**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. DEPARTMENT OF JUSTICE including its components OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY,<br><br>Defendants. | 15 Civ. 9002 (PKC) |

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF**
**PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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**Table of Contents**

## Table of Authorities

### Cases



### Statutes

**Introduction**

This Freedom of Information Act ("FOIA") suit concerns the government's withholding of a legal opinion authored by the Department of Justice's Office of Legal Counsel ("OLC") in May 2003. The opinion ("OLC Opinion" or "Opinion") pertains to "common commercial service agreements," relates to the Bush administration's warrantless wiretapping program, and is critical to understanding current cybersecurity legislation. The government's primary basis for withholding the Opinion—FOIA's Exemption 5—is unavailing because the Opinion reflects "working law." Public statements made by Senator Ron Wyden and Caroline Krass, then OLC's principal deputy, show that an agency relied on the Opinion as the basis for its policy. This is the very definition of working law and defeats the government's invocation of Exemption 5. The government's arguments to the contrary reflect a basic misunderstanding of Plaintiffs' position and the law. Plaintiffs do not argue that OLC opinions are "always" working law, Gov't Opp. 4, or that legal advice becomes working law when officials merely "act[] in a manner . . . consistent with the advice," *id.* at 6. Instead, Plaintiffs argue that the public record shows that an agency embraced the Opinion's reasoning and conclusions, relying on it as effective agency law.

The government's remaining arguments are also unavailing. *Res judicata* does not bar Plaintiffs' action because their claims rely on new facts that Plaintiffs did not and could not have known in prior litigation and that alter the legal analysis. Finally, the government's conclusory explanations supporting its invocation of Exemptions 1, 3, and 5 do not satisfy its burden to justify its withholding with specificity on the public record. Even in cases involving national security, the government must do more than offer boilerplate recitations of the law.

For these reasons, the Court should order the government to release the Opinion. At a minimum, the Court should order the government to supplement the public record regarding the

circumstances of the Opinion's creation and use—either through a supplemental declaration or limited discovery conducted by Plaintiffs—so that the Court can determine whether the government in fact relied upon the Opinion as a basis for policy, as the public record shows.

## I. The OLC Opinion reflects "working law" because an agency actually relied on the document as a basis for its policy.

The public record shows that an executive branch agency or component actually relied on the Opinion as the basis for its policy. The Opinion thus reflects "working law," which FOIA obligates the government to disclose. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152–53 (1975). The government's arguments to the contrary are without merit.

### A. An executive branch agency relied on the Opinion as a basis for its policy.

Plaintiffs have presented compelling evidence, particularly the statements of Senator Wyden and Ms. Krass, that officials in at least one executive branch agency or component used the OLC Opinion to justify its policy. *See* Pls. Br. 7–10.[1] The government does not meaningfully contest Plaintiffs' evidence. It calls Plaintiffs' reading of Senator Wyden's statements "strained," Gov't Opp. 8, yet it is anything but. Senator Wyden requested the release of the Opinion specifically because it was one of several documents reflecting "government agencies' reliance on secret interpretations of the law." 2015 Letter (Sweren-Becker Decl. Ex. D). The government attempts to recast Plaintiffs' argument as one about whether officials "act[ed] in a manner consistent with" the Opinion. Gov't Opp. 6. But Plaintiffs do not argue that an official merely read the Opinion before formulating a policy. Rather, Plaintiffs argue, and the record shows, that

[1] Plaintiffs also presented evidence that the Opinion is one of several OLC memoranda that constituted the legal rationale for the President's authorization of warrantless surveillance of domestic communications from 2001 to 2007, known as the Terrorist Surveillance Program ("TSP"). The government erroneously claims that Plaintiffs base that conclusion solely on the identity of the Opinion's author. *See* Gov't Opp. 8 n.7. But the government *itself* identified the Opinion as a record related to the TSP in prior FOIA litigation. *See* First Bradbury Decl. Ex. K at 14 (Sweren-Becker Decl. Ex. I); *id.* ¶¶ 32–38.

