UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Introduction

This Freedom of Information Act ("FOIA") lawsuit seeks to enforce Plaintiffs' request for a legal opinion—authored by the Department of Justice's Office of Legal Counsel ("OLC")—concerning "common commercial service agreements." Plaintiffs requested the opinion based on statements by Senator Ron Wyden, a member of the Senate Intelligence Committee, who has repeatedly warned that the opinion's legal interpretation is directly relevant to the ongoing debate on cybersecurity legislation, yet "is inconsistent with the public's understanding of the law." Plaintiffs' request has become more urgent since Congress passed the Cybersecurity Act of 2015 on December 18, 2015. *See* Pub. L. No. 114-113, 129 Stat. 2242, 2936–56. Senator Wyden's warnings suggest that the law may implicate Americans' privacy even more significantly than publicly known if the government is still relying on the legal conclusions or reasoning in the opinion ("OLC Opinion" or "Opinion").

The government has withheld the Opinion in its entirety under FOIA Exemptions 1, 3, and 5. Its blanket withholding fails for several reasons. The government may not withhold the Opinion under Exemption 5 because the Opinion reflects agency working law, which FOIA obliges the government to disclose. This fact is apparent from public statements made by Senator Wyden and by Caroline Krass during her tenure as the principal deputy of the OLC, all of which strongly suggest that an agency relied on the Opinion in the past as its working law. Moreover, the government has failed to establish that the deliberative-process or attorney–client privileges shield the Opinion from disclosure. The government has also improperly withheld the Opinion under Exemptions 1 and 3 because: (1) the government's declarant is not competent to invoke those exemptions on behalf of another agency; (2) the government has offered only conclusory statements to justify its withholding; and (3) the government has failed to show that the

Opinion's legal analysis cannot be segregated from information exempted from disclosure. The government's conclusory submissions are all the more problematic because they contain a "key assertion" that is "inaccurate" and "central to the DOJ's legal arguments." Sweren-Becker Decl. Ex. E (Letter from Sen. Ron Wyden to Attorney Gen. Loretta Lynch (Mar. 24, 2016) (hereinafter 2016 Letter)). Finally, the doctrine of *res judicata* does not bar Plaintiffs' claims because they are based on new facts that Plaintiffs did not and could not have known in prior litigation.

Plaintiffs respectfully request that the Court deny the government's motion for summary judgment, grant Plaintiffs' cross-motion for summary judgment, and, as relief: (1) order the government to release the record sought or any segregable portions of it; or, at a minimum, (2) order the government to supplement the public record (through a supplemental declaration or limited discovery) regarding the circumstances of the Opinion's creation and use, and examine the Opinion *in camera* to determine whether legal analysis in it can be released without disclosing properly classified information. Plaintiffs also urge the Court to order the government to produce to the Court, for its *in camera* review, the classified annex to Senator Wyden's 2016 Letter, which addresses the inaccurate assertion in the government's legal filings.

Background

On March 10, 2015, Plaintiffs submitted a FOIA request seeking the disclosure of an OLC opinion on "common commercial service agreements." Sweren-Becker Decl. Ex. F. Plaintiffs requested the Opinion based on a series of public statements concerning the Opinion made by Senator Ron Wyden between 2012 and 2015 and by Caroline Krass during a Senate hearing in 2013, when Ms. Krass served as the Principal Deputy Assistant Attorney General at

the OLC.[1] Those statements are described fully below. Briefly, however, Senator Wyden has warned that the OLC Opinion is inconsistent with the public's understanding of the law; he has stated that it is directly relevant to recently enacted cybersecurity legislation; and he has strongly suggested that the executive branch relied on the Opinion as a basis for policy in the past. Ms. Krass has indicated that the Opinion remains operative unless an agency requests reconsideration of it or the relevant elements of the intelligence community disavow it. *See* Krass Hearing.

On March 16, 2015, the OLC denied Plaintiffs' request and withheld the document based on the deliberative-process and attorney–client privileges under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Sweren-Becker Decl. Ex. G. The OLC also suggested that the document might be classified and exempt under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). *Id.* On May 14, 2015, Plaintiffs timely appealed from the OLC's denial of their request. Sweren-Becker Decl. Ex. H. After more than four months with no response, Plaintiffs filed this suit.

On December 30, 2015, counsel for the government disclosed for the first time that the Opinion was one of several records at issue in prior FOIA litigation involving Plaintiffs. *See Elec. Privacy Info. Ctr. v. DOJ* (*EPIC*), Nos. 1:06-CV-00096, 1:06-CV-00214 (RCL), 2014 WL 1279280 (D.D.C. Mar. 31, 2014). As explained below, Plaintiffs knew virtually nothing about the Opinion during the prior litigation, and so could not raise the challenges to its withholding they make here.

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[1] *See* Sweren-Becker Decl. Exs. A–D, K (Letter from Sen. Ron Wyden to Attorney Gen. Eric Holder (Feb. 2, 2015) (hereinafter 2015 Letter); *Nomination of Caroline Diane Krass to be General Counsel of the Central Intelligence Agency: Hearing before the Senate Intelligence Committee*, 113 Cong. (2013) *available at* http://1.usa.gov/1M71FiE (1:24–1:28) (hereinafter Krass Hearing); *Open Hearing on Foreign Intelligence Surveillance Authorities Before the S. Select Comm. on Intelligence*, 113th Cong. (2013) (Questions for the Record from Sen. Wyden) (hereinafter Questions for the Record); Letter from Sen. Ron Wyden to John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism (Jan. 14, 2013) (hereinafter 2013 Letter); Letter from Sen. Ron Wyden to Attorney Gen. Eric Holder (Jul. 23, 2012) (hereinafter 2012 Letter)).

