KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

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February 15, 2019

via email

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5511
Washington, DC 20530

Re: Freedom of Information Act Request

Dear Ms. Golden,

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), for all Office of Legal Counsel ("OLC") formal written opinions issued prior to February 15, 1994. The request is submitted by five scholars whose work relies on historical research and two non-profit organizations: Matthew J. Connelly, Mary L. Dudziak, Megan Ming Francis, Matthew L. Jones, Hiroshi Motomura, the Campaign for Accountability, and the Knight First Amendment Institute at Columbia University (the "requesters").

I. Background

Since 1789, the Attorney General has been charged by statute with providing legal "advice and opinion" to the Executive Branch.[1] The

[1] The Attorney General's opinion-writing duties are currently codified in two provisions of the federal code, *see* 28 U.S.C. § 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President."); *id.* § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."), which correspond to the Judiciary Act of 1789, *see* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (charging the Attorney General with "giv[ing] his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments").

Attorney General, however, has delegated "virtually all"[2] of his opinion-writing duties to the OLC since 1933.[3] Created as the Office of the Assistant Solicitor General that year,[4] the OLC's "core function" is to settle legal questions or resolve interagency disputes.[5] In discharging its duties, the "OLC generally avoids abstract or code-like decrees."[6] Instead, the office occupies a "quasi-judicial" role within the Executive Branch that follows a "decisional process resembl[ing that of] a court: it is case specific and

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[2] Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for A Unitary Executive*, 15 Cardozo L. Rev. 337, 337 (1993).

[3] Under 28 C.F.R. § 0.25—which, today, remains substantially similar to the version of the regulation originally adopted in 1969, *see* 28 C.F.R. § 0.25 (1969)—the OLC is responsible for, in relevant part

> (a) Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.
>
> (b) Preparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General.
>
> (c) 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.
>
> (d) Approving proposed orders of the Attorney General, and orders which require the approval of the Attorney General, as to form and legality and as to consistency and conformity with existing orders and memoranda.

[4] The OLC was renamed in 1953 and took its modern form in 1977. *See* Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 819–30 & n.44 (2017).

[5] Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) [hereinafter Best Practices Memorandum], *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (The "OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law."); *see also* Kmiec, *supra* note 2 (discussing how the OLC details the President's constitutional objections to pending legislation; advises the President on executive orders, executive privilege, and other programmatic and legal matters; advises Executive Branch agencies on legal questions; and resolves interagency disputes, among other duties); Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. Legis. & Pub. Pol'y 239, 245 (2014).

[6] *See* Renan, *supra* note 4, at 815.

precedent based."[7]

To that end, the OLC often issues "formal written opinions."[8] These opinions bind the Executive Branch in its interpretation of the law unless or until they are withdrawn or reconsidered by the OLC, displaced by a judicial ruling, or overruled by either the President or Attorney General.[9] Because overruling by the President or Attorney General "happens rarely,"[10] the OLC generally has the final word on how the Executive Branch interprets and applies the law. In this way, the OLC is, as one former official has described it, akin to the "Supreme Court of the executive branch."[11]

As such, the OLC's opinions create "a body of formal, written law that is relied upon, distinguished, and evaluated over time."[12] This body of law is critically important to understanding the government's powers, policies, and responsibilities, as well as the private rights of individuals. But the OLC has published "only a fraction" of its formal written opinions.[13] As a result, the Executive Branch has been relying on "secret law," in violation of basic democratic principles. The requesters submit this request to help the public access the secret law that governs this country.

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[7] *Id.*

[8] These OLC opinions are sometimes referred to as "Attorney General opinion[s]" or "memorandums." *See* 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, 94 (2008).

[9] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1305 (2000) ("When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General."); *see also* Renan, *supra* note 4, at 816 ("Barring [the President's or Attorney General's] reversal, OLC creates the binding law of the executive."); Messinger, *supra* note 5, at 246.

[10] *See* Renan, *supra* note 4, at 816.

