

**COMMENTS BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
ON DISCLOSURE OF AGENCY LEGAL MATERIALS**

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Introduction

In response to the request for comments by the Administrative Conference of the United States (“ACUS”) on what legal materials should be made publicly available and how, Citizens for Responsibility and Ethics in Washington (“CREW”) offers the following comments.

First, CREW recommends that ACUS adopt a clear and comprehensive definition of “agency legal materials.” This term lacks any universally accepted meaning and is not generally employed either by agencies or those litigating against agencies. Any definition ACUS adopts will overlap with other categories of records that ACUS already has addressed, such as agency guidance documents¹ and adjudication materials,² but should also include materials that fall outside those groups yet still impact the legal relationships and obligations between the public and the federal government.

Second, CREW recommends that ACUS include as “agency legal materials” that must be made publicly available opinions from the Department of Justice’s (“DOJ”) Office of Legal Counsel (“OLC”). Through litigation CREW has sought unsuccessfully to compel the publication of OLC opinions pursuant to a provision of the Freedom of Information Act (“FOIA”). Relying on a certain ambiguity in that statute courts have concluded that DOJ currently has no legal obligation to make OLC opinions publicly available. CREW notes that

¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019).

² See, e.g., Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017).

while OLC opinions are not the only category of records properly considered to be agency legal materials that are not made public, they represent one of the most significant categories to which the public lacks access given OLC's central role in interpreting the meaning and impact of federal statutes and the U.S. Constitution for the executive branch as a whole.

DISCUSSION

I. ACUS SHOULD ADOPT A CLEAR AND COMPREHENSIVE DEFINITION OF "AGENCY LEGAL MATERIALS"

ACUS should adopt a clear and comprehensive definition of "agency legal materials." To our knowledge, this term has no legally or even generally accepted meaning. We agree with the four categories of documents ACUS's request for comments considers, specifically materials that: (1) "determine the rights or interests of private parties"; (2) "advise the public of the agencies' interpretation of the statutes and rules they administer"; (3) "advise the public prospectively of the manner in which agencies plan to exercise discretionary powers; or (4) "otherwise explain agency actions that affect members of the public."

As a group these four categories describe agency materials that impact or have the ability to impact the rights and legal obligations of the public or change a member of the public's relationship with the federal government. As such, the term encompasses more than materials that mandate the outcome of a specific dispute or legal question. Indeed, it is this limitation that has allowed the Department of Justice to keep OLC opinions secret based on an argument that because OLC lacks authority to dictate agency policy, its opinions spelling out the limitations and requirements of those policies are nothing more than non-binding opinions that leave the agency free to set its own policies. However, given that the Department often turns around and relies on these same OLC opinions as having the force of law, this argument seems specious at best.

A clear and comprehensive definition will also clarify that “agency legal opinions” encompass more than the guidance and adjudication materials agencies already are required to make public.

II. “AGENCY LEGAL MATERIALS” SHOULD INCLUDE OLC OPINIONS.

As currently crafted the so-called “reading room provision” of the FOIA requires agencies to proactively make publicly available “final opinions . . . made in the adjudication of cases” and “statements of policy and interpretations which have been adopted by an agency and are not published in the Federal Register,” 5 U.S.C. § 552(a)(2). The D.C. Circuit has construed these requirements to exclude OLC opinions as a broad category, reasoning that ““OLC does not speak with authority on [an agency’s] policy,”” *CREW v. U.S. Dep’t of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019) (quoting *Electronic Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 9 (D.C. Cir. 2014) (“*EFF*”)), and that “formal written opinions are not the ‘working law’ of an agency simply because they are nominally ‘controlling.’” *Id.* at 489. But what this decision fails to fully consider is the function that OLC performs for the executive branch writ large and the practical impact of its decisions.

The functions currently housed at OLC date back to the Judiciary Act of 1790, making it “nearly as old as the Republic itself.” *CREW v. Dep’t of Justice*, 846 F.3d 1235, 1238 (D.C. Cir. 2017). That Act charged the Attorney General with, *inter alia*, rendering advice and opinions on legal questions at the request of either the President or agency heads “touching any matters that may concern their departments.” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. Currently that provision is codified at 28 U.S.C. §§ 511-2. *See also* U.S. Constitution, art. 2, § 2, cl 1 (President “may require the opinion, in writing, of the principal officer in each of the executive departments”). Pursuant to 28 U.S.C. § 510, current DOJ regulations define the function of OLC

as including the preparation of “the formal opinions of the Attorney General,” 28 C.F.R. § 0.25(a), and “rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department.” *Id.* at § 0.25(c).

In addition, the President by executive order has directed agency heads to submit inter-agency disputes to the Attorney General “[w]henver two or more Executive agencies are unable to resolve a legal dispute between them.” Exec. Order No. 12,146, § 1-401, reprinted as amended in 28 U.S.C. § 509 (1988). Several different DOJ components have exercised this authority over the years. In 1934, the Independent Offices Appropriation Act, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307 (June 16, 1933), created within DOJ a new office of the assistant solicitor general to which the Attorney General delegated the responsibility to draft legal opinions and provide legal advice to other executive branch agencies.³ The Reorganization Plan No. 2 of 1950, 64 Stat. 1261, abolished that office and replaced it with the Executive Adjudications Division. In 1953, the Attorney General renamed it the Office of Legal Counsel. Att’y Gen. Order No. 9-53 (Apr. 3, 1953).