On March 7, 2016, the government moved for summary judgment, arguing that Plaintiffs' claims are barred by the doctrine of *res judicata* and that the Opinion is exempt from disclosure under Exemptions 1, 3, and 5. For the reasons set out below, Plaintiffs request that the Court deny the government's motion, grant Plaintiffs' cross-motion for summary judgment, and provide the relief requested.

Statutory Framework and Legal Standards

Congress enacted FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Through FOIA, Congress set out a "new conception of Government conduct," defined by "a general philosophy of full agency disclosure." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16, (2001) (quotation marks omitted). This transparency is "vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

To fulfill that congressional intent, courts adjudicating FOIA disputes enforce "a strong presumption in favor of disclosure." *Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009). Courts narrowly construe the nine categories of records exempted from disclosure, *see* 5 U.S.C. § 552(b); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355–56 (2d Cir. 2005), and resolve "all doubts as to the applicability of [an] exemption . . . in favor of disclosure," *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). Moreover, the government bears the burden of proving that a FOIA exemption applies. *See* 5 U.S.C. § 552(a)(4)(B); *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012). To satisfy that burden, the government must submit a public declaration—referred to as a *Vaughn* index—describing the withheld information and explaining the basis for withholding in as much detail as possible. *See Halpern v. FBI*, 181 F.3d 279, 290–

91 (2d Cir. 1999). Courts review an agency's invocation of any exemption *de novo*. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

Argument

I. The government may not withhold the OLC Opinion under Exemption 5.

The government relies primarily on Exemption 5 as the basis for withholding the Opinion. *See* Gov't Br. 10–13. Courts have interpreted Exemption 5, 5 U.S.C. § 552(b)(5), to shield from disclosure information that would be protected by traditional common-law privileges. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *La Raza*, 411 F.3d at 356. Here, the government invokes the deliberative-process and attorney–client privileges.

The government's withholding under Exemption 5 fails for two reasons. First, Exemption 5 cannot be used to withhold the government's "working law," and there is now strong reason to believe that the Opinion reflects "working law." Second, the government has not met its burden of showing that the deliberative-process and attorney–client privileges apply to the Opinion.

A. The government may not withhold the Opinion under Exemption 5, because the Opinion reflects agency working law.

1. FOIA requires the government to disclose its working law.

Congress's overarching purpose in enacting FOIA was to eliminate secret law by forcing executive agencies to disclose their rules, policies, and practices. *See Sears*, 421 U.S. at 153; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) ("an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege"); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1310 (D.D.C. 1973) ("secret law is an abomination"). To fulfill that purpose, courts have held that agencies may not rely on Exemption 5 to withhold their "working law." Under the working-law doctrine, an agency must disclose

records that provide the reasoning for, describe, reflect, or comprise an agency's "effective law and policy." *Sears*, 421 U.S. at 152–53; *see La Raza*, 411 F.3d at 359–60 ("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. . . . [T]he public can only be enlightened by knowing what the [agency] believes the law to be." (quotation marks omitted)); *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 196 (2d Cir. 2012).

The deliberative-process and attorney–client privileges may not be used to shield agency working law. *See Sears*, 421 U.S. at 153 ("Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy" (quotation marks omitted)). Even if a document was once deliberative, it falls "outside the scope of" Exemption 5 if the conclusions and interpretations it contains later become working law. *Brennan Ctr.*, 697 F.3d at 194–95. The same is true of the attorney–client privilege. *See La Raza*, 411 F.3d at 360 ("once an attorney's (or employee's) recommendation becomes agency law, the agency is then responsible for defending that policy. . . . Disclosure is therefore appropriate").

Critically, the working-law doctrine applies whether or not the record at issue is "designated as 'formal,' 'binding,' or 'final.' *Electronic Frontier Foundation v. DOJ* (*EFF*), 739 F.3d 1, 7 (D.C. Cir. 2014).[2] Where an agency has "relied on" or "routinely used" an opinion as a basis for agency policy or action, that opinion constitutes working law and must be disclosed—"whatever the formal powers . . . to issue binding interpretations." *Coastal States*, 617 F.2d at

[2] *Accord Sears*, 421 U.S. at 153 ("The affirmative portion of the Act . . . represents an affirmative congressional purpose to require disclosure of documents *which have the force and effect of law*." (citations and quotation marks omitted) (emphasis added)); *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010); *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("The legal conclusions . . . constitute agency law, even if those conclusions are not formally binding . . . ."); *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983); *Coastal States*, 617 F.2d at 859–60.

869. Indeed, "withholding [such opinions] would serve no legitimate policy interest of the government." *Id.*[3]

2. The Opinion reflects working law.

Publicly available information now shows that the OLC Opinion reflects, or at one point reflected, agency working law. The public first learned of the existence of the Opinion in 2012, when Senator Wyden voiced his concern about the Opinion and its continued secrecy.[4] Senator Wyden has since described the Opinion five times, including during the Senate testimony of Caroline Krass in 2013, when she was the OLC's principal deputy.[5] Senator Wyden's statements and Ms. Krass's testimony together show that the Opinion reflected agency working law in the past and may continue to do so today. The few publicly available sources describing the nature of the Opinion bolster this conclusion.

