

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

AMERICAN CIVIL LIBERTIES UNION, and  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE et al.,  
Defendants.

15 Civ. 9317 (AKH)

**DECLARATION OF PAUL P. COLBORN**

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Department’s Motion for Summary Judgment in this case. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

**OLC’S RESPONSIBILITIES**

2. The principal function of OLC is to assist the Attorney General in her role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions

involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. Although OLC publishes some opinions and makes discretionary releases of others, OLC legal advice is generally kept confidential. One important reason OLC legal advice often needs to stay confidential is that it is part of a larger deliberative process—a process that itself requires confidentiality to be effective. If government agencies and OLC had to conduct deliberations with knowledge that their deliberations were open to public view, such discussions would naturally be chilled or inhibited, and the efficiency of government policy making would suffer as a result.

4. These deliberative confidentiality concerns apply with particular force to OLC advice because of OLC's role in the decisionmaking process. OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive activities of the Executive Branch on matters that can be quite controversial. So that Executive Branch officials may continue to request, receive, and rely on candid legal advice from OLC on such sensitive matters, it is essential that OLC legal advice provided in the context of internal deliberations not be inhibited by concerns about public disclosure.

5. The foregoing considerations regarding the need for confidential Executive Branch deliberations are particularly compelling in the context of the provision of legal advice, given the nature of the attorney-client relationship. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal

advice. When the advice is provided in confidence, it is protected from compelled disclosure. As the Supreme Court has observed, “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critical to protect this relationship of trust in the governmental context, to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote such broader public interests in the government’s observance of law and the administration of justice. The free and candid flow of information between agency decisionmakers and their outside legal advisers depends on the decisionmakers’ confidence that the advice they receive will remain confidential. Moreover, disclosure of legal advice necessarily reveals confidential communications from agency clients made for the purposes of securing advice.

6. When requested to provide counsel on the law, OLC attorneys stand in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. Thus, the need to protect the relationship of trust between OLC and the client seeking its legal advice provides an additional reason OLC legal advice often needs to stay confidential.

7. The interests protected by the deliberative process and attorney-client privileges continue to apply fully to confidential OLC legal advice in circumstances where the Executive Branch or one of its departments or agencies elects, in the interest of transparency, to explain

publicly the Executive Branch's understanding of the legal basis for current or contemplated Executive Branch conduct. There is a fundamental distinction between an explanation of the rationale and basis for a decision, which would not be privileged, and confidential legal advice received prior to making a decision, which is privileged. Thus, there is no disclosure of privileged legal advice, and therefore no waiver of attorney-client privilege, when, as part of explaining the rationale for its actions or policies, the Executive Branch explains its understanding of their legal basis without reference to any confidential legal advice that Executive Branch decisionmakers may have received before deciding to take the action or adopt the policy. Likewise, confidential advice does not lose the protection of the deliberative process privilege simply because the Executive Branch explains the basis or rationale for its actions or policies without referring to that advice; rather, confidential deliberative advice loses this protection only through adoption, *i.e.*, if the advice is expressly adopted through incorporation by reference or in some other way as part of the explanation of the rationale for the decision, or waiver, *i.e.*, through specific voluntary disclosure of the deliberative material. If merely explaining publicly the legal basis for Executive Branch conduct were understood to remove the protection of the deliberative process and attorney-client privileges from the confidential legal advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of Executive Branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of the decisionmaking process, and it would also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

**PLAINTIFFS' FOIA REQUEST**

8. On August 17, 2015, OLC received a request dated August 14, 2015, from Dror Ladin on behalf of the American Civil Liberties Union Foundation (together with the American Civil Liberties Union, hereinafter the “ACLU”), requesting 69 records identified in a numbered table. *See* Ex. A (FOIA Request (August 14, 2015)) (hereinafter, “the ACLU Request”).

9. By letter dated August 28, 2015, Deputy Assistant Attorney General John Bies informed Mr. Ladin that OLC acknowledged receipt of the ACLU Request and was denying expedited treatment under 28 C.F.R. § 16.5(e)(1)(ii). *See* Ex. B, at 1 (OLC Acknowledgment (August 28, 2015)). By letter dated September 17, 2015, Mr. Bies informed Mr. Ladin that the Office of Public Affairs had considered his request for expedited treatment under 28 C.F.R. § 16.5(e)(1)(iv) and granted expedited status, and accordingly OLC had reassigned the request to the expedited processing track. *See* Ex. C, at 1 (OLC Expedite Grant (September 17, 2015)).

10. On November 25, 2015, before OLC had completed its search, ACLU filed this lawsuit.

11. On June 13, 2016, following a search and processing by OLC and other government entities, OLC informed Mr. Ladin that it had processed nine responsive records. *See* Ex. D at 1 (OLC Response (June 13, 2016)). Of the nine records, OLC enclosed one in full and eight with portions redacted. *Id.* Mr. Ladin was informed that the redactions were made pursuant to FOIA Exemptions One, Three, and/or Six, 5 U.S.C. § 552(b)(1), (3), (6). *Id.* I understand that ACLU has not challenged the redactions to any of these documents.

