligence activities" and "intelligence sources or methods" that, if disclosed, could be expected to cause damage to the national security. E.O. 13526, §§ 1.2, 1.4(c).

Appendix C

To show that it has properly withheld information under E.O. 13526, and that the classification is proper, DOJ must demonstrate that the withheld information falls within the substantive scope of E.O. 13526, and that the information was classified using the proper procedures.[1] Under section 1.1(a) of E.O. 13526, information can be properly classified if it (1) is classified by an original classification authority; (2) is owned, produced, or controlled by the U.S. government; (3) pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology", among other protected categories, and (4) "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in [a specified level of] damage

1. *See King v. DOJ,* 830 F.2d 210, 214, 265 U.S. App. D.C. 62 (D.C. Cir. 1987); *Halperin v. Dep't of State,* 565 F.2d 699, 703, 184 U.S. App. D.C. 124 (D.C. Cir. 1977); Hardy Decl. ¶ 7. These proper procedures include: (1) the document was marked as required and stamped with the proper classification designation, E.O. 13526, §§ 1.6(a)(1)-(5); (2) the document was marked to indicate clearly which portions are classified, which portions are exempt from declassification as set forth in E.O. 13526, § 1.6(c), and which portions are unclassified, E.O. 13526, § 1.6(c); (3) the prohibition and limitations on classification specified in E.O. 13526, § 1.7(a) were adhered to; (4) the declassification policies set forth in E.O. 13526, §§ 3.1 ("Authority for Declassification") and 3.3 ("Automatic Declassification") were followed; and (5) any reasonably segregable portions of this classified document which did not meet the standards for classification under E.O. 13526 were declassified and marked for release, unless withholding was otherwise warranted under applicable law, 5 U.S.C. § 552(b). *See* Hardy Decl. ¶ 10. The Hardy declaration explains that all of the procedural requirements of E.O. 13526 were followed in this case. *Id.*

to the national security,... and the original classification authority is able to identify or describe the damage." E.O. 13526, §§ 1.1(a), 1.4(c); *see also* Hardy Decl. ¶ 8.

Here, DOJ withheld from the plaintiff specific portions of the OLC Opinion that contained highly specific, classified information relating to FBI intelligence sources or methods. *See* Hardy Decl. ¶¶ 12, 16, 17. The eleven-page OLC Opinion was written in response to a specific request from the FBI for legal analysis and advice regarding the OIG's then ongoing evaluation of the FBI's information-gathering techniques in national security investigations. *Id.* ¶ 11. To support its actions in this case, the Department submitted two declarations, one from David M. Hardy, Section Chief of FBI's Records Management Division, and another from Paul P. Colborn, OLC Special Counsel. *See generally id.*; Colborn Decl. Based on these detailed declarations, I find that the specified portions of the OLC Opinion were appropriately withheld by DOJ under Exemption 1.

First, the Department's declarations demonstrate that the classification markings in the OLC Opinion, which were ultimately withheld, were properly made pursuant to the mandated procedures of E.O. 13526. More specifically, the Hardy and Colborn declarations explain that the FBI, in making its request for legal advice to OLC, sent two letters to the agency that included classified factual information regarding "certain sensitive techniques used in the context of national security and law enforcement

investigations."[2] Colborn Decl. ¶¶ 9-11; Hardy Decl. ¶ 4. Utilizing such classified factual information to render its guidance, OLC followed its standard practice and marked as classified "[t]hose portions of the [OLC] Opinion which reflect classified factual information provided to OLC by the FBI." Colborn Decl. ¶ 11. Accordingly, in determining whether each classification marking contained in the OLC Opinion is proper, Hardy, who holds original classification authority pursuant to E.O. 13526,[3] also carefully reviewed each of the classification markings contained in the two FBI letters. Hardy Decl. ¶¶ 4, 18, 21. The Hardy declaration makes clear that, in accordance with E.O. 13526, all withheld information in the OLC Opinion was appropriately classified at the "SECRET/NOFORN" ("S/NF") level by the FBI, was under the control of the U.S. government, and continues to warrant classification

2. The first letter, a November 27, 2009 opinion request, was from FBI's General Counsel, Valerie Caproni, to OLC's Acting Assistant Attorney General, David Barron. Hardy Decl. ¶ 4. Supplementing the previous letter with additional facts and an expanded request for legal advice, the second letter, dated December 11, 2009, was again from Caproni to Barron. *Id.* The DOJ declarations confirm that a number of the individual paragraphs in these two letters were marked as classified by the FBI at the "SECRET/NOFORN" ("S/NF") level, which restricts access to persons who need to know with an appropriate security clearance. *See id.*; Colborn Decl. ¶ 10.