[11] *Homeland Security Secretary 'Fully Confident' in Legality of Obama's Immigration Action*, PBS NewsHour (Nov. 24, 2014, 6:35 PM), *available at* http://www.pbs.org/newshour/bb/homeland-securitysecretary-fully-confident-legality-obamas-immigration-action [https://perma.cc/4MSL-2C6Q] (quoting Jeh Johnson, former Secretary of the Department of Homeland Security).

[12] *See* Renan, *supra* note 4, at 815.

[13] Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1476 (2010).

II. The Requesters

Matthew J. Connelly is a Professor in the Department of History at Columbia University. His work focuses on covert operations, state surveillance, and war powers. He has spent several years preparing a history of official secrecy in the United States based on research at presidential libraries and the U.S. National Archives. Without access to OLC opinions, however, it has been difficult for him to determine how Presidents have made crucial decisions on behalf of the American people even decades in the past, and to learn from past experiences and apply any lessons to the future.

Mary L. Dudziak is the Asa Griggs Candler Professor of Law at Emory University School of Law. She writes and teaches about civil rights history, foreign relations history, constitutional law, and the history of war's impact on American law and politics. She has a particular scholarly interest in OLC opinions regarding the use of force, especially, but not limited to, opinions that discuss (1) whether a specific use of force is lawful, (2) whether a specific use of force is within the president's authority without a congressional authorization, and (3) what the scope of any existing authorizations may be.

Megan Ming Francis is an Associate Professor in the Department of Political Science at the University of Washington. She studies American politics, race, and the development of constitutional law. She is especially interested in OLC opinions that relate to (1) questions of criminal procedure or criminal justice, (2) workplace discrimination, and (3) housing discrimination, especially as incidents emerged in greater numbers in the 1940s, 50s, and 60s. She also has a particular interest in OLC opinions that address civil rights issues related to education, including those that help illuminate how the federal government dealt with the vastly changed civil rights landscape following the Supreme Court's decision in *Brown v. Board of Education*.

Matthew L. Jones is the James R. Barker Professor of Contemporary Civilization in the Department of History at Columbia University. He studies the intersection of new communications technologies and the legal and regulatory structures that govern their interception in the United States and its Five Eyes allies. He has undertaken detailed inquiry into the writing and subsequent interpretation of Executive Order 12,333 based on extensive work at presidential libraries and via FOIA. He is particularly interested in OLC opinions on these issues, as well as on information warfare and information operations.

Hiroshi Motomura is the Susan Westerberg Prager Distinguished Professor of Law at the University of California, Los Angeles School of Law. His research has focused on a variety of immigration and citizenship

law topics. He is interested in OLC opinions that relate to these topics, including, but not limited to, (1) the evolution of executive branch understandings of state and local authority to enforce immigration law, (2) the history of discretion in the enforcement of immigration law by federal executive branch officers, and (3) the role of the federal executive branch in the formulation of immigration law and policy.

The Campaign for Accountability ("CfA") is a non-profit, non-partisan organization that uses litigation, research, and advocacy to hold public officials accountable. CfA works on behalf of the public interest to expose corruption, negligence, and unethical behavior wherever it may occur. As part of its research, CfA uses government records made available to it under public information laws to investigate public officials and government agencies.

The Knight First Amendment Institute at Columbia University is a non-profit corporation based at Columbia University. The Institute works to defend and expand the freedoms of speech and the press through strategic litigation, research, and public education. The Institute has, since its founding, worked to expose information essential to informed and democratic self-governance, including the formal written opinions of the OLC.

