[ORAL ARGUMENT NOT SCHEDULED]

No. 18-5116

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellant in this case is Citizens for Responsibility and Ethics in Washington (CREW). The appellee is the U.S. Department of Justice.

B. Rulings Under Review

The ruling under review is the March 27, 2018 order of the district court (McFadden, J.), granting the Department of Justice's motion to dismiss CREW's complaint seeking disclosure of certain opinions of the Department's Office of Legal Counsel under the Freedom of Information Act. App. 33. The March 27 order incorporated the reasoning of the court's February 28, 2018, memorandum opinion. App. 23-31. The memorandum opinion is published at 298 F. Supp. 3d 151.

C. Related Cases

This case has not previously been before this Court or any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). As the district court's opinion noted, *see* App. 24 n.1, a case brought by a different plaintiff seeking some of the same records sought by CREW here is currently pending in district court. *See Campaign for Accountability v. U.S. Dep't of Justice*, 16-cv-1068-KBJ (D.D.C.). In addition, in a prior appeal, this Court affirmed the dismissal of a case brought by CREW seeking similar relief to the relief sought here, on the ground that

CREW could not obtain relief under the Administrative Procedure Act and instead had to proceed under the Freedom of Information Act. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235 (D.C. Cir. 2017).

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
OLC	Office of Legal Counsel

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. App. 6. The district court entered final judgment dismissing plaintiff's complaint on March 27, 2018. App. 33. Plaintiff filed a timely notice of appeal on April 19, 2018. App. 34; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Plaintiff's complaint asserted that the Freedom of Information Act required the Department of Justice to disclose "all existing and future" "formal written opinions" of the Office of Legal Counsel under the Act's "reading room" provision, 5 U.S.C. § 552(a)(2). App. 13. The district court dismissed this "universal" claim for failure to state a claim on which relief could be granted, because this Court's decision in *Electronic Frontier Foundation v. U.S. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014), established that at least one such opinion was protected from disclosure by the deliberative process privilege, and because the decisions of district courts indicated that some such opinions are likewise protected by the attorney-client privilege. App. 27-29. The issue presented is:

Whether the district court properly dismissed plaintiff's claim that "all existing and future" "formal written opinions" of the Office of Legal Counsel are subject to mandatory disclosure under 5 U.S.C. § 552(a)(2).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, sets out three requirements for the disclosure of agency records to the public. Most FOIA litigation involves the third requirement, which compels agencies (subject to certain exemptions) to produce documents upon receiving a valid request under the FOIA. *See* 5 U.S.C. § 552(a)(3). This case concerns the second requirement, commonly known as the "reading room" provision. That provision places an affirmative obligation on agencies to "make available for public inspection in an electronic format" certain documents, such as "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." *Id.* § 552(a)(2)(A), (B). The reading room provision also requires agencies to provide "current indexes" of such records. *Id.* § 552(a)(2).

This disclosure obligation, like all others under the FOIA, is qualified by a list of statutory exemptions. *See* 5 U.S.C. § 552(b)(1)-(9). One of the exemptions permits agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." *Id.*

§ 552(b)(5). This exemption incorporates privileges traditionally available to the government in civil discovery, including the attorney-client and deliberative process privileges. *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008).

B. Factual Background and Prior Proceedings

This FOIA litigation concerns legal opinions issued by the Office of Legal Counsel (OLC) of the Department of Justice. The Attorney General has statutory authority to give his opinion on questions of law to the President, heads of executive departments, and heads of military departments. *See* 28 U.S.C. §§ 511-513. That authority has been delegated to OLC. 28 C.F.R. § 0.25(a). Pursuant to this authority, OLC provides legal advice to the Executive Branch, including through "formal written opinions" drafted in response to a request from an Executive Branch official. App. 17-18.