3. More specifically, Hardy has been designated by the Attorney General of the United States as an original classification authority pursuant to E.O. 13526, §§ 1.3 and 3.1. Hardy Decl. ¶ 2.

at the "S/NF" level in the interest of national security.[4] *Id.* ¶¶ 5, 9, 12, 19, 21.

In addition, through the assertions in its declarations, the DOJ demonstrates that the withheld portions of the OLC Opinion were properly classified under section 1.4(c) as intelligence activities, sources or methods and that disclosure of such information could reasonably be expected to cause damage to national security. More specifically, Hardy avers in his declaration that the classified information contained in the OLC Opinion concerns: (1) "actual intelligence activities, sources or methods used by the FBI against targets of foreign counterintelligence and counterterrorism investigations or operations"; and (2) "intelligence-gathering capabilities used by the FBI to gather specific information on targets of national security investigations." Hardy Decl. ¶¶ 14-15. Explaining that such information is "highly specific," "known to very few individuals," and "still used by the FBI today to gather intelligence information," *id.* ¶ 16, Hardy asserts that the disclosure of such information could reasonably be expected to cause "serious damage to national security" by, among other things, "allow[ing] hostile entities to discover the current methods and activities used" and "appraise the scope, focus, location, and capabilities of the FBI's intelligence-gathering methods and activities." *Id.* ¶¶ 12, 16-17. In addition to causing a major disruption to FBI's intelligence-

4. The only reclassification ordered by Hardy after his "careful classification review" of the OLC Opinion was the re-designation from "UNCLASSIFIED" ("U") to "S/NF" of one footnote. Hardy Decl. ¶ 21.

gathering capabilities, this would also "severely damage the FBI's efforts to detect and apprehend violators of the United States' national security and criminal laws." *Id.* ¶ 16. Moreover, Hardy explains that disclosure also could "allow hostile agents to devise countermeasures to circumvent these intelligence activities or methods," such as the "alteration of behavior to evade detection" or the "utiliz[ation] [of] these same methods and activities to engage in disinformation," thus rendering the FBI's methods and activities "useless in providing intelligence information." *Id.* ¶¶ 16-17.

"[C]ourts must 'recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record.'" *Salisbury v. United States,* 690 F.2d 966, 970, 223 U.S. App. D.C. 243 (D.C. Cir. 1982) (quoting S. Rep. No. 93-1200, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6290). Thus, while this Court's review is *de novo*, our Circuit has consistently emphasized its deferential posture to the executive in FOIA cases involving national security concerns, as judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case." *Halperin,* 629 F.2d at 148; *see also Larson,* 565 F.3d at 865; *Ctr. for Nat'l Sec. Studies v. DOJ,* 331 F.3d 918, 928, 356 U.S. App. D.C. 333 (D.C. Cir. 2003). Accordingly, this Court should not "conduct a more detailed inquiry to test the [DOJ's] judgment and expertise or to evaluate whether the court agrees with the [DOJ's] opinions" if the agency's statements in support of exemption "contain reasonable

specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise." *Larson,* 565 F.3d at 865; *see also Hodge v. FBI,* 764 F. Supp. 2d 134, 138 (D.D.C. 2011). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Larson,* 565 F.3d at 862 (internal citations and quotation marks omitted); *Wolf v. CIA,* 357 F. Supp. 2d 112, 116 (D.D.C. 2004), *rev'd on other grounds*, 473 F.3d 370, 374 U.S. App. D.C. 230 (D.C. Cir. 2007) ("In reviewing a classification decision ... this Circuit has required little more than a showing that the agency's rationale is logical.").

Conferring substantial weight and deference to the DOJ's declarations, I find that the Department has explained with sufficient detail why the withheld information in the OLC Opinion qualifies as "intelligence sources or methods" and adequately described the potential harm to national security that could result from the information's public disclosure. The Department has thus met its burden for invoking FOIA Exemption 1 by demonstrating that the information requested by plaintiff in the OLC Opinion is properly classified according to the criteria established by E.O. 13526.