Senator Wyden's first public reference to the Opinion came in a letter sent to the Attorney General in 2012 urging the Attorney General to release the Opinion. He wrote:

> The opinion regarding commercial service agreements has direct relevance to the ongoing debate in Congress regarding cybersecurity legislation. In my view, it

[3] A related doctrine requires agencies to disclose a record when its contents have been "adopted, formally or informally." *Brennan Ctr.*, 697 F.3d at 195. Courts often discuss the "working law" and "adoption" doctrines in tandem, *see, e.g.*, *Elec. Frontier Found. v. DOJ*, 890 F. Supp. 2d 35, 45 (D.D.C. 2012), because both are paths to establishing an agency's "effective law and policy." The government conflates the two doctrines, however, in arguing that Plaintiffs must demonstrate adoption to prevail on their working-law claim. *See* Gov't Br. 12.

[4] *See* Sweren-Becker Decl. Ex. A (Letter from Sen. Ron Wyden to Attorney General Eric Holder (July 23, 2012)).

[5] *See* Sweren-Becker Decl. Exs. A–E, K (Letter from Sen. Ron Wyden to Attorney General Loretta Lynch (Mar. 24, 2016); Letter from Sen. Ron Wyden to Attorney General Eric Holder (Feb. 2, 2015); *Nomination of Caroline Diane Krass to be General Counsel of the Central Intelligence Agency: Hearing before the Senate Intelligence Committee*, 113 Cong. (2013) *available at* http://1.usa.gov/1M71FiE (1:24–1:28); *Open Hearing on Foreign Intelligence Surveillance Authorities Before the S. Select Comm. on Intelligence*, 113th Cong. (2013) (Questions for the Record from Sen. Wyden); Letter from Sen. Ron Wyden to John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism (Jan. 14, 2013)).

> will be difficult for Congress to have a fully informed debate on cybersecurity legislation if it does not understand how these agreements have been secretly interpreted by the executive branch.
>
> I continue to believe that this opinion is inconsistent with the public's understanding of the law and that it should be withdrawn. However, I am concerned that simply withdrawing this opinion will not necessarily prevent its interpretation of commercial service agreements from being asserted again in the future. Therefore, I believe it is important to declassify this opinion and release it to the public, so that anyone who is a party to one of these agreements can consider whether they should be revised or modified. For these reasons, I renew my request that you both revoke and declassify this opinion.

2012 Letter. This letter strongly suggests that the Opinion reflects agency working law. First, the Senator clearly implied that the government has relied on the Opinion in the past. For example, he expressed concern that the Opinion's legal interpretation would be "asserted *again* in the future," *id.* (emphasis added), necessarily indicating that it has been asserted before. And he explained that the government had relied on the Opinion to interpret "common commercial service agreements." *Id.* ("these agreements *have been* secretly interpreted by the executive branch" (emphasis added)). Second, Senator Wyden emphasized the Opinion's role as secret law, writing that the Opinion set out a "secret[]" legal interpretation that "is inconsistent with public's understanding of the law." *Id.* Here, the Senator signaled that the Opinion represents precisely what the working-law doctrine aims to prevent: the development of operative law that trumps public code without public knowledge. Third, the Senator suggested that the Opinion continues to control the meaning of cybersecurity legislation and "common commercial service agreements." For example, by advocating for the Opinion's release "so that anyone who is a party to one of these agreements can consider whether they should be revised or modified," *id.*, the Senator indicated that the Opinion's legal interpretation bears on the meaning of those agreements vis-à-vis the government's current cybersecurity activities or, perhaps, that it was relied upon in the government's initial negotiation of those agreements.

Since 2012, Senator Wyden has reiterated these descriptions of the Opinion. For example, the Senator has repeatedly said that the Opinion is "inconsistent with the public's understanding of the law." *See* Questions for the Record; 2015 Letter; 2016 Letter. He has continued to warn that the Opinion's legal interpretation is the foundation for the government's "common commercial service agreements." 2015 Letter; 2016 Letter. And Senator Wyden has strengthened his assertion that the government has relied on the Opinion in the past. In a letter sent to the Attorney General in 2015, Senator Wyden requested the release of certain documents, including the OLC Opinion, expressly because agencies had secretly relied on the legal interpretations in the documents: "You and I have discussed my concerns about government agencies' reliance on secret interpretations of the law." 2015 Letter. The Senator then clearly implied that one or more officials relied on the Opinion in the past, writing: "I believe the wisest course of action would be for you to withdraw and declassify this opinion, so that *other* government officials are not tempted to rely on it in the future." *Id.*

Senator Wyden emphasized the same features of the Opinion—including the government's reliance on it—during his questioning of Caroline Krass at a 2013 Senate hearing. The Senator described the Opinion as "inconsistent with the public's understanding of the law" and asked Ms. Krass whether she would rely on the Opinion's reasoning because he "want[ed] to make sure nobody *else* ever relies on that particular opinion." Krass Hearing (emphasis added). Before ending his questioning, Senator Wyden reiterated that "unless the opinion is withdrawn, at some point somebody *else* might be tempted" to rely on it. *Id.* (emphasis added). These statements confirm that at least one official or agency—"somebody else"—had relied on the Opinion in the past. In response to Senator Wyden's questions, Ms. Krass noted that an OLC opinion is typically only withdrawn when an agency requests reconsideration of it. *Id.* But,

recognizing Senator Wyden's "serious concerns about this opinion," Ms. Krass suggested that the Senator could request "an assurance from the relevant elements of the Intelligence Community that they would not rely on the opinion." *Id.* Ms. Krass also assured Senator Wyden that she would not rely on the Opinion. *Id.* In short, Ms. Krass indicated that the Opinion would remain operative unless an agency requested reconsideration of it or disavowed it.[6]