In July of 2013, Citizens for Responsibility and Ethics in Washington (CREW) requested that OLC release to the public "all OLC opinions that are binding on the executive branch" under the FOIA's reading room provision. App. 16. In response, OLC explained that the legal advice it provides "is ordinarily covered by the attorney-client and deliberative process privileges, and is therefore exempt from mandatory disclosure under the FOIA," and noted that because its opinions reflect "confidential and pre-decisional legal advice," OLC opinions generally do not qualify as "'final opinions . . . made in the adjudication of cases'" or "'statements of policy and interpretations which have been adopted by the agency.'" App. 16 (quoting 5 U.S.C.

§ 552(a)(2)(A), (B)). CREW then brought suit under the Administrative Procedure Act, seeking an injunction requiring OLC to disclose all documents covered by the reading room provision. This Court concluded that CREW's suit could not proceed under the Administrative Procedure Act, as the FOIA provided an "adequate remedy" for CREW's alleged harm. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1240, 1246 (D.C. Cir. 2017); *see* 5 U.S.C. § 704.

After that decision, CREW wrote to OLC to "renew[] its requests," which it described as seeking "all formal written opinions issued by OLC, all additional formal written opinions formalized in the future, and all existing indices of OLC's formal written opinions." App. 15; *see* App. 10. CREW then brought this FOIA suit in March of 2017. *See* 5 U.S.C. § 552(a)(4)(B). CREW's complaint asserted that the Department of Justice has a "mandatory, non-discretionary duty under the FOIA's 'reading room provision,' 5 U.S.C. § 552(a)(2), to make available to [CREW] on an ongoing basis formal written opinions issued by [the Department]'s Office of Legal Counsel . . . and indices of such opinions." App. 5. CREW alleged that these opinions must be disclosed because they are "controlling," "authoritative," and "binding by custom and practice in the executive branch." App. 9 (quotation marks omitted). CREW requested a declaration that OLC has failed to comply with 5 U.S.C. § 552(a)(2) and an injunction requiring OLC and the Department to "mak[e] available to CREW on an ongoing basis, and without any further requests, all formal written opinions OLC has created and will create in the future," App. 11, as well as "all past

and future indices of all formal written opinions," App. 12. The complaint did not identify or seek access to any specific OLC advice document.

The district court granted the Department's motion to dismiss. The district court began by observing that "CREW's suit is premised on a universal claim: 'all existing and future OLC formal written opinions' and indices thereof are subject to mandatory disclosure." App. 27 (quoting App. 13). Thus, "if the [Department] can identify any formal written opinions that are *not* subject to FOIA disclosure, CREW's universal claim fails." *Id.* The district concluded that the Department had met this burden because "at least some of the documents sought are subject to FOIA Exemption 5, which protects both the deliberative process privilege and the attorney-client privilege." App. 23.

In particular, the district court focused on this Court's decision in *Electronic Frontier Foundation v. U.S. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014). As the district court observed, *Electronic Frontier Foundation* involved "a FOIA request for a formal, written OLC opinion" provided to the Federal Bureau of Investigation (FBI). App. 27. This Court held that the opinion was protected in its entirety by the deliberative process privilege, rejecting the contention that the opinion was not privileged because it reflected "the FBI's effective or working law," which must be disclosed. App. 28. As the district court observed, this Court concluded that the formal written OLC opinion at issue could not be the FBI's working law because "OLC cannot speak authoritatively on the FBI's policy" and "is not authorized to

make decisions about the FBI's investigative policy." *Id.* (quoting *Electronic Frontier Foundation*, 739 F.3d at 9). And this was true, the district court emphasized, "even when a formal, written OLC opinion is 'controlling (insofar as agencies customarily follow OLC advice that they request)' and 'precedential.'" App. 27 (quoting *Electronic Frontier Foundation*, 739 F.3d at 9). This conclusion, the district court held, "doom[ed] CREW's complaint as currently articulated, because at least one of OLC's formal written opinions—the opinion in [*Electronic Frontier Foundation*]—is exempt from FOIA disclosure pursuant to Exemption 5." App. 28.