officials relied on the Opinion's legal interpretation *as a basis for policy*. *See Sears*, 421 U.S. at 152–53 ("the reasons which did supply the basis for an agency policy . . . constitute the 'working law' of the agency"). Senator Wyden's warnings and his exchange with Ms. Krass clearly indicate that the Opinion constituted the government's view of the law that applies to common commercial service agreements and served as the same sort of secret law used to justify other legal excesses of its period. *See, e.g.*, 2015 Letter (the "legal opinion . . . is inconsistent with the public's understanding of the law . . . [and] should be declassified and released to the public, so that anyone who is a party to one of these agreements can consider whether their agreement should be revised or modified"); Krass Hearing (Sweren-Becker Decl. Ex. K).

### B. The working-law doctrine requires the government to disclose the legal interpretation in the Opinion.

Because the government relied on the Opinion as a basis for policy, it is "working law" and cannot be withheld under Exemption 5. Plaintiffs' opening brief explained that courts have unambiguously established that an agency's actual reliance on a document as a basis for its policy or decisions transforms that record into working law. *See* Pls. Br. 6; *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (holding that the deliberative-process privilege did not protect IRS legal memoranda because "the documents here are 'routinely used' and relied upon by [agency officials]"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) (records constitute "secret law" where the agency "relied on" or "routinely used" the records as a basis for agency policy or action).[2] In response, the government offers two sweeping arguments, which are incorrect and undermine the core purpose of the working-law doctrine.

[2] *Accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 359–60 (2d Cir. 2005) ("The Department . . . relied on the OLC Memorandum not only to justify what it . . . *would* do as a result of its deliberations, but also to justify what a third party . . . *should* and *could* lawfully do. . . . These reasons, if expressed within the agency, constitute the 'working law' of the agency."

The government argues initially that legal advice can *never* be working law because it is not binding on the recipient, Gov't Opp. 3–5, and because agencies regularly receive and rely on legal advice, *id.* at 7. This argument is incorrect for many reasons. First, the precise purpose of the working-law doctrine is to expose legal advice that serves as an agency's effective law or policy and is, therefore, more than merely "advice." Congress enacted FOIA "to prevent the development of secret law," and courts crafted the working-law doctrine to effectuate that purpose of exposing secret *legal* interpretations. *Coastal States*, 617 F.2d at 867; *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 196 (2d Cir. 2012). The working-law doctrine ensures that an agency's "effective law and policy" cannot be hidden from the public. *Sears*, 421 U.S. at 152–53; *see La Raza*, 411 F.3d at 360 (the "view that [an agency] may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA"). Second, the government's claim that legal interpretations and advice can *never* constitute working law rejects decades of settled law, including the Supreme Court's decision in *Sears*, which applied the working-law doctrine to legal advice. *See* 421 U.S. at 158 (concluding that legal advice memoranda "represent[ed] the 'law' of the agency"); *see also Tax Analysts*, 117 F.3d at 618 (holding that legal advice memoranda "are statements of the agency's legal position"); *Coastal States*, 617 F.2d at 869 (interpretations of regulations must be disclosed because "in practice [they] represent interpretations of established policy on which the agency relies in discharging its regulatory responsibilities"). Third, as Plaintiffs have explained, a record's designation as nonbinding has no bearing on whether it reflects working law. *See* Pls. Br. 6. Whether Exemption 5 shields a document from disclosure depends on the actual role the document played

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(quoting *Sears*, 421 U.S. at 152–53)); *Elec. Frontier Found. v. DOJ* (*EFF*), 739 F.3d 1, 9 (D.C. Cir. 2014) (recognizing that an OLC opinion would be working law if it "determine[d]" agency policy); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971).