The nature of the OLC Opinion—the time of its drafting, its subject matter, and its author—provides further evidence that the Opinion reflects working law. The Opinion was dated May 30, 2003 and signed by OLC Deputy Assistant Attorney General John Yoo. *See* Amended Colburn Decl. ("Colburn Decl.") ¶ 12. The Opinion was one of several OLC memoranda related to the President's authorization of warrantless surveillance of domestic communications from 2001 to 2007, known as the Terrorist Surveillance Program ("TSP") and the President's Surveillance Program ("PSP"). *See* Sweren-Becker Decl. Ex. I (First Bradbury Decl.). According to a report prepared by the Inspectors General of the Department of Justice and four intelligence agencies, Mr. Yoo was "the only OLC official 'read into' the PSP from the program's inception in October 2001 until Yoo left DOJ in May 2003." *See* Unclassified Report on the President's Surveillance Program 10 (July 10, 2009), https://fas.org/irp/eprint/psp.pdf (hereinafter IG Report). Mr. Yoo was "the single OLC attorney to draft *the legal rationale* for the program." *Id.* at 14 (emphasis added). The government's declaration in this case, its submissions in *EPIC*, and the IG report together establish that the OLC Opinion was one of the highly criticized opinions

[6] The government dismisses the relevance of the statements of Senator Wyden, arguing that he cannot officially acknowledge facts on behalf of an executive agency. *See* Gov't Br. 12. But the government conflates the "official acknowledgment" doctrine (which governs waivers of classification under Exemptions 1 and 3) with the "working law" doctrine (which removes records from the protection of Exemption 5). Plaintiffs cite Senator Wyden's public statements as evidence that the executive branch has relied on the Opinion as its working law, and they are clearly relevant evidence of such reliance. In any event, Plaintiffs also rely on statements made by Ms. Krass, who was the principal deputy of the OLC at the time.

authored by Mr. Yoo setting out the legal reasoning for the TSP's reauthorization. That reasoning constitutes working law and must be disclosed under FOIA. *See Sears*, 421 U.S. at 152 ("[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.").

The government relies on *EFF*, 739 F.3d 1, and *New York Times Co. v. DOJ*, 806 F.3d 682 (2d Cir. 2015), but this case is unlike either of those cases. Those cases held that particular OLC opinions did not constitute working law because the plaintiffs showed only that the documents at issue described what an agency was "*permitted* to do," but did not actually determine or guide agency policy. *New York Times*, 806 F.3d at 687 (quoting *EFF*, 739 F.3d at 10) (emphasis in original). Essential to the D.C. Circuit's decision in *EFF* was the fact that the FBI did not "rely" on the OLC's opinion. 739 F.3d at 10. The D.C. Circuit recognized, however, that an OLC opinion constitutes working law—and, therefore, must be disclosed—when it "determined policy." *Id.* at 9. Similarly, the Second Circuit in *New York Times* recognized that an OLC opinion is working law when an agency "adopts it." 806 F.3d at 687. Plaintiffs here have shown that the OLC Opinion was actually relied upon as a basis for executive branch policy or action. Therefore, the Opinion constitutes working law that must be disclosed.[7]

[7] While this case is distinguishable from *EFF* and *New York Times*, Plaintiffs respectfully submit that the panels in those cases erred. Many OLC opinions are, by their nature, controlling and, as such, constitute working law whether or not executive agents take or forego action based on the opinions' conclusions. *See* David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for Attorneys of the Office: Best Practices for OLC Legal Advice & Written Opinions* 1 (July 16, 2010), http://1.usa.gov/1pRNDah ("OLC's core function, pursuant to the Attorney General's delegation, is to provide *controlling advice* to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." (emphasis added)). The Court need not reach that question, however, because there is specific evidence here that the opinion sought was relied upon as working law.

B. The government has also failed to establish that the deliberative-process or attorney–client privileges apply.

The government's withholding under Exemption 5 fails for the separate reason that the government has not established the facts necessary to justify its claims of privilege.

To satisfy its burden of proving that a FOIA exemption applies, the government "must supply the courts with sufficient information to allow [them] to make a reasoned determination that they were correct." *Nat'l Immigration Project v. DHS*, 868 F. Supp. 2d 284, 291 (S.D.N.Y. 2012) (quoting *Coastal States*, 617 F.2d at 861). That determination is particularly fact-dependent for Exemption 5 claims, and requires the government to provide information about the function of the document, its role, and the context in which the record was issued and used. *See Sears*, 421 U.S. at 138 ("Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them."); *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 80 (2d Cir. 1979) ("Whether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process."); *Tigue v. DOJ*, 312 F.3d 70, 78 (2d Cir. 2002) (same); *Coastal States*, 617 F.2d at 858 ("[T]o determine whether the agency's claim . . . is valid, an understanding of the function the documents serve within the agency is crucial."); *id.* at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.").

The government has not provided any of this information here, and therefore has failed to justify its invocation of Exemption 5.