III. Records Requested

The requesters request all of the OLC's formal written opinions,[14] or equivalent thereof, created on or before February 15, 1994. This request encompasses *all* such opinions, including, but not limited to:

1. *Opinions resolving interagency disputes*. Executive Order 12,146 directs federal agencies to submit interagency legal disputes to the OLC for resolution. *See* Exec. Order No. 12,146, 44 F.R. 42,657 (1979). The request encompasses all of the OLC's formal written opinions resolving interagency disputes, whether

[14] By "formal written opinions," the requesters mean to include any OLC document that satisfies guiding principles set out in any of the office's best practices memoranda, *see, e.g.*, David J. Barron, *Re: Best Practices for OLC Legal Advice and Written Opinions*, OLC (July 16, 2010); Steven G. Bradbury, *Re: Best Practices for OLC Opinions*, OLC (May 16, 2005), any document that satisfies principles *similar* to those outlined in the OLC's best practices memoranda, or any document "containing substantive final legal advice of [the] OLC, transmitted to a client agency, and signed by an OLC Assistant Attorney General or Deputy Assistant Attorney General" or the Attorney General, *see* Letter from Assistant Attorney Gen. Peter J. Kadzik to Rep. Jason Chaffetz, Chairman of the Comm. on Oversight and Gov't Reform, and Rep. Elijah E. Cummings, Ranking Member of the Comm. on Oversight and Gov't Reform (April 1, 2016) (attached here). The requesters also mean to include any cover letter or attachments to such opinions.

submitted pursuant to Executive Order 12,146 or otherwise;[15]

2. *Opinions adjudicating or determining private rights.* As former OLC lawyer and then–Judge Alito has written, "many of the questions on which OLC opines do involve private rights."[16] The request encompasses all of the OLC's formal written opinions that involve private rights;[17]

3. *Opinions interpreting non-discretionary legal obligations.* The request encompasses all of the OLC's formal written opinions that interpret statutes or other authorities that impose non-discretionary legal obligations on federal agencies or officials;[18]

4. *Opinions concluding that a statute is unconstitutional.* The request encompasses all of the OLC's formal written opinions determining that a federal statute is unconstitutional in whole or in part and that, as a result, federal agencies may decline to give the statute effect;[19] and

5. *Opinions concerning the scope of presidential power.* The request encompasses all of the OLC's opinions concerning the scope of presidential power, particularly those regarding the use of force, surveillance, and the formulation and enforcement of immigration law and policy.[20]

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[15] For an example of this type of OLC opinion, see Office of Legal Counsel, Dep't of Justice, *The Authority of the Equal Employment Opportunity Commission To Order a Federal Agency To Pay a Monetary Award To Remedy a Breach of a Settlement Agreement* (2008), *available at* https://www.justice.gov/opinion/file/833591/download [https://perma.cc/5YX2-TX24].

[16] Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 509–10 (1993).

[17] For an example of an OLC opinion that involves private rights, see Office of Legal Counsel, Dep't of Justice, *Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act* 1 n.1 (2007), *available at* https://www.justice.gov/file/451616/download [https://perma.cc/8TW4-UX8D].

[18] For an example of this type of OLC opinion, see *id.*

[19] For an example of this type of OLC opinion, see Office of Legal Counsel, Dep't of Justice, *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007* (2008), *available at* https://www.justice.gov/file/477336/download [https://perma.cc/BA7R2NZ9].

[20] For an example of this type of OLC opinion, see Office of Legal Counsel, Dep't of Justice, *Deployment of United States Armed Forces into Haiti* (1994), *available at*

Given the requesters' scholarly interests, we ask that, to the extent possible, you prioritize the processing of OLC opinions related to national security, the use of military force, immigration, and civil rights.[21]

We also ask that you disclose all segregable portions of otherwise exempt records, *see* 5 U.S.C. § 552(b), provide responsive electronic records in their native file format, *see id.* § 552(a)(3)(B), and process our request on a rolling basis.

IV. Application for Waiver or Limitation of Fees

The requesters request a waiver of document search, review, and duplication fees on three independent grounds. First, the disclosure of the requested records is in the public interest and is "likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Second, the requesters qualify for the "educational" exception under FOIA because their purposes include "scholarly . . . research" and the records are not sought for commercial use. *Id.* § 552(a)(4)(A)(ii)(II). Third, the requesters are "representative[s] of the news media" within the meaning of FOIA and, again, the records are not sought for commercial use. *Id.*

First, the documents sought are needed to inform the public about actual or alleged government activity. Specifically, the requested records constitute the Executive Branch's authoritative interpretation of the law. This body of secret law is the final legal authority on a wide range of issues relevant to the public, from torture policy to welfare benefits. But because most of the OLC's opinions remain secret, it is not possible for the public to discern whether the Executive Branch is acting outside its authority, meeting its obligations, or violating the private rights of citizens and residents. For these reasons, disclosure of the records would be in the public interest.