within the agency. *See id.* at 12. Finally, the fact that agencies regularly receive legal advice does not determine whether particular legal advice has become working law. Of course, not *all* legal advice constitutes working law and Plaintiffs have not suggested otherwise (contrary to the government's claims, *see* Gov't Opp. 4, 7). Plaintiffs instead argue that the agency that received *this* Opinion treated the specific legal interpretation set out in the document as its effective law or policy—thus converting predecisional, deliberative advice into working law.[3]

The government next takes the position that an OLC opinion can never be working law and only falls outside the scope of Exemption 5's protection if an agency adopts it "expressly." *See id.* at 4. As an initial matter, this contradicts the position government's counsel took at the status conference held on January 22, 2015.[4] In any event, the government is incorrect.

First, the government dramatically misreads *New York Times* and *EFF*. Those cases held, at most, that not *all* OLC opinions are working law. They nowhere suggested that OLC opinions can *never be* working law.[5] In fact, the Second Circuit's analysis in *New York Times* rejects such a far-reaching rule. After noting that the requesters in that case could only make the "general argument that the legal reasoning in OLC opinions is 'working law,'" *New York Times*, 806 F.3d

[3] The presidential-privilege cases that the government cites, *see* Gov't Opp. 7, are inapposite because the government has not invoked the presidential privilege and because plaintiffs do not contend that legal advice provided to the president must be disclosed as working law. Moreover, these cases neither apply the presidential privilege to documents that constitute agency working law, nor even address legal advice, as the government misleadingly suggests. *See id*.

[4] That conference was not transcribed. According to Plaintiffs' notes and recollection, Plaintiffs summarized their argument that an agency actually relied upon the Opinion as a basis for policy and that, therefore, the government may not withhold it under Exemption 5. The Court then asked whether counsel for the government agreed with Plaintiffs' view of the law, and the government's counsel ultimately agreed.

[5] *Cf. Elec. Frontier Found. v. DOJ*, No. 4:11-CV-05221 (YGR), 2014 WL 3945646, at *8 (N.D. Cal. Aug. 11, 2014), *appeal dismissed* (Feb. 4, 2015) (rejecting the government's claim that *EFF* held that OLC opinions can never be working law because "[s]uch a blanket argument ignores that the proper determination . . . is . . . dependent on the individual document and the role it plays in the administrative process" (quotation marks omitted)).

682, 687 (2nd Cir. 2015), the Second Circuit held that "*these* OLC documents are not 'working law.' At most, they provide, *in their specific contexts*, legal advice as to what a department or agency 'is *permitted* to do.'" *Id.* (emphasis added). That analysis would have been gratuitous if the sweeping view the government advances were true.[6]

Second, reading *EFF* and *New York Times* to mean that OLC opinions are only working law if "expressly adopted" would require overruling *Brennan Center* and *Sears.* In *Brennan Center*, the Second Circuit relied on *Sears* in concluding that the working-law and adoption doctrines are "separate path[s] towards the loss of Exemption 5's protection." *Brennan Ctr.*, 697 F.3d at 196; *see id.* at 199 ("While our previous cases . . . have largely focused on . . . whether a memorandum has been expressly adopted or incorporated by reference, *Sears* also requires us to ask whether the OLC opinion constitutes the 'working law of the agency' and therefore must be disclosed."). After establishing this framework, the Second Circuit conducted separate analyses to determine whether certain OLC opinions constituted working law or were adopted. *See id.* at 203–04. In so doing, the Second Circuit clearly contemplated that OLC opinions could constitute working law even if not adopted. To eliminate the working-law doctrine would require overruling *Brennan Center* and *Sears*; the courts in *EFF* and *New York Times* lacked the power to do so, and there is no indication that was their intent.[7]

Third, FOIA does not limit the type of evidence that a plaintiff may present to show that a record is not entitled to Exemption 5's protection. At bottom, both the working-law and adoption doctrines require the disclosure of documents that constitute an agency's effective law or policy.