In particular, the government has not offered anything more than conclusory assertions to show that the Opinion is "predecisional" and "deliberative," as required by the deliberative-

process privilege. *See Brennan Ctr.*, 697 F.3d at 194.[8] The government's brief and declaration restate the definition of and rationale for the privilege, but its support for its invocation is pure boilerplate: "the memorandum is (a) predecisional, *i.e.*, prepared in advance of Executive Branch decisionmaking; and (b) deliberative, *i.e.*, contains advice by OLC attorneys to other Executive Branch officials in connection with that decisionmaking." Colburn Decl. ¶ 16. Such "boilerplate assertion[s]" are "insufficient." *Nat'l Day Laborer Org. v. ICE*, 811 F. Supp. 2d 713, 749 (S.D.N.Y. 2011); *Coastal States Gas*, 617 F.2d at 861 ("[C]onclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases."). The government offers no specific information to support these conclusions. For example, the government has failed to explain how the Opinion was produced and at whose request, who it was shared with, how it related to the formulation of policy, or how it was used. The government does not even identify the category of deliberative records to which the Opinion belongs. *See Grand Cent. P'ship*, 166 F.3d at 482 (listing the principal categories of deliberative documents as: "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency").

The government's assertion of the attorney–client privilege is equally conclusory and, therefore, insufficient. To invoke the attorney–client privilege, the government "must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). In addition, the government must establish that the "predominant purpose" of the communication was to render or solicit legal advice. *Nat'l Day*

[8] "Predecisional" means "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "Deliberative" means "actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999).

Laborer, 811 F. Supp. 2d at 743; *see also Cty. of Erie*, 473 F.3d at 420. The government argues that these factors apply to the Opinion, but it does not provide any factual support. *See e.g.*, Colburn Decl. ¶ 18; Gov't Br. 13. The government's declaration lacks anything approaching the justification courts have required in other cases. *See, e.g.*, *Coastal States*, 617 F.2d at 863 ("The burden is on the agency to demonstrate that confidentiality was expected . . . and that it was reasonably careful to keep this confidential information protected from general disclosure."); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977) (the agency must show that information was supplied "with the expectation of secrecy" and that the information "was not known by or disclosed to any third party").

Finally, the government has failed to segregate and disclose those portions of the Opinion that contain unprotected information, or show with specificity that the record is not segregable. Under FOIA, the government must provide "[a]ny reasonably segregable portion of a record" to a requester "after deletion of the portions which are exempt." 5 U.S.C. § 552(b). This burden extends to material withheld under Exemption 5. *See Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("The segregability requirement applies to all [§ 552] documents and all exemptions in the FOIA." (quotation marks omitted)); *Loving v. DOD*, 550 F.3d 32, 38 (D.C. Cir. 2008) ("[T]he deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must."); *accord Assadi v. U.S. Citizenship & Immigration Servs.*, No. 12 CIV. 1374 RLE, 2013 WL 230126, at *4 (S.D.N.Y. Jan. 22, 2013). The government claims that the Opinion does not contain "any reasonably segregable information." *See* Colburn Decl. ¶ 22. However, the government must do more than simply say so. "For each withheld portion, the agency must . . . *show* that the information withheld is not reasonably segregable." *Lawyers Comm. for Human*

Rights v. INS, 721 F. Supp. 552, 560 (S.D.N.Y. 1989) (emphasis added). The government has failed to satisfy this burden.

II. The government may not withhold the Opinion under Exemption 1 or 3.

The government also argues that the OLC Opinion contains information relating to intelligence sources or methods, and that it is therefore classified and exempt from disclosure under Exemptions 1 and 3. Gov't Br. 14–15. But the government has not justified its withholding under those exemptions for three independent reasons. First, the government's declarant is not competent to invoke Exemption 1 or 3 because he has disclaimed classification authority and personal knowledge of the bases for the Opinion's withholding under those exemptions. *See* Colburn Decl. ¶¶ 19–20. Second, the government's public defense of its reliance on Exemptions 1 and 3 is wholly conclusory and, therefore, inadequate. Third, the government has not segregated non-exempt material or offered a detailed justification as to why non-exempt material is not segregable from classifiable information. The government has thus failed to carry its burden to justify its withholding under Exemptions 1 and 3.

A. The government's public declarant is not competent to invoke Exemptions 1 and 3.

The government has not submitted a public declaration by an official competent to claim the protections of Exemption 1 or 3. Therefore, the government may not rely on those exemptions to withhold the Opinion.

The government claims that the Opinion is exempt under Exemption 1 because it is properly classified under Executive Order 13,526. See Gov't Br. 14. And it claims that the Opinion is exempt under Exemption 3 because it describes "intelligence sources and methods" protected from disclosure by the National Security Act, 50 U.S.C. § 3024(i)(1). *See* Gov't Br. 14.

The government's declarant, OLC Special Counsel Paul Colburn, is not competent to defend the invocation of either exemption because he does not have personal knowledge of the asserted bases for those exemptions. On a motion for summary judgment, a declarant's affidavit must be based on personal knowledge. *See* Fed. R. Civ. P. 56(c)(4); *Judicial Watch, Inc. v. U.S. Dep't of Transp.*, No. CIV. 02-566-SBC, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (the declarant must have personal knowledge of the classification decision to sustain an Exemption 1 claim). Mr. Colburn has not asserted or otherwise demonstrated his personal knowledge of the classification of the Opinion or of the determination that it is protected from disclosure by statute. In fact, Mr. Colburn disclaims personal knowledge of these matters, expressly stating that other individuals classified the Opinion and determined that it contains information protected by statute. *See* Colburn. Decl. ¶ 20 ("The document at issue in this case is marked as classified because it contains information OLC received from another agency that was marked as classified."); *id.* (stating that he has "been informed by the relevant agency that information contained in the document is protected from disclosure under FOIA by statute").