Plaintiff's arguments to the contrary are unpersuasive. First, plaintiff argues that the DOJ failed to provide a detailed justification of its withholdings, tied to the particular part of the OLC Opinion to which it applied, and thus failed to sustain its burden regarding FOIA

Exemption 1 on summary judgment.[5] *See* Pl.'s Mem. at 14-15. The law of our Circuit has made clear, however, that an agency satisfies its burden provided that the agency's submissions[6] set forth a "relatively detailed justification for invoking an exemption to disclosure; specifically identify the reasons why a particular exemption is relevant; and correlate those claims with those records (or portions thereof) to which they apply." *Schoenman v. FBI,* 763 F. Supp. 2d 173, 188 (D.D.C. 2011) (quoting *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 145 (D.C. Cir. 2006)) (internal quotation marks omitted).

Here, the Department has made clear, via its declarations, that it is asserting Exemption 1 only as to certain paragraphs of the OLC Opinion which have been marked as classified in accordance with the classification markings included in the FBI's two letters to OLC requesting legal advice. *See* Hardy Decl. ¶¶ 4-5, 12, 20-21; Colborn Decl. ¶¶ 10-11. Having conveyed enough information for the plaintiff and the Court "to identify the records referenced and understand the basic reasoning behind the claimed exemptions," *Morley v. CIA,* 508 F.3d

5. More specifically, plaintiff takes issue with DOJ's application of Exemption 1, in the aggregate, to pages 1 to 2 and 4 to 11 of the OLC Opinion, without specifying "that [certain] words, lines, or paragraphs in the document are classified." Pl.'s Mem. at 14.

6. Although a *Vaughn* index is generally required in FOIA cases, our Circuit has made clear that supporting affidavits may be submitted in lieu of a *Vaughn* index, as "it is the function, not the form, of the index that is important." *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 146 (D.C. Cir. 2006); *Keys v. U.S. Dep't of Justice,* 830 F.2d 337, 349, 265 U.S. App. D.C. 189 (D.C. Cir. 1987).

1108, 1123, 378 U.S. App. D.C. 411 (D.C. Cir. 2007), the Department's submitted declarations are sufficiently specific to satisfy its burden without going so far as to disclose protected information. *See Judicial Watch,* 449 F.3d at 147 ("We have never required repetitive, detailed explanations for each piece of withheld information."). As such, this Court declines plaintiff's invitation to review the records at issue *in camera. See* Pl.'s Reply Mem. in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Reply") at 5, ECF No. 20; *Hayden,* 608 F.2d at 1387 (in FOIA cases, *in camera* review is a "last resort to be used only when the affidavits are insufficient for a responsible *[d]e novo* decision") (internal citation and quotation marks omitted).

Second, plaintiff alleges that DOJ has failed to demonstrate a "logical connection" between the withheld information, which it characterizes as "ten pages of legal analysis," and the claimed exemption, namely the disclosure of intelligence activities, sources, or methods. Pl.'s Mem. at 15-16. The Department's submissions elucidate, however, that information withheld from the OLC Opinion under Exemption 1 reflects classified factual information provided to OLC by the FBI that, if disclosed, could cause damage to national security, and any portion of the OLC Opinion that contains only legal analysis, divorced from classified factual information, has been withheld under Exemption 5, not Exemption 1.[7] Plaintiff's argument is thus misplaced.

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7. *See* Colborn Decl. ¶ 11 ("Those portions of the [OLC] Opinion which reflect classified factual information provided to OLC by the FBI are marked classified. Those portions of the [OLC] Opinion that are marked unclassified reflect other confidential factual as well as confidential legal communications provided by the FBI to OLC for the purpose of obtaining legal advice.").

Last, plaintiff accuses the Department of improperly classifying some of the material to avoid embarrassment or conceal law-breaking. *See* Pl.'s Mem. at 16-17. The plaintiff however has no evidence to support its bald allegation of government misconduct. Without any evidence suggesting bad faith on behalf of the defendant, I conclude that this information was properly withheld under Exemption 1. *See Gov't Accountability Project v. U.S. Dep't of State,* 699 F. Supp. 2d 97, 102 (D.D.C. 2010).

