IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 1:16-cv-1068 (KBJ)

STIPULATION

The parties in the above-captioned matter hereby stipulate to the following facts for purposes of this litigation.[1]

HISTORY AND NATURE OF OLC

1. The Office of Legal Counsel ("OLC") is a component of the Department of Justice ("DOJ" or the "Department"). The core function of OLC, pursuant to a delegation of authority from the Attorney General, is to provide controlling legal advice to executive branch officials on questions of law involving the operations of the executive branch.

2. A statute deriving from the Judiciary Act of 1789 charges the Attorney General with providing advice and opinions on questions of law when required by the President and rendering opinions on questions of law when requested to do so by the heads of executive departments. 28 U.S.C. §§ 511–512.

3. In 1925, the Attorney General delegated his opinion-writing authority to the Office of the Solicitor General. In 1933, it was delegated to the newly created Office of the

[1] Although the parties stipulate to the facts contained herein, this stipulation does not constitute agreement that all of the facts have relevance to the remaining dispute.

Assistant Solicitor General. In 1950, the responsibility for the Department's opinion-writing was transferred out of the Office of the Solicitor General to a newly created office, then known as the Executive Adjudications Division. Renamed the Office of Legal Counsel in 1953, the Office is headed by an Assistant Attorney General who reports to the Attorney General, including through the Deputy Attorney General.

4. Under current regulations, OLC is tasked with preparing the formal opinions of the Attorney General, rendering opinions and legal advice to agencies[2] 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. *See* 28 C.F.R. § 0.25(a).[3]

5. OLC rarely issues opinions unless it is requested to do so by one or more agencies. Requests may be made through formal letters or memoranda, informally by email, or orally, in person or by telephone. Requests may be received directly by OLC, or they may arrive through other components in the Department, including through the offices of the Attorney General, Deputy Attorney General, or Associate Attorney General.

6. OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Requests for opinions may arise in connection with highly complex activities of the executive branch on matters that can be controversial.

[2] OLC provides advice to a variety of entities within the Executive Branch, including to the Attorney General and other divisions within DOJ. Some of these entities are agencies or departments, while others are components of larger agencies or of the Executive Office of the President. For clarity, this Stipulation refers to all such entities as "agencies."

[3] The operative regulation refers to opinions prepared for the Attorney General's signature as "formal" and those rendered by OLC as "informal." This terminology dates to an earlier period, when all OLC opinions were termed "informal." *See* Foreword, 1 Op. O.L.C., at v-vi (1977). This distinction is no longer maintained, and the parties agree that OLC renders "formal opinions" as defined by Plaintiff's FOIA request.

OLC OPINIONS RESOLVING INTERAGENCY DISPUTES

7. OLC is occasionally asked to provide legal opinions in order to resolve disputes between two or more agencies about questions of law. The attorneys currently at OLC do not recall an instance in which a request for a formal written opinion resolving an interagency dispute has ever been declined by OLC when two or more agencies maintained conflicting legal positions.

8. Interagency disputes may come to OLC in different forms. For example, two or more agencies may indicate in a joint request to OLC that they disagree about a question of law. By Executive Order, "[w]henever two or more Executive agencies are unable to resolve a legal dispute between them . . . each agency is encouraged to submit the dispute to the Attorney General." Exec. Order No. 12146, 44 Fed. Reg. 42657 (July 18, 1979), § 1-401. When those agencies are both "agencies whose heads serve at the pleasure of the President," they "shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere." *Id.* § 1-402. Although the Attorney General is authorized to resolve such disputes, this role is as a general matter delegated to OLC as part of its authority under 25 C.F.R. § 0.25(a) to "render[] . . . legal advice to the various agencies of the Government." Some OLC opinions resolving such disputes expressly cite Executive Order No. 12146, but others do not.

9. OLC may also resolve interagency disputes submitted to it by a single agency. On rare occasions, OLC issues an opinion in such circumstances even where the other agency or agencies implicated in the dispute oppose OLC's resolution of the matter. *See, e.g.*, Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding, 11 Op. O.L.C. 92, 98 (1987).

10. Additionally, OLC may resolve disputes between agencies that emerge during the course of OLC's opinion-writing process. Such disputes often become apparent once OLC has solicited views from another interested agency and that agency's submission makes clear that it does not agree with some aspect of the views expressed by the initial requesting agency. *See, e.g.*, Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act, 35 Op. O.L.C. 1 (2011).