Relatedly, Mr. Colburn lacks classification authority and so could not defend the invocation of Exemption 1 even if he had personal knowledge of the classification decision. To sustain an Exemption 1 claim under Executive Order 13,526, courts require the government to submit an affidavit from an individual with classification authority. *See Wickwire Gavin, P.C. v. Def. Intelligence Agency*, 330 F. Supp. 2d 592, 601 (E.D. Va. 2004); *Wash. Post v. DOD*, 766 F. Supp. 1, 8–9 (D.D.C. 1991) (rejecting a challenge to the sufficiency of a CIA declaration because plaintiff's contention that the declarant was not an original classification authority was unsupported). Mr. Colburn specifically disclaims that authority, stating that "OLC does not have

original classification authority," Colburn. Decl. ¶ 19, and that all information in the OLC Opinion that the government claims is classified was designated as such by another agency. *Id.*

For these reasons, the government may not rely on Mr. Colburn's declaration to justify its invocation of Exemptions 1 and 3. The government has, of course, submitted a classified, *ex parte* declaration in this case. Courts have permitted the government to supplement its public explanation for withholding with a classified one in appropriate circumstances. But here, the government has provided effectively *no* public explanation for the Opinion's withholding under Exemptions 1 and 3. As explained below, this violates the government's settled obligation in FOIA cases of explaining the basis for its withholdings *publicly*, in as much detail as possible.

B. The government's public defense of its reliance on Exemptions 1 and 3 is wholly conclusory and, therefore, inadequate.

The government's justification for withholding the Opinion under Exemptions 1 and 3 is entirely conclusory, containing nothing more than boilerplate recitations of the legal standards governing those exemptions. While Plaintiffs acknowledge that *some* material within the OLC Opinion may be protected by Exemptions 1 and 3, neither exemption entitles the government to withhold the entire Opinion based on wholly generic claims. Thus, even if Mr. Colburn were a competent declarant, the government has failed to justify its withholdings with specificity.

An agency bears the burden of establishing with specificity its right to withhold information. *See Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985). Indeed, "[s]pecificity is the defining requirement of the *Vaughn* index and affidavit." *Lawyers Comm.*, 721 F. Supp. at 560. In contravention of this requirement, the government has offered a wholly conclusory declaration and brief that fail to justify its withholding under Exemptions 1 and 3.

At no point does the government provide any justification—let alone a detailed and specific one—for maintaining the secrecy of the material in the Opinion. The government's declaration contains just two sentences on this point, and they say only that the Opinion contains information marked as classified and protected by statute. *See* Colburn Decl. ¶ 20. This is plainly inadequate. *See Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (the "[c]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."); *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392–93 (D.C. Cir. 1987) ("The agency's claims . . . must not merely recite the statutory standards.").

That the Opinion may relate to intelligence sources and methods does not excuse the government's tautological explanations. Even in the national-security context, where courts accord an agency's declarations some measure of deference, *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009), "deference is not equivalent to acquiescence," *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). And deference is not appropriate at all when an agency offers only boilerplate explanations—as the government has done here. *See Halpern*, 181 F.3d at 293 (in the Exemption 1 context, "blind deference is precisely what Congress rejected"); *ACLU v. FBI*, 429 F. Supp. 2d 179, 187 (D.D.C. 2006) ("[A]n agency affidavit invoking Exemption 1 must provide 'detailed and specific' information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing executive order.").

The government's classified, *ex parte* declaration does not satisfy its burden under FOIA to publicly justify its withholding. *See Mead*, 566 F.2d at 251 ("[T]he burden which the FOIA specifically places on the Government . . . cannot be satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material for *in camera* inspection."). FOIA obligates the government to explain its claims in as much detail as possible on the public record.

See New York Times Co. v. DOJ, 758 F.3d 436, 439 (2d Cir. 2014) ("The court is to require the agency to create as full a *public* record as possible, concerning the nature of the documents and the justification for nondisclosure."). The government has failed to do so.

C. The government has failed to show that the legal analysis and conclusions in the Opinion are not segregable from properly classified facts.

The government has argued that Exemptions 1 and 3 protect the Opinion in its entirety, but the government has not shown, as is its burden, that the Opinion's legal analysis and conclusions are inextricably intertwined with properly classified facts. Therefore, the government may not withhold the OLC Opinion in its entirety.

Exemptions 1 and 3 do not permit the government to withhold legal analysis, unless that legal analysis is inextricably intertwined with properly classified facts. *See New York Times v. DOJ*, 756 F.3d 100, 119 (2d Cir. 2014); *id.* ("[L]egal analysis is not an intelligence source or method." (quotation marks omitted)). Accordingly, even if the Opinion contains protected information, that does not justify blanket secrecy. *See Mead*, 566 F.2d at 260 ("The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). Instead, the government must show that no unprotected information can be segregated from properly exempted material.

The government has not made that showing here. It claims in conclusory terms that the Opinion contains no segregable information. *See* Colburn Decl. ¶ 22. But that conclusory explanation is inadequate. *See, e.g.*, *Conti v. DHS*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *25 (S.D.N.Y. Mar. 24, 2014) ("[T]he agency must provide a detailed justification for its decision that non-exempt material is not segregable."). Even setting that deficiency aside, it is implausible that every word of the Opinion is properly classified or protected by statute. As an initial matter, key details about the Opinion have already been publicly disclosed, including its

subject matter ("common commercial service agreements"), the context of its drafting (as part of a series of OLC opinions providing the legal justification for the Terrorist Surveillance Program), and numerous facts about the Terrorist Surveillance Program. Surely these details, as they appear in the Opinion, can be disclosed. Moreover, it is very likely that legal analysis in the Opinion can be segregated from protected information. In prior FOIA cases, the government has proven capable of doing just that: disclosing legal analysis from OLC opinions, even when they address matters of national security and intelligence.[9] The government has offered no reason why it could not similarly redact protected material in this OLC Opinion and disclose the rest.