Second, the requesters request a waiver of search and review fees on the ground that they qualify as "educational . . . institution[s]" or whose purposes include "scholarly . . . research" and the records are not sought for commercial use. *Id.* The requesters include a group of scholars who seek the OLC's opinions to inform their research on a variety of topics. These topics include issues in domestic and foreign policy that are critical to understanding how the Executive Branch governs—from the right to an

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https://www.justice.gov/file/20306/download [https://perma.cc/MR5H-HNF6].

[21] For example, the requesters are especially interested in an OLC opinion authored by then–Assistant Attorney General Theodore B. Olson on or around May 24, 1984, which the requesters believe is entitled "Constitutionality of Certain National Security Agency Electronic Surveillance Activities Not Covered Under the Foreign Intelligence Surveillance Act of 1978."

adequate education to state-sponsored surveillance of U.S. citizens.

The organizational requesters also have substantial educational missions. CfA operates a number of research and advocacy initiatives to inform the public about issues like consumer protection violations and corporate influence in government. For example, in 2016, CfA launched the Google Transparency Project to track, analyze, and expose how Google influences elected officials, public policies, and daily life.[22] CfA also regularly publishes publicly available reports on its research.[23]

Situated within a prominent academic research university, the Knight Institute is an educational institution that performs scholarly research on pressing First Amendment questions. The Institute's research program brings together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It publishes that commentary in many forms—in scholarly publications, in long-form reports, and in short-form essays. For example, the Institute published papers from leading thinkers on rising or intensifying threats to free expression in its *Emerging Threats* series.[24] The Institute also regularly hosts public events and symposia to educate the public about the First Amendment questions it studies.[25]

Third, the requesters request a waiver of search and review fees on the ground that they are "representatives of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The requesters meet the statutory definition of a "representative of the news media" because they "gather[] information of potential interest to a segment of the public, use[] [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience." *Id.* § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information,

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[22] *See generally Google Transparency Project*, Campaign for Accountability, *available at* https://www.googletransparencyproject.org/ (last visited Feb. 15, 2019).

[23] *See generally Reports*, Campaign for Accountability, *available at* https://campaignforaccountability.org/works/reports/ (last visited Feb. 15, 2019).

[24] *See generally Emerging Threats*, Knight First Amendment Institute at Columbia University, *available at* https://knightcolumbia.org/emergingthreats (last visited Dec. 10, 2018).

[25] *See, e.g.*, *A First Amendment for All? Free Expression in an Age of Inequality*, Knight First Amendment Institute at Columbia University, *available at* https://knightcolumbia.org/content/3232018-first-amendment-all-free-expression-age-inequality; *see also Events*, *available at* https://knightcolumbia.org/content/events.

exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of FOIA); *accord Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282 (D. Conn. 2012); *ACLU of Wash. v. Dep't of Justice*, No. 09-0642, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). Courts have found other non-profit requesters, whose mission of research and public education is similar to that of the requesters here, to be "representatives of the news media." *See, e.g.*, *Cause of Action v. IRS*, No. 13-0920, 2015 WL 5120863 (D.C. Cir. Aug. 28, 2015); *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).

Finally, disclosure would not further the requesters' commercial interests. CfA and the Knight Institute are non-profit organizations and will make any information disclosed available to the public at no cost. The requesters who are scholars will "make their [scholarly research] available" either at no cost or "for purchase by or subscription by or free distribution to the general public." 5 U.S.C. § 552(a)(4)(A)(ii)(III). Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

For these reasons, the requesters are entitled to a fee waiver.

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Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of it or, where reasonable, to narrow our request.

I certify that the statements made herein are true and correct to the best of my knowledge and belief.

Sincerely,

/s/ *Daniela Nogueira*
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Alex Abdo
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