RECORD NO. 18-5116

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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All Relevant Statutes and Regulations are set forth in the opening brief and addendum.

SUMMARY OF ARGUMENT

The question before this Court is whether the Department of Justice may freely ignore the reading-room provision of the FOIA, 5 U.S.C. § 552(a)(2), that imposes on the agency a proactive obligation to disclose opinions from the Office of Legal Counsel that have the force and effect of law and an index of those opinions. As written, this provision independently triggers a duty to make these records publicly available, without a request, and defines the scope of that duty to include final opinions made in the adjudication of cases and unpublished statements of policy and interpretations of law that the agency has adopted.

Disregarding the clarity of the statute's language and this Court's previous recognition that the reading-room provision imposes an "*affirmative* obligation[]" that is enforceable without first filing "a request for specific records under section 552(a)(3)," *CREW v. U.S. Dep't of Justice*, 846 F.3d 1235, 1240 (D.C. Cir. 2017) ("*CREW I*") (emphasis added), DOJ argues the scope of its obligation can be limited by a letter CREW sent requesting "all formal written opinions." JA 15. From this DOJ concludes that, because CREW seeks *all* formal written opinions, and because this Court recognized in *Electronic Frontier Foundation v. U.S. Dep't*

of Justice, 739 F.3d 1 (D.C. Cir. 2014) ("*EFF*"), that at least one such opinion is protected from disclosure by the deliberative process privilege, CREW's all-or-nothing claim must fail in its entirety.

DOJ is wrong on all counts. Accepting DOJ's arguments would render the reading-room provision meaningless as to the single most important decision-making component within the executive branch, *see CREW I*, 846 F.3d at 1238 (describing OLC as "the most significant and centralized source of legal advice in the Executive Branch"), would contravene decades of Circuit and Supreme Court precedent, and would conflict with the FOIA's underlying purpose and structure.

Contrary to DOJ's argument, it is the language of § 552(a)(2) itself, not CREW's letter, that establishes the scope of OLC's disclosure obligations. As applied here, that obligation extends to all formal written opinions prepared pursuant to the process spelled out in OLC's Best Practices Memo. Applying an all-or-nothing approach to define what OLC must produce, and placing the burden of proof on plaintiff, turns the FOIA on its head by imposing on CREW a greater burden in invoking the proactive provision of the FOIA, 5 U.S.C. § 552(a)(2), than CREW bears as a requester under the reactive provision of the FOIA, 5 U.S.C. § 552(a)(3). Finally, construing *EFF* as extending to all OLC opinions places a weight on that decision it cannot bear and contravenes the record here and controlling Supreme Court precedent.

ARGUMENT

I. THE READING-ROOM PROVISION OF THE FOIA DEFINES AND TRIGGERS DOJ'S OBLIGATION TO PUBLISH FORMAL WRITTEN OLC OPINIONS PREPARED PURSUANT TO THE BEST PRACTICES MEMO.

Embracing the District Court's approach, DOJ argues it is excused entirely from complying with the reading-room provision because CREW seeks "all existing and future OLC formal written opinions," and under *EFF* at least one such opinion is subject to privilege and therefore properly kept secret under FOIA Exemption 5. DOJ Brief 14. According to DOJ, the fact that one opinion has been held to be exempt renders the entirety of CREW's claim "wholly implausible." *Id.* at 10.

The starting point must be the FOIA itself, which contains "both reactive and affirmative obligations," *CREW I* at 1240, that collectively are subject to one standard of judicial review. *Id.* While the two parts of § 552(a) share a common goal of "mak[ing] information available to the public," *id.*, they achieve that goal in different ways. The reading room provision, § 552(a)(2), places on an agency, here DOJ, the responsibility to identify and make publicly available those final opinions that have "the force and effect of law," H. Rep. No.89-1497 at 28 (1966), with no independent action by CREW or any other member of the public necessary. By contrast, § 552(a)(3) imposes on an agency the obligation to make publicly available only specifically requested, non-exempt documents, a disclosure

obligation triggered by a request and not the FOIA standing alone.

DOJ now seeks to derail this statutory scheme by converting the reading-room provision into a *reactive* requirement that is not triggered unless and until a requester seeks opinions that fall within its scope. DOJ goes a step further by arguing that its obligation in responding to such a request is actually far narrower than its reactive obligation to respond to requests made pursuant to § 552(a)(3). According to DOJ, the scope of its reading-room disclosure obligations is defined exclusively and narrowly by the exact language a requester – here CREW – uses regardless of the language Congress used in the statute itself.

As applied here DOJ's statutory interpretation yields an absurd result: CREW gets nothing because, in DOJ's view, CREW asked for everything and *all* OLC opinions are not subject to disclosure.[1] By contrast, had CREW requested the same documents under § 552(a)(3), DOJ's duty to segregate, 5 U.S.C. § 552(b), would have required OLC to release "any reasonably segregable portion of a record" after deleting any exempt portions. *Id.* In other words, had CREW filed a request under § 552(a)(3) for all OLC opinions issued between 2010 and 2015, DOJ could not have escaped its production burden by arguing that, because

[1] As CREW explained in its opening brief, properly construed its request did not seek all existing formal written opinions but only those prepared pursuant to the process spelled out in the Best Practices Memo, which by definition are a subset of all written OLC opinions. CREW Br. 18.

one opinion is exempt, CREW gets nothing.