The district court went on to hold that "[e]ven if the deliberative process privilege did not apply, the attorney-client privilege would also preclude CREW's carte blanche access to OLC's formal written opinions." App. 28. Because "[a]ttorney-client privilege applies . . . to 'confidential communications between Government officials and Government attorneys,'" several district courts have concluded "that OLC opinions are protected by attorney-client privilege." App. 29 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011)). The district court therefore could not "reasonably infer that none of OLC's formal written opinions are protected by attorney-client privilege." *Id.*

Finally, the district court rejected CREW's request to proceed to discovery, holding that "the possibility that *some* formal written OLC opinions are subject to disclosure cannot rescue a complaint that by its own terms seeks *all* such opinions," and that CREW "must file a complaint—not proposed discovery—stating a plausible

claim to relief." App. 30. The district court dismissed the complaint, but gave CREW the opportunity to file an amended complaint to identify "some specific subset of OLC's formal, written opinions" that might plausibly be subject to the requirements of § 552(a)(2). App. 29; *see* App. 32. Rather than amend its complaint, CREW requested that the district court enter a final judgment, and the court obliged. App. 33.

SUMMARY OF ARGUMENT

CREW contends that "all existing and future OLC formal written opinions," App. 13, are subject to mandatory disclosure under the FOIA's reading room provision. Such a claim is foreclosed by this Court's precedent. In *Electronic Frontier Foundation v. U.S. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014), this Court held that a formal written OLC opinion was protected in its entirety by the deliberative process privilege and thus exempt from disclosure under Exemption 5 of the FOIA. This Court specifically rejected the argument that the OLC opinion at issue in that case "must be 'working law' because it is controlling (insofar as agencies customarily follow OLC advice that they request)" and "precedential," because "these indicia of a binding legal decision" could "not overcome the fact that OLC does not speak with authority on" the policy of a different agency. *Id.* at 9. CREW's arguments here are of a piece with the arguments rejected in *Electronic Frontier Foundation*, as the district court properly recognized. And because OLC does not establish policy for any agency, its opinions are also not subject to the FOIA's reading room provision.

Moreover, as the district court also recognized, CREW's assertion that all formal written OLC opinions must be disclosed cannot be squared with decisions concluding that attorney-client privilege applies to such opinions—a premise CREW does not seriously contest.

Unable to square its categorical claim with decisions concluding that Exemption 5 protects OLC opinions, CREW asserts that it should proceed to discovery so that it can attempt to establish that some unspecified set of documents are subject to the reading room provision. There is no basis in the FOIA for CREW's apparent view that it can survive a motion to dismiss merely by asserting that the government has violated the FOIA. Although CREW asserts that the FOIA places the burden "on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B), the only "action" identified in CREW's complaint is the Department's failure to disclose "all existing and future OLC formal written opinions," App. 13—an action that the Department has no obligation to take. The district court did not err in requiring CREW to assert a claim not foreclosed by this Court's precedent, and CREW declined the district court's invitation to amend its complaint to attempt to assert a viable claim.

STANDARD OF REVIEW

A district court's dismissal of a complaint for failure to state a claim is reviewed de novo. *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as

true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

CREW'S REQUEST FOR ALL FORMAL WRITTEN OLC OPINIONS IS FORECLOSED BY THIS COURT'S PRECEDENT

CREW's suit depends on the assertion that "all existing and future OLC formal written opinions" are subject to mandatory disclosure under the FOIA's reading room provision, 5 U.S.C. § 552(a)(2). App. 13; *accord* App. 11 (requesting an injunction requiring the Department to provide to CREW "all formal written opinions OLC has created and will create in the future"). This categorical assertion is foreclosed by this Court's precedent. This Court has squarely held that a formal written OLC opinion indistinguishable from those that CREW seeks is privileged advice protected from disclosure by Exemption 5 of the FOIA. *Electronic Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 9 (D.C. Cir. 2014). Because the central premise of CREW's suit is wrong, the district court correctly concluded that CREW had failed to state a claim.