11. Although in some cases OLC addresses opinions resolving interagency disputes to both agencies, in other cases OLC addresses such an opinion only to the agency that raised the question to OLC, despite the existence of another agency with differing views. *Compare, e.g.*, Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges, 27 Op. O.L.C. 24 (2003) (addressed jointly to the General Counsel of the Department of the Navy and the Acting Deputy General Counsel of the Equal Employment Opportunity Commission), *with, e.g.*, Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds, 34 Op. O.L.C. 263 (2010) (addressed only to the Acting General Counsel of the Social Security Administration, but noting a disagreement on a point of law between that agency and the General Services Administration).

12. OLC opinions resolving interagency disputes are not stored separately or separately identified within OLC's records. With respect to opinions issued in the future, OLC would have the capability of maintaining records reflecting which formal opinions addressed interagency disputes in instances where OLC was aware at the time it rendered the opinions.

OLC'S PROCESS FOR RESOLVING INTERAGENCY DISPUTES

13. OLC's ordinary process for providing formal written opinions is set forth in a

publicly available memorandum. *See* Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf ("Best Practices Memo"). That memorandum applies to situations in which OLC writes formal opinions resolving interagency disputes. A true and correct copy of the Best Practices Memo is attached hereto as **Exhibit A**. The Best Practices Memo speaks for itself, and the parties stipulate to its contents as an accurate description of OLC's best practices for the preparation of formal written opinions, including those resolving interagency disputes.

14. To date, OLC has not updated the Best Practices Memo, and there have been no similar memoranda detailing OLC's process for writing, issuing, or publishing formal opinions since the Best Practices Memo was published.

15. Pursuant to the Best Practices Memo, OLC may solicit the views of outside agencies when "consistent with the confidentiality interests of the requesting agency." Best Practices Memo at 3. To the best of the knowledge of current OLC attorneys, in the context of opinions resolving interagency disputes OLC has rarely declined to request the views of an outside agency due to the confidentiality interests of one of the requesting agencies. In those circumstances, the confidentiality interests at issue are most commonly the "need to know" requirement for classified information or law enforcement sensitivities.

16. If OLC believes that soliciting the views of another agency would be a necessary precondition to OLC being able to provide its advice, OLC may refuse to provide an opinion if the requesting agency did not agree to share information with that agency. The current OLC attorneys do not recall an instance in which OLC refused to provide a formal written opinion for

this reason.

17. Consistent with the Best Practices Memo, when resolving interagency disputes, OLC expects "agencies on each side of a dispute to share their memoranda with the other side, or permit [OLC] to share them." Best Practices Memo at 3. Although not every communication between OLC and the interested agencies is shared with every other interested agency, OLC's current attorneys are not aware of any instances in which an agency involved in an interagency dispute has refused a request to share its memoranda with all other agencies involved in the dispute.

PUBLICATION AND DISCLOSURE OF OLC OPINIONS

18. OLC may share drafts or final versions of formal, written opinions with other agencies in the executive branch, particularly if an aspect of the analysis bears on an agency's area of expertise, or if the legal conclusions therein are relevant to their operations. OLC does not require the consent of requesting agencies before disseminating an opinion within the executive branch, although OLC may ask the requesting agency's views about distribution and takes into account the requesting agency's confidentiality interests.

19. OLC publishes bound volumes containing some of its formal written opinions. OLC published its first such volume in 1980, containing opinions issued in 1977, at the direction of then-Attorney General Griffin Bell. According to the preface for the 1977 volume of OLC opinions, Bell "believed that [OLC opinions'] value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorney General." Foreword, 1 Op. O.L.C., at vi (1977).

20. These bound volumes do not include all of OLC's formal written opinions. The opinions published in OLC's 1977 volume, for example, represented "approximately one-quarter of the written opinions rendered by" OLC in that year. *Id.* at v.

21. OLC's process for selecting and preparing opinions for publication and for disclosure by other means is further described in the 2010 Best Practices Memo at 5–6. The Best Practices Memo speaks for itself, and the parties stipulate to its contents as an accurate description of OLC's best practices for the publication and disclosure of formal written opinions, including those resolving interagency disputes.

DATED: July 15, 2021

Respectfully submitted,

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