II. FOIA Exemption 5

FOIA Exemption 5 protects from disclosure inter-agency or intra-agency letters or memoranda "which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify for this exemption, a document "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001). Courts have incorporated civil discovery privileges into this exemption, such as attorney work-product, attorney-client privilege, and "deliberative process" privilege. *See NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 148-49, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975); *Coastal States Gas Corp. v. DOE,* 617 F.2d 854, 862, 199 U.S. App. D.C. 272 (D.C. Cir. 1980). Here, the defendant asserts both the deliberative process privilege and the attorney-client privilege to withhold the entirety of the OLC Opinion. Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") at 1, ECF No. 11-2. For the following reasons, I agree.

Appendix C

A. Deliberative Process Privilege

The deliberative process privilege exempts from disclosure those documents that contain deliberations comprising part of a process by which governmental decisions and policies are made. *Klamath Water Users,* 532 U.S. at 8. Accordingly, government materials that are both "predecisional" and "deliberative" are shielded by the privilege. *Tax Analysts v. IRS,* 117 F.3d 607, 616, 326 U.S. App. D.C. 53 (D.C. Cir. 1997); *see also Vaughn v. Rosen,* 523 F.2d 1136, 1143-44, 173 U.S. App. D.C. 187 (D.C. Cir. 1975) (noting that a document is "deliberative" if it "makes recommendations or expresses opinions on legal or policy matters"); *Petroleum Info. Corp. v. Dep't of the Interior,* 976 F.2d 1429, 1434, 298 U.S. App. D.C. 125 (D.C. Cir. 1992) (citing *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168, 184, 95 S. Ct. 1491, 44 L. Ed. 2d 57 (1975))("A document is predecisional if it was prepared in order to assist an agency decision-maker in arriving at his decision, rather than to support a decision already made.") (internal quotation marks omitted). "[T]he ultimate purpose of this long-recognized [deliberative process] privilege is to prevent injury to the quality of agency decisions" as well as to encourage "the frank discussion of legal and policy issues" by ensuring that agencies are not "forced to operate in a fishbowl." *Sears,* 421 U.S. at 151; *Mapother v. DOJ,* 3 F.3d 1533, 1537, 303 U.S. App. D.C. 249 (D.C. Cir. 1993); *Wolfe v. Dep't of Health & Human Servs.,* 839 F.2d 768, 773, 268 U.S. App. D.C. 89 (D.C. Cir. 1988) (*en banc*).

In this case, the Department withholds the entirety of the eleven-page OLC Opinion under the deliberative process privilege because "it constitutes advice used by decision-makers at the FBI and by other Executive Branch agencies and Department components in the context of their efforts to ensure that any [FBI] information-gathering procedures comply fully with the law." Colborn Decl. ¶ 13. In his declaration, Colborn explains that the OLC Opinion was sought by the FBI in connection with the agency's "re-evaluation" of its use of sensitive techniques in national security and law enforcement investigations, in response to questions raised about such techniques by the OIG. *Id.* In evaluating how it should respond to OIG's draft report on the issue, the FBI thus sought OLC's guidance regarding "the proper interpretation of the law with respect to information-gathering procedures employed by the FBI and other Executive Branch agencies."[8] *Id.* ¶ 14. Disclosure of the OLC Opinion, Colborn asserts, "would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective governmental decision-making." *Id.* ¶ 13.

It is apparent that the OLC Opinion is both predecisional and deliberative in nature, and thus subject to the deliberative process privilege. The OLC

8. FBI's request to OLC for legal guidance fits squarely within the OLC's principal function: to assist the Attorney General in his role as legal advisor to the President of the United States and to departments and agencies of the Executive branch. Colborn Decl. ¶ 2. In this role, the OLC "provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch." *Id.*

Appendix C

Opinion as described in the Department's declarations contains inter-agency material that was generated as part of a continuous process of agency decision-making, namely how to respond to the OIG's critique of the FBI's information-gathering methods in certain investigations. The declarations explain that the OLC prepared the memorandum at issue, which expresses legal opinions and makes recommendations based thereon, to assist the FBI in arriving at its policy decision.[9] The law of our Circuit is clear that under such circumstances, the OLC Opinion is appropriately exempt from disclosure pursuant to Exemption 5.[10] Indeed, it is not hard to imagine how

9. Although plaintiff may dispute the DOJ's chronology of events, Pl.'s Mem. at 21-27, agency affidavits are accorded a presumption of good faith. *See SafeCard Servs.,* 926 F.2d at 1200.