A. CREW's arguments are foreclosed by this Court's decision in *Electronic Frontier Foundation*.

Under the FOIA, an agency is required to affirmatively disclose "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," as well as "current indexes" of such records. 5 U.S.C. § 552(a)(2). Even for documents that

meet this requirement, however, an agency is under no obligation to affirmatively disclose them if one of the FOIA's exemptions applies. *Id.* § 552(b)(1)-(9).

These exemptions render CREW's assertion that *every* formal written OLC opinion must be affirmatively disclosed wholly implausible. While such opinions may be subject to multiple exemptions, such as those for classified information, 5 U.S.C. § 552(b)(1), or for information "specifically exempted from disclosure by statute," *id.* § 552(b)(3), the district court recognized that the relationship between formal written OLC opinions and the FOIA's Exemption 5 sufficed to resolve this case. Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." *Id.* § 552(b)(5). The exemption "incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant," including the deliberative process and attorney-client privileges. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006). It is well established that if a document is entirely protected by either of these privileges, the agency is not required to disclose it. *See* 5 U.S.C. § 552(b)(5); *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 n.21 (1975) (even materials that would otherwise be subject to 5 U.S.C. § 552(a)(2) would not be disclosable if they were privileged "since the Act 'does not apply' to documents falling within any of the exemptions" (quoting 5 U.S.C. § 552(b)).

In *Electronic Frontier Foundation v. U.S. Department of Justice*, this Court held that one of OLC's formal written opinions of exactly the type CREW seeks was not subject to disclosure because it was protected in its entirety by the deliberative process privilege. There, the FBI sought "legal advice from OLC" about certain "investigative tactics" that the FBI had previously employed. 739 F.3d at 5. The OLC opinion concluded that the FBI had legal authority to use those investigative tactics. *Id.* This Court rejected the argument that the OLC opinion at issue constituted the "working law" of the FBI such that it could not be withheld under the deliberative process privilege. The Court observed that "OLC did not have the authority to establish the 'working law'" of the FBI, but instead offered only "advice offered by OLC for consideration by" the FBI. *Id.* at 8. Thus, the OLC opinion was an example of privileged "legal memoranda that concern the *advisability* of a particular policy, but do not authoritatively state or determine the agency's policy." *Id.* at 8.

This Court specifically rejected the argument that the OLC opinion at issue "must be 'working law' because it is controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn." *Electronic Frontier Found.*, 739 F.3d at 9. "[T]hese indicia of a binding legal decision" could "not overcome the fact that OLC does not speak with authority on the FBI's policy." *Id.* Thus, the Court emphasized, "[e]ven 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." *Id.* at 10. Moreover, the opinion addressed the legality of an investigative

tactic potentially available to the FBI and concluded that the FBI could employ that tactic in the future. *Id.* at 5, 10. As the Court noted, "[t]he FBI was free to decline to adopt the investigative tactics deemed legally permissible in the OLC Opinion," and had in fact "declined, for the time being, to rely on the authority discussed in the OLC Opinion." *Id.* at 10 (quotation marks omitted).

CREW attempts to distinguish the opinions it requests from the opinion at issue in *Electronic Frontier Foundation* by asserting that it seeks only formal written opinions described in OLC's "Best Practices Memo," App. 17-22, which it characterizes as "prospective" OLC opinions that provide "*controlling legal interpretations*" and establish "a system of binding precedent." Br. 29-30. But as noted, this Court recognized that the opinion at issue in *Electronic Frontier Foundation* was "controlling" and "precedential," and that it "describe[d] the legal parameters of what the FBI is *permitted* to do." *Electronic Frontier Foundation*, 739 F.3d at 9-10. And CREW's suggestion that the OLC opinion at issue in *Electronic Frontier Foundation* was merely "examin[ing] policy options" rather than providing "controlling legal advice," Br. 29 (quotation marks omitted; brackets in original), ignores this Court's recognition that OLC "examines policy options" by analyzing whether they are "legally permissible," not by asserting its own policy preferences. *See Electronic Frontier Found.*, 739 F.3d at 10; *see also* 28 U.S.C. §§ 511-513 (describing Attorney General's authority to provide advice on "questions of law"); 28 C.F.R. § 0.25(a) (delegating authority to OLC). Thus, as the district court recognized, App. 27-28 & n.4, all of the features