[6] To be clear, Plaintiffs disagree with the holdings in *New York Times* and *EFF*, based on the OLC's own description of its final opinions as establishing the law of the executive branch. Plaintiffs have preserved that disagreement for appellate review. *See* Pls. Br. 11 n.7.

[7] Furthermore, the Second Circuit's brief discussion of working law in *New York Times* was dictum. The court had already held that, "[w]hether or not 'working law,' the documents are classified and thus protected under Exemption 1." *New York Times*, 806 F.3d at 687.

*See Brennan Ctr.*, 697 F.3d at 195. Courts articulated these doctrines to prevent the development of secret agency law, *Sears* 412 U.S. at 153, while preserving the deliberative-process and attorney–client privileges, which both aim to promote frank communication during agency decisionmaking, *La Raza*, 411 F.3d at 360. When a document is no longer deliberative, but has become an agency's operative law, the record's disclosure cannot influence the quality of agency communications or decisions. *See id.*; *Sears*, 421 U.S. at 151; *Sterling Drug*, 450 F.2d at 708 ("These 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."). Whether an agency embraces a document as its effective law or policy through internal agency reliance or external agency adoption, the result is the same. In either case, the document reflects the *agency's* position—as opposed to simply the views of its author—and it may not be withheld under Exemption 5. *See La Raza*, 411 F.3d at 360. In other words, the critical inquiry is whether a document reflects an agency's effective law or policy, and a plaintiff may offer various kinds of evidence to make that showing. In this case, the public record shows that an agency relied on the OLC Opinion to justify policy decisions. This evidence comes in large part from a senator who is familiar, based on his oversight responsibilities, with the government's reliance on the Opinion. The government's effort to discount this evidence—by insisting that only a public statement of adoption by an executive branch official suffices to show that a record constitutes an agency's effective law—is simply wrong. Every case recognizing working law is to the contrary, because each of those cases points to evidence *other than* express adoption as a basis for disclosure.

Even if the Court required evidence of adoption to establish that an OLC opinion constitutes an agency's effective law or policy (which Plaintiffs contest), adoption need not be demonstrated by a "public statement by any Executive Branch official adopting both the

reasoning and conclusions of the memorandum," as the government suggests. Gov't Opp. 4 n.4. Certainly, such public statements—including Ms. Krass's statements regarding the Opinion—constitute evidence of adoption. *See, e.g.*, *Brennan Ctr.*, 697 F.3d at 204. Those expressions, however, are not the only means of showing that an agency has accepted a document "as its *own* reasoning." *EFF*, 739 F.3d at 11; *see La Raza*, 411 F.3d at 358 ("a court may properly find adoption" when there is both "reliance on a document's conclusions" and "reliance on a document's analysis"); *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005) (asking whether "any other high-level DOJ officials made any public references to the [document]" *and* whether "[t]here is . . . evidence in the record from which it could be inferred that DOJ adopted the reasoning of the [document]" before holding that the record had not been adopted); *cf. Elec. Frontier Found. v. DOJ*, 890 F. Supp. 2d 35, 45 (D.D.C. 2012) ("In determining [w]hether a document has in fact been 'adopted' . . . , the Court must examine the function and significance of the document in the agency's decisionmaking process." (quotation marks omitted)). Indeed, the Supreme Court recognized in *Sears* that "the reasons which did supply the basis for an agency policy *actually adopted* . . . if expressed *within the agency*, constitute the 'working law' of the agency." 421 U.S. at 152–53 (emphasis added). Thus, when an agency relies on a document to justify its policy internally, the agency has adopted it as its working law. That is precisely what the public record shows: that an executive branch agency accepted the OLC Opinion as its own reasoning to justify a policy. For that reason, the Opinion may not be withheld under Exemption 5.

## II. *Res judicata* does not bar Plaintiffs' claims because new facts alter the legal analysis applied in the earlier case.

Plaintiffs' opening brief explained that their claims are not barred by the doctrine of *res judicata* because they are "based on facts not yet in existence at the time of the original action" and "changed circumstances [that] alter the legal issues involved." *ACLU v. DOJ*, 321 F. Supp.