Transferring this function to OLC was far from an historical accident. Attorney General Bell, who began the tradition of having OLC compile and publish certain of its opinions,⁴ was a fierce advocate for entrusting OLC, as “a dispassionate and detached

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

⁴ See Foreword, 1 Op. O.L.C. Supp., at vii-viii (2013).

institutional actor,” with developing a “coherent, consistent interpretation of the law[.]”⁵ Through its formal written opinions, OLC continues to serve as “a centralized and singular voice of executive branch legality.”⁶

A detailed memorandum delineating OLC best practices acknowledges OLC’s core function as providing “controlling” legal interpretations to executive branch officials on questions of law that are centrally important to the functioning of the federal government. Memorandum from Acting Assistant Attorney General David J. Barron to Attorneys of the Office, *Best Practices for OLC Legal Advice and Written Opinions*, July 16, 2010 (“Best Practices Memo”).⁷ As that Memo recognizes, within the executive branch “OLC has a unique mission[.]” *Id* at 6. Former OLC head Karl R. Thompson publicly characterized OLC’s advice as “authoritative” and “binding by custom and practice in the executive branch. It’s the official view of the office. People are supposed to and do follow it.”⁸

The Best Practices Memo expressly acknowledges that OLC’s formal opinions effectively may be the final word on controlling law. Just as significantly, they confer the functional equivalent of immunity from criminal prosecution as DOJ generally does not prosecute individuals who acted in reliance on OLC opinions, even if their actions are later determined to be illegal.

⁵ Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 822 (2017) (“Renan”), quoting Griffin B. Bell, U.S. Att’y Gen., Remarks Adapted from the Eighth Annual John F. Sonnett Memorial Lecture at Fordham University School of Law (Mar. 14, 1978), *in* *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049, 1064 and 1068 (1978).

⁶ Renan at 821.

⁷ That memo is available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

⁸ He made those comments at an American Bar Association conference that was the subject of public reporting, available at <https://joshblackman.com/blog/2015/11/06/olc-lawyers-president-asks-for-fewer-olc-opinions-to-avoid-foia-requests/>.

The D.C. Circuit has described OLC as “[f]or decades . . . the most significant and centralized source of legal advice in the Executive Branch.” *CREW v. Dep’t of Justice*, 846 F.3d at 1238. Executive branch officials have sought OLC opinions “on some of the weightiest matters in our public life: from the president’s authority to direct the use of military force without congressional approval, to the standards governing military interrogation of ‘alien unlawful combatants,’ to the president’s power to institute a blockade of Cuba.” *Id.* OLC opinions have a profound effect on federal officers and employees, and therefore on members of the public affected by their actions, by determining the lawfulness of a range of conduct. *Id.*

Despite the central role that OLC opinions play and the legal authority on which they are based, courts to date have refused to construe the FOIA as requiring their publication under the reading room provision, relying on DOJ’s argument that many such opinions are advisory at best and leave the agency with the final decision. In *EFF*, for example, the D.C. Circuit accepted uncritically the government’s argument that an OLC opinion that analyzed the legality of a policy the FBI was contemplating was not binding because the FBI remained free to decide whether to implement the policy. 739 F.3d at 9. This reasoning ignored the practical effect of that decision and the reality that the FBI could not adopt a policy contrary OLC’s analysis. Relying on this authority the Department of Justice has defeated numerous attempts to compel it to publish OLC opinions as a category, believing it retains the discretion whether and when to make any individual opinion publicly available. As a result, the American public doesn’t even have a clear conception of the universe of opinions that OLC has authored and those we are aware of likely only represent a fraction of the OLC’s work.

The *EFF* and *CREW* decisions appear to change nearly five decades of Circuit and Supreme Court precedent establishing that where legal memoranda have a precedential effect, promote uniformity in legal interpretations, and guide future agency action, they must be proactively disclosed as agency working law. *See, e.g., National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980). As a result, although OLC opines on some of the most significant issues of the day from the constitutionality of indicting a sitting president to the scope of a president's war powers, its opinions remain secret unless and until OLC decides otherwise.

Accordingly, ACUS should recommend that OLC opinions as a class be included in the definition of "agency legal materials" that must be made public, either through an amendment to the FOIA or a separate statutory provision dealing specifically with OLC opinions. We recognize that publication of OLC opinions may have limits and agree that limited exemptions, including an exemption for material that is classified to protect national security, should apply. In cases where an opinion cannot be released because it would, among other things, harm national security, the OLC should instead release the title of the opinion and a redacted summary of its contents.

Further, the D.C. Circuit has construed the remedial power the FOIA confers on courts very narrowly as applying only to a particular plaintiff, despite the widely accepted proposition that the FOIA "imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Refusing to adopt a common-sense approach, the D.C. Circuit has concluded that the reading room requirement to publish or post records, 5 U.S.C. § 552(a)(2), limits the ability of courts to

provide relief to only an individual complainant, rather than the general public. *See CREW v. U.S. Dep't of Justice*, 846 F.3d at 1244. Such a result conflicts directly with the clear purpose of the reading room provision—to protect the right of the public at large, not merely “a few specialists or lobbyists,” to access information on how the government operates. S. Rep. No. 79-752, at 198 (1945).⁹

ACUS should therefore recommend an amendment to the FOIA that would clarify the power of federal courts under the FOIA to compel an agency to publish requested documents to the public at large, and not only to an individual requester.

⁹ While Congress was discussing § 3 of the Administrative Procedure Act this “public information” section was the predecessor to the FOIA’s reading room requirement, enacted 20 years later.