CREW attributes to the formal written OLC opinions it seeks were present in the OLC opinion that this Court has already held to be subject to the deliberative process privilege. Even accepting CREW's characterization of the documents it seeks, *Electronic Frontier Foundation* establishes that the deliberative process privilege applies to at least one formal written OLC opinion (and, indeed, to OLC opinions in general).

This Court's analysis in *Electronic Frontier Foundation* also illustrates why, even apart from being privileged, OLC's opinions are generally not subject to 5 U.S.C. § 552(a)(2). The Court concluded that the OLC opinion at issue was a "legal memorand[um] that concern[ed] the *advisability* of a particular policy, but d[id] not authoritatively state or determine the agency's policy." *Electronic Frontier Found.*, 739 F.3d at 8. The Court further reasoned that "the OLC Opinion could not be the 'working law' of the FBI unless the FBI 'adopted' what OLC offered." *Id.* at 9. The same reasoning precludes a conclusion that OLC opinions, as a general matter, are "statements of policy [or] interpretations which have been adopted by the agency," 5 U.S.C. § 552(a)(2). OLC does not set policies or direct agencies to adopt particular interpretations, but provides legal advice to policymaking agencies about their available options.

In addition, as the district court recognized, the attorney-client privilege protects at least some of the formal written OLC opinions CREW seeks. CREW does not attempt to explain why the district court was incorrect in concluding that at least some formal written OLC opinions are subject to the attorney-client privilege,

nor does it address the district court opinions reaching that conclusion. *See* App. 29; *see also New York Times Co. v. U.S. Dep't of Justice*, 282 F. Supp. 3d 234, 238-41 (D.D.C. 2017) (holding that an OLC opinion and cover memo were properly withheld in full pursuant to attorney-client privilege); *National Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 196-200 (D.D.C. 2013) (holding that sixteen OLC opinions were protected in their entirety by attorney-client privilege when created). Indeed, in district court, CREW specifically disclaimed the argument "that no OLC opinion is subject to the attorney-client privilege, in whole or in part." Dkt. No. 12, at 23. That admission alone suffices to demonstrate that CREW's all-encompassing claim fails.

Because "at least some of the documents sought are subject to FOIA Exemption 5," and documents covered by a FOIA exemption are not subject to disclosure at all, CREW's categorical claim "fails as a matter of law." App. 23.

B. CREW's bare assertion that the government had violated the FOIA did not entitle CREW to discovery.

CREW contends that the district court erred in requiring it to plead a viable claim to proceed to discovery. CREW argues, in particular, that by parroting the language of § 552(a)(2), it has placed the onus on the Department "to identify the specific OLC opinions that fall within the category of records subject to the FOIA's reading room provision." Br. 20. This assertion turns the pleading standard on its head. It is CREW's burden—not the government's—to "suggest a plausible scenario that shows that the pleader is entitled to relief." *Patton Boggs LLP v. Chevron Corp.*, 683

F.3d 397, 403 (D.C. Cir. 2012) (quoting *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011)). A plaintiff is required to provide "more than labels and conclusions," and "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted).

As discussed above, CREW's only relevant factual allegations in this case mirror the facts of *Electronic Frontier Foundation*, in which OLC was held to have no disclosure obligation. Absent further pleading of facts suggesting an entitlement to relief, CREW's complaint failed to state a claim.