12. Following the response described above, the Central Intelligence Agency (CIA) referred one additional responsive document to OLC for processing. In a letter dated June 27, 2016, OLC informed Mr. Ladin that it was withholding this document—identified in the ACLU

Request as Document 17—in full pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5). *See* Ex. D at 1 (OLC Response (June 27, 2016)). Mr. Ladin was further informed that the document is protected by the deliberative process and attorney-client privileges, that it is not appropriate for discretionary release, and that portions of the document are also exempt from disclosure pursuant to FOIA Exemptions One and Three, 5 U.S.C. § 552(b)(1), (3). *Id.* I understand that ACLU intends to challenge the withholding of this document.

### **OLC'S SEARCH**

13. I have been informed that the ACLU does not challenge the adequacy of OLC's search for responsive documents, and for that reason I do not describe the search here.

### **DOCUMENT AT ISSUE**

14. I am personally familiar with the withheld document issue in this case.

15. The withheld document is an eight-page draft of a possible OLC opinion that would provide legal advice to the General Counsel of the CIA, dated January 9, 2003, and marked "**DRAFT**" in bold at the top of the first page. The draft memorandum bears a signature block for OLC Deputy Assistant Attorney General John Yoo, but is unsigned. The draft memorandum was prepared in response to confidential communications from the CIA soliciting legal advice from OLC. After searching OLC's records of final legal advice, we believe that OLC ultimately did not issue a final opinion in response to this request or otherwise finalize an opinion based on this draft of a potential opinion.

16. Given the passage of time, changes in personnel at OLC, and the lack of information as to its use, OLC lacks definitive knowledge as to when and for what purpose the draft opinion was shared with the CIA. It may have been shared with the client for editing suggestions or other comments as part of OLC's deliberative process in preparing the opinion, it

may have also been shared in draft form in order to provide tentative or preliminary legal advice in a time-sensitive situation, or it may have been transmitted for some other purpose.

Regardless, as a draft opinion, the document on its face reflects only predecisional legal analysis prepared as part of OLC's deliberative process in preparing its legal advice. Moreover, as with all such OLC legal advice memoranda, the draft opinion contains confidential client communications made for the purpose of seeking legal advice. And if it was shared with the CIA as legal advice, the draft opinion also constitutes predecisional legal advice from OLC to an Executive Branch client as part of government deliberative processes.

17. As cited in the ACLU Request, and to the best of my knowledge, the only public disclosure of the existence of the draft opinion is in footnote 686 in the publicly released version of the *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, a report issued by the Senate Select Committee on Intelligence (hereinafter "SSCI Report"). The draft opinion was among many documents the CIA shared in confidence with the Intelligence Committee.

18. Footnote 686 in the SSCI Report identifies the draft opinion as a "Draft Memorandum" and correctly identifies the subject of the draft opinion as concerning a "Presidential Memorandum" of February 7, 2002. The footnote ends with a sentence that describes content from "[t]he memorandum." Because of that sentence's imprecision concerning which "memorandum" it was referring to, I have reviewed the draft opinion and the presidential memorandum and determined that the content described in the first sentence of the footnote is included in the presidential memorandum, which is publicly available, and is not contained in the draft opinion.



**APPLICABLE EXEMPTIONS**

*Withholding Pursuant to Exemption Five*

19. The withheld record is a draft OLC opinion written by one or more OLC attorneys containing those attorneys' confidential, predecisional, and non-final legal analysis, and it was prepared for the purpose of assisting an Executive Branch client in making policy decisions. Accordingly, the document is covered by the deliberative process and attorney-client privileges, and therefore is exempt under FOIA Exemption Five, unless those privileges have been lost by waiver or adoption.

20. The deliberative process privilege protects documents that are (a) predecisional, in that they were generated prior to decisions or potential decisions; and (b) deliberative, in that they contain, reflect, or reveal advice, discussions, proposals, and the exchanges that characterize the government's deliberative processes.

21. The withheld draft OLC opinion is protected by the deliberative process privilege because it is confidential, predecisional, and deliberative. Drafts are particularly sensitive in the deliberative process that occurs within OLC, where OLC attorneys make extensive use of drafts to focus, articulate, and refine their legal advice and analysis. OLC attorneys circulate draft legal analysis for review, seeking comments, edits, suggestions, and criticism, in order to improve OLC's final work product. Inevitably, initial drafts of documents differ substantially from the final version, as attorneys adjust their reasoning, analysis, and sometimes conclusions in response to input from their colleagues. It is not uncommon at OLC for legal conclusions themselves to change over the course of the deliberations. As a draft, the document at issue is thus quintessentially deliberative, reflecting the tentative thought processes and reasoning of the Office in a document containing draft legal analysis that was never finalized, regarding possible



advice in connection with Executive Branch deliberations concerning detention. Moreover, such draft legal analysis, like the final versions of OLC legal advice memoranda, is also deliberative and predecisional to potential Executive Branch policy decisions regarding detention.

22. If the draft opinion was provided to CIA with the intention that it be relied on as tentative or preliminary OLC advice, the document also falls squarely within the protection of the deliberative process privilege as confidential legal advice. The document is (a) predecisional, *i.e.*, prepared in advance of Executive Branch decisionmaking; and (b) deliberative, *i.e.*, containing advice from OLC to