For these reasons, the government has not justified its categorical withholding of the Opinion under Exemptions 1 and 3.

III. *Res judicata* does not bar Plaintiffs' claims because the availability of new evidence changes the legal analysis applied in the earlier case.

On December 30, 2015, the government's counsel disclosed to Plaintiffs for the first time that the OLC Opinion sought here was at issue in *EPIC v. DOJ*, a consolidated FOIA lawsuit involving Plaintiffs. On this basis, the government argues that *res judicata* bars Plaintiffs from challenging the government's present withholding of the Opinion. That is not so, for two reasons. First, as explained below, the doctrine of *res judicata* applies only narrowly in the FOIA context, particularly because the passage of time affects the legal analysis of the harm justifying withholding. Second, *res judicata* does not bar successive FOIA suits or claims that, as here, challenge the government's withholding based on evidence entirely unavailable to the requesters

[9] *See, e.g.*, Jack L. Goldsmith, Assistant Attorney Gen., OLC, *Memorandum for the Attorney General: Legality of the STELLAR WIND Program* (May 6, 2004), https://www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf; David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar Al-Aulaqi* (July 16, 2010), https://www.aclu.org/sites/default/files/field_document/2014-06-23_barron-memorandum.pdf.

in the first suit. Plaintiffs' primary argument in this suit is that Senator Wyden's and Ms. Krass's statements regarding the Opinion provide strong evidence that the Opinion reflects working law, which the government may not withhold under Exemption 5. Plaintiffs could not have challenged the withholding of the Opinion in the earlier suit on that basis because the suit was filed years before those statements were made and, even once those statements were made, Plaintiffs had no way of connecting them to the earlier suit because the government provided virtually no information about the Opinion during that litigation.

EPIC v. DOJ involved two consolidated FOIA lawsuits that, together, sought the release of records related to the Bush administration's post-9/11 warrantless wiretapping program, now known as the "Terrorist Surveillance Program." *See EPIC*, 2014 WL 1279280, at *1–2. Plaintiffs were the requesters in one of the consolidated suits. During the suit, the plaintiffs in *EPIC* challenged the withholding of hundreds of documents. While the court upheld the majority of those withholdings, the court twice found that the government's declarations had failed to provide an adequate basis for withholding many of the requested records, including one labeled "ODAG 42." Referring to the government's initial submission as "conclusory" and "too vague and general to be useful," and noting that "'because we say so' is an inadequate method for invoking Exemption 5," the court allowed the government to supplement its initial declaration. *EPIC v. DOJ*, 511 F. Supp. 2d 56, 69, 70, 71 (D.D.C. 2007). After reviewing the government's second declaration, the court held that the government's declarations were "still lacking with respect to some of the withheld documents." *EPIC v. DOJ*, 584 F. Supp. 2d 65, 83 (D.D.C. 2008). The court singled out the inadequacy of information provided with respect to ODAG 42, noting that the government had "provided *no* segregability analysis" for that document, *id.* at 74, n.12, and that it was "unclear whether the deliberative process privilege is asserted with respect

to ODAG 42," *id.* at 74, n.14. The court ordered *in camera* review of ten OLC opinions, including ODAG 42. *Id.* at 83. Before this review was conducted, the government released redacted versions of two of the opinions. Upon reviewing all ten records *in camera*, the court issued a very short decision holding that the government's withholdings were justified under Exemptions 1, 3, and 5, and that there was no segregable information in the opinions. *EPIC*, 2014 WL 1279280, at *1. It did not specify whether each of those exemptions provided an independent basis to withhold each opinion in its entirety. The plaintiffs did not appeal.

After Plaintiffs filed the current suit, counsel for the government informed Plaintiffs that ODAG 42 is the same record that Plaintiffs seek here—the OLC Opinion. Plaintiffs could not have known that. In *EPIC*, the government's public description of ODAG 42 consisted of labeling it a "Memo Client Communication," and identifying it as "a 19-page memorandum, dated May 30, 2003, from a Deputy Assistant Attorney General in OLC to the General Counsel of another Executive Branch agency . . . , withheld under FOIA Exemptions One, Three, and Five." *See* Sweren-Becker Decl. Ex. I (First Bradbury Decl.); Ex. J (Second Bradbury Decl. ¶ 98). Even though several of Senator Wyden's statements regarding the OLC Opinion were made during the final stages of litigation in *EPIC*, the government never disclosed to the plaintiffs (or to the court, so far as Plaintiffs are aware) that those statements were at all relevant.

On these facts, *res judicata* is no bar to Plaintiffs' suit or claims.