10. *See, e.g., Grumman,* 421 U.S. at 188 ("By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."); *Brinton v. Dep't of State,* 636 F.2d 600, 604, 204 U.S. App. D.C. 328 (D.C. Cir. 1980) ("There can be no doubt that . . . legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale. . ."); *Coastal States,* 617 F.2d at 868 ("series of memoranda to the Assistant Secretary of the Army from the General Counsel . . . recommending legal strategy" is a "classic case of the deliberative process at work"); *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.,* 249 F.R.D. 1, 5-7 (D.D.C. 2008) (OLC memorandum fits within the scope of deliberative process privilege because it "contains legal advice from the equivalent of [the Office of Administration's]

disclosure of the OLC Opinion would likely interfere with the candor necessary for open discussions on the FBI's preferred course of action regarding the OIG evaluation. *See* Colborn Decl. ¶ 4.

Accordingly, I uphold the DOJ's classification of the OLC Opinion as subject to the deliberative process privilege and therefore exempt from disclosure under Exemption 5. Because all of the information withheld pursuant to the attorney-client privilege was also withheld pursuant to the deliberative process privilege, I do not need to consider the propriety of the defendant's application of the attorney-client privilege.

B. Segregability

Finally, with regard to segregability, it is well established that an agency claiming that a document is exempt under FOIA must, after excising the exempted

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outside counsel", "does not mandate a particular policy", and "can[not] rightly be described as itself a statement of the Executive Branch's legal position"); *Elec. Privacy Info. Ctr. v. DOJ,* 584 F. Supp. 2d 65, 75 (D.D.C. 2008) ("If OLC provides legal advice as part of a decision-making process, this legal advice is protected under the deliberative process privilege."); *Southam News v. INS,* 674 F. Supp. 881, 886 (D.D.C. 1987) (concluding that OLC opinion letters "generated in the course of formulating policies and positions that were being considered" falls within the deliberative process privilege); *Morrison v. DOJ,* No. 87-3394, 1988 U.S. Dist. LEXIS 17906, 1988 WL 47662, at *1-2 (D.D.C. Apr. 29, 1988) (finding that an OLC legal opinion analyzing the constitutionality of a proposed amendment was exempt from disclosure under the deliberative process privilege).

information, release any reasonably segregable information unless the non-exempt information is inextricably intertwined with the exempt information. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.,* 177 F.3d 1022, 1026-27, 336 U.S. App. D.C. 189 (D.C. Cir. 1999).

Here, the Department has sufficiently established that no portion of the OLC Opinion is reasonably segregable and releasable. The DOJ's declarations explicate that, although only portions of the OLC Opinion were withheld under Exemption 1, the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in a redacted format. *See* Hardy Decl. ¶ 5; Colborn Decl. ¶ 11. As the Colborn declaration adequately states, the unclassified portions of the OLC Opinion could not be released without "harm[ing] the deliberative processes of the government" by "chill[ing] the candid and frank communications necessary for effective governmental decision-making." Colborn Decl. ¶¶ 13, 15. In the absence of contrary evidence or specific cites to potentially unsegregated portions, the declarations are afforded the presumption of good faith. *See SafeCard Servs.,* 926 F.2d at 1200. Therefore, I find that no portion of the OLC Opinion could be segregated and subsequently released.

Appendix C

CONCLUSION

For all of the foregoing reasons, the Court GRANTS the defendant's Motion for Summary Judgment [Dkt. #11] and DENIES plaintiff's Cross-Motion for Summary Judgment [Dkt. #14]. An Order consistent with this decision accompanies this Memorandum Opinion.

/s/
RICHARD J. LEON
United States District Judge

APPENDIX D — RELEVANT STATUTE

5 U.S.C. § 552

(a) Each agency shall make available to the public information as follows:

…

(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;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

…

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which

(i) reasonably describes such records and

(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

…

(b) This section does not apply to matters that are—

…

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;