In an effort to circumvent this basic principle, CREW invokes the FOIA's remedial provision, which places the burden "on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). But the only "action" identified in CREW's complaint is the Department's failure to publicly disclose "all existing and future OLC formal written opinions." App. 13. This is underscored by the primary remedy CREW seeks: an injunction directing the Department to "mak[e] available to CREW on an ongoing basis, and without any further requests, all formal written opinions OLC has created and will create in the future." App. 11. Yet as already discussed, the Department's refusal to take this categorical "action" is clearly correct: at least some formal written OLC opinions are protected by the deliberative process and attorney-client privileges (to say nothing of other applicable FOIA exemptions), and are not final opinions subject to disclosure under § 552(a)(2). CREW's complaint thus failed to state a

plausible claim that the Department's challenged "action" violated the FOIA. *See Irons v. Schuyler*, 465 F.2d 608, 613-14 (D.C. Cir. 1972) (affirming dismissal of a generalized request under § 552(a)(2) where some requested records were "required to be kept confidential" under Exemption 3 of the FOIA, rendering the request "broader than the statutory limits of Section 552(a)(2)").

CREW likewise does not aid its case by criticizing the district court for "ignor[ing] the evidence CREW offered that OLC has failed to make public opinions that fall within section 552(a)(2)," pointing to OLC opinions CREW identified in its sur-reply in opposition to the motion to dismiss. Br. 26. Even in that belated filing, CREW did not deviate from its misunderstanding of the relevant precedents. CREW asserts, for example, that agencies were required to "adhere to 'the definitive Executive Branch position'" spelled out in an OLC opinion. Br. 23 (quoting *Whether Appropriations May Be Used for Informational Video News Releases*, 29 Op. O.L.C. 74 (2005)). But this Court held in *Electronic Frontier Foundation* that "[e]ven 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." 739 F.3d at 10. Only if the FBI, through its own policymaking process, "adopt[ed]" the opinion would it become "the 'working law' of the FBI." *Id.* at 9.

CREW's position thus cannot be reconciled with *Electronic Frontier Foundation*, as further evidenced by CREW's assertion that *Electronic Frontier Foundation* is "in tension" with prior precedent from this Court addressing the "working law" doctrine.

Br. 36. There is no "tension": in *Electronic Frontier Foundation*, this Court specifically addressed and distinguished the cases CREW relies on here. *Compare Electronic Frontier Found.*, 739 F.3d at 7-8 (discussing cases), *with* Br. 31-36 (discussing the same cases). The critical point, as this Court explained, is that unlike in the cases on which CREW relies, "OLC did not have the authority to establish the 'working law' of the FBI." *Electronic Frontier Found.*, 739 F.3d at 8. CREW has not established that OLC has any more authority to establish the working law of any other agency.

Against this backdrop, it is no surprise that CREW identifies no case in which an OLC opinion has been held to be non-privileged from its inception (as opposed to losing its privileged character through waiver or adoption). On the contrary, courts have regularly recognized that OLC opinions are privileged legal advice, not "working law." *See, e.g.*, *New York Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 687 (2d Cir. 2015) (rejecting claim that OLC documents are "working law" because "they provide, in their specific contexts, legal advice as to what a department or agency 'is *permitted* to do'" and OLC lacks "authority to establish the 'working law' of the [agency]'" (quoting *Electronic Frontier Found.*, 739 F.3d at 8)); *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 203 (2d Cir. 2012) (rejecting assertion that OLC advice documents were "working law").

Moreover, as the district court recognized, even if CREW could plausibly allege "that *some* formal written OLC opinions are subject to disclosure," it would not "rescue a complaint that by its own terms seeks *all* such opinions." App. 30. And

indeed, the district court invited CREW to amend its complaint to identify "some specific subset of OLC's formal, written opinions [that] are being unlawfully withheld"—an invitation CREW declined. App. 29; *see* App. 33. At a minimum, the district court did not abuse its discretion in requiring CREW to amend its complaint to the extent that it sought to deviate from its original request for all OLC opinions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,437 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brad Hinshelwood
Brad Hinshelwood

ADDENDUM

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5 U.S.C. § 552 (excerpts) A1

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(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;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying

information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

. . .

(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, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

. . .