DOJ also relies on its all-or-nothing argument to excuse the District Court's error in ruling that CREW, not DOJ, failed to meet its burden of proof. As demonstrated in CREW's opening brief, the FOIA places on every agency the burden once sued "to sustain its action," 5 U.S.C. § 552(a)(4)(B). By contrast, the requester bringing suit need not "disprove, that the materials sought . . . have not been improperly withheld." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citation and quotation marks omitted). That this burden applies to all FOIA actions seeking disclosure of wrongfully withheld documents was made crystal clear by this Court in *CREW I*, 846 F.3d at 1240 ("Our precedent makes clear that FOIA's remedial provision . . . governs judicial review of all three types of documents – that is, requests for information under sections 552(a)(1), (2), or (3)." (quotation omitted)).

Sidestepping the District Court's clear error in imposing the burden of proof on CREW, DOJ insists its refusal to disclose *all* OLC opinions is "clearly correct" in light of the *EFF* decision. DOJ Br. 15. But DOJ's burden went well beyond showing that a single OLC opinion addressed in *EFF* was properly withheld from public disclosure. Because CREW seeks all written OLC opinions prepared pursuant to the process the Best Practices Memo spells out, DOJ bears the burden of proffering evidence that this entire body of OLC opinions is identical to – or at

least typical of – the backward-looking advice memo at issue in *EFF* and that every single formal written OLC opinion falls with the protection of Exemption 5. As discussed *infra*, DOJ has not met that burden here.

In sum, DOJ's contorted construction of § 552(a)(2) contravenes the structure and purpose of the FOIA and in effect would read the reading-room provision out of existence. But it is Congress, not DOJ, that has the power to rewrite a statute, and to date Congress has not chosen to exercise that power to give DOJ the power to ignore its affirmative disclosure obligations under §552(a)(2).

II. DOJ HAS NOT MET ITS BURDEN OF PROVING ALL THE WRITTEN OLC OPINIONS CREW SEEKS ARE EXEMPT FROM COMPELLED DISCLOSURE.

Both the District Court and DOJ committed a fundamental error in attempting to place on CREW the burden of identifying the specific and still secret OLC opinions DOJ must make publicly available under the FOIA's reading-room provision, without the assistance of even the statutorily required index. DOJ compounds this error by insisting that because *EFF* held that a single OLC opinion "of exactly the type CREW seeks was not subject to disclosure," DOJ Br. 11, it necessarily follows that all – or virtually all – OLC opinions are not subject to

disclosure. The *EFF* opinion, however, cannot bear the weight DOJ seeks to place on it.

In its opening brief CREW explained how the opinion before the Court in *EFF* differs from the opinions CREW seeks here. Most significantly, the *EFF* opinion concerned only past conduct, while opinions issued pursuant to the Best Practices Memo "address legal questions prospectively." JA 19, CREW Br. 28. DOJ ignores this critical distinction to focus instead on language from the *EFF* Court explaining that, even if the OLC opinion before it "describe[d] the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy." *EFF*, 739 F.3d at 10 (emphasis in original), quoted in DOJ Br. at 12. Certainly, that effect dictated in part the outcome in *EFF*. Here, however, CREW has identified multiple OLC opinions that in fact "state or determine" the outcome of disputes between agencies or those affecting private individuals, *see* CREW Br. at 23-26, and DOJ has offered nothing to counter this evidence.

Nor has DOJ even attempted to explain how this Court in *EFF* properly could have implicitly overruled a Supreme Court case, *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), or decades of precedent from this Court. *See* CREW Br. at 31-34. DOJ's silence on the conflict between its excessively expansive interpretation of *EFF* and prior precedent speaks volumes.

Like the District Court's opinion, DOJ's position here rises and falls on its all-or-nothing gambit. According to DOJ, either CREW is entitled to all formal written OLC opinions or it is entitled to none, with no other viable alternative. According to DOJ, all formal written opinions OLC issues share the characteristics of the opinion this Court addressed in *EFF* and, like that opinion, are exempt from disclosure under the FOIA. But unlike *EFF*, DOJ offers no evidence whatsoever to back up such a sweeping claim. Moreover, in the face of CREW's request to supplement the record through discovery, DOJ insists the factual predicate for discovery is absent here, ignoring that the FOIA imposes a burden of proof on the agency, not the requester. At the very least, given the undeveloped record here and the government's failure to satisfy its burden of proof, the Court should not reach a conclusion about the effect of the *EFF* decision without fully understanding the characteristics of the OLC opinions CREW seeks here and whether they in fact are of the same or a different character.

CONCLUSION

For the foregoing reasons and those set forth in plaintiff's opening brief, the judgment of the District Court dismissing this action should be reversed, and the case remanded for further proceedings on the merits of plaintiff's claim.

Respectfully submitted,

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Dated: October 11, 2018

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Dated: October 11, 2018

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 11th day of October, 2018, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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