2d 24, 34 (D.D.C. 2004); *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1319 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974). Plaintiffs' claim here is based on Senator Wyden's and Ms. Krass's statements about the Opinion, which are evidence that the document served as working law. *See* Pls. Br. 7–10. This evidence is critical to the withholdability of the Opinion and yet was not available to the plaintiffs when the *EPIC* case was litigated. *See* Pls. Br. 22. Because these new facts provide a new basis for disclosure under FOIA, *res judicata* does not bar Plaintiffs' action.[8]

The government claims that Plaintiffs "made substantially the same 'working law' argument in *EPIC* that it makes here," Gov't Opp. 2, but that is not true. The plaintiffs in *EPIC* did not make a working-law argument, but instead argued that the OLC opinions at issue were "final opinions" under the affirmative-disclosure provisions of FOIA. 5 U.S.C. § 552(a)(2)(A). In fact, the plaintiffs in *EPIC* used the phrase "working law" only twice—in the footnotes of a single brief—during six years of litigation. The government also states that the decision in *EPIC* "contained an extensive discussion of the 'working law' arguments presented by Plaintiffs." Gov't Opp. 10. But that decision does not use the term "working law" even a single time. The plaintiffs in *EPIC* did not and could not litigate the working-law claim raised here because the evidence provided by Senator Wyden's and Ms. Krass's statements was not yet available. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (*res judicata* bars relitigation of "issues that were or could have been raised in that action."). Plaintiffs thus did not have a full and fair opportunity to litigate their working-law claim.

[8] None of the cases that the government cites, *see* Gov't Opp. 11, requires that the "changed circumstances" affect the nature of the responsive document before a party may initiate a second FOIA suit for the same record. In fact, the primary case on which the government relies for that proposition does not address successive FOIA claims, and it actually supports Plaintiffs. *See Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) (concluding that plaintiff's claim was not precluded and finding "particularly noteworthy" that "the central events underlying" the second lawsuit "had not even taken place at the time" of the first).

## III. The government's conclusory justifications for withholding the Opinion fail to show that the Opinion is entitled to protection under Exemption 1, 3, or 5.

The government has failed to meet its burden of justifying its withholding with specificity and on the public record. Though the government characterizes its declarations as "amply" satisfying its burden, *see* Gov't Opp. 13, the declarations contain nothing more than boilerplate recitations of the law. *See* Pls. Br. 13, 18. Even in the national security context, the government's declarations must "afford the FOIA requester a meaningful opportunity to contest" the withholding. *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). The government's entirely conclusory justifications in this case deny Plaintiffs that opportunity.

That the government has *also* submitted *ex parte* declarations does not relieve the government of its duty to justify its withholding publicly. *See* Pls. Br. 18–19. Courts disfavor reliance on *in camera* affidavits because of their "negative impact on the effective functioning of the adversarial system." *Armstrong v. Executive Office of the President*, 97 F.3d 575, 580–81 (D.C. Cir. 1996); *ACLU v. DOD*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005). Trial courts must ensure that the use of *in camera* affidavits "is justified to the greatest extent possible on the public record and must then make available to the adverse party as much as possible of the *in camera* submission." *Lykins v. DOJ*, 725 F.2d 1455, 1465 (D.C. Cir. 1984). This obligation applies equally in cases involving national security. *See Armstrong*, 97 F.3d at 581; *see also Wilner v. NSA*, 592 F.3d 60, 75–76 (2d Cir. 2009).

Finally, the government does not contest Plaintiffs' argument that the government's declarant is not competent to invoke Exemptions 1 or 3. *See* Pls. Br. 15–17. Therefore, the government may not rely on those exemptions to withhold the Opinion.

## Conclusion

For these reasons, Plaintiffs' motion should be granted and the government's denied.

May 26, 2016

Respectfully submitted,

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