First, the doctrines of claim and issue preclusion apply only narrowly in the FOIA context and should not bar Plaintiffs' action. *See Taylor v. Sturgell*, 553 U.S. 880, 903 (2008) ("Congress' provision for FOIA suits with no statutory constraint on successive actions counsels against judicial imposition of constraints through extraordinary application of the common law of preclusion."). The FOIA suit at issue here seeks to enforce a different FOIA request than was

at issue in *EPIC*. In other words, "the two actions are based on two different FOIA requests of different scope made years apart." *Negley v. FBI*, 589 F. App'x 726, 729 (5th Cir. 2014) (unpublished opinion) (rejecting claim of *res judicata*). Moreover, the government's arguments for withholding necessarily depend upon an assessment of possible harm, which may change over time. FOIA requesters are entitled to retest the government's basis for withholding a record, at the very least after the passage of a reasonable amount of time. For example, a vast amount of information about the Terrorist Surveillance Program has been publicly disclosed since the ruling in *EPIC*, and so Plaintiffs are entitled to challenge the continuing justification for withholding.[10]

Second, even on their own terms, the doctrines of claim and issue preclusion do not apply. Neither doctrine precludes a plaintiff from asserting claims that it has not yet had a "full and fair opportunity to litigate." *Montana v. United States*, 440 U.S. 147, 153 (1979). And Plaintiffs have not yet had a "full and fair" opportunity to litigate their central claim here: that the OLC Opinion is working law.

Courts have consistently allowed FOIA plaintiffs to bring a successive action to compel disclosure where new facts arise that alter the legal analysis in the prior case. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 34 (D.D.C. 2004) ("It is clear that *res judicata* does not preclude claims based on facts not yet in existence at the time of the original action or when changed circumstances alter the legal issues involved." (citations omitted)); *Negley*, 169 F. App'x at 594 ("FOIA does not limit a party to a single request"); *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1319 (D.D.C. 1973) ("*res judicata* does not apply because [of] changed circumstances"); *Bernson v. Interstate Com. Comm.*, 635 F. Supp. 369, 371 (D. Mass. 1986) ("If changed circumstances have rendered a FOIA exemption inapplicable . . . plaintiffs may file new FOIA requests . . . .").

[10] *See, e.g.*, Charlie Savage, *Government Releases Once-Secret Report on Post-9/11 Surveillance*, N.Y. Times, Apr. 24, 2015, http://nyti.ms/1MKz9TY.

Plaintiffs did not have any opportunity to assert in *EPIC* that ODAG 42 reflects working law. Senator Wyden did not voice his concerns about the OLC's opinion on "common commercial service agreements" until 2012—more than six years after the *EPIC* litigation began. Though some of Senator Wyden's statements occurred while the *EPIC* litigation was ongoing, at no time did the government notify the *EPIC* plaintiffs that ODAG 42 was the opinion on "common commercial service agreements." The evidence that one or more executive agencies relied on the Opinion was not available to the *EPIC* plaintiffs. This evidence constitutes new factual material that substantially changes the legal issues litigated in *EPIC*. Therefore, Plaintiffs' action is not barred by claim or issue preclusion.

IV. The Court should order the government to provide additional information about the Opinion.

For the reasons explained above, the government has failed to carry its burden of justifying the withholding of the Opinion. For that reason, the Court should grant summary judgment in favor of Plaintiffs. If the Court finds it needs more information to resolve the applicability of the claimed exemptions, however, Plaintiffs respectfully request that the Court order the government to supplement the public record regarding the circumstances of the Opinion's creation and use, through a supplemental declaration or limited discovery conducted by Plaintiffs, *see* Fed. R. Civ. P. 56(d). In addition, the Court should order the government to provide it with the classified annex to the letter that Senator Wyden has described in his amicus brief. Plaintiffs request that the Court examine the Opinion *in camera*, with the benefit of these facts, to determine whether the Opinion reflects working law and whether that working law can be segregated from properly classified information.

The Court should order the government to supplement the record because facts critical to the Court's review of the government's Exemption 5 claim lie outside the four corners of the

Opinion. Exemption 5 is extremely context-dependent and "an understanding of the function the document[] serve[d] within the agency is crucial." *Coastal States*, 617 F.2d at 858. Therefore, *in camera* review alone would not be sufficient to allow the Court to assess the applicability of Exemption 5. Moreover, this case is virtually unprecedented in that a U.S. Senator has submitted an amicus brief stating that the government's brief contains a "key assertion" that is "inaccurate" and "central to the DOJ's legal arguments." 2016 Letter. The government must be required to address that claim publicly, in as much detail as possible, so that the Court can perform the *de novo* review FOIA requires. Whether the Court orders the government to supplement its filings or allows limited discovery, the focus of the inquiry should be the same: the circumstances related to the creation of the Opinion; the ways in which the Opinion was distributed, used, or relied upon; and the agencies or individuals that requested or received the Opinion.[11]

In addition, the Court should review the Opinion *in camera* to assess whether legal analysis and other facts can be segregated from classified or otherwise protected information. FOIA invests courts with discretion to review withheld documents *in camera*. *See* 5 U.S.C. § 552(a)(4)(B). *In camera* review is particularly appropriate when—as here—the number of records at issue is small and the government seeks to withhold records in their entirety based on only conclusory justifications. *See Associated Press v. DOJ*, 549 F.3d 62, 67 (2d Cir. 2008).

Conclusion

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

[11] Though uncommon in FOIA cases, discovery is appropriate because the government's filings are deficient and because the government's reliance on Exemption 5 cannot be tested absent evidence beyond the four corners of the Opinion. *See Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *Porter v. DOJ*, 717 F.2d 787, 793 (3d Cir. 1983); *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974); *Taylor v. Babbit*, 673 F. Supp. 2d 20, 22 (D.D.C. 2009).

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Respectfully submitted,

/s/ Alex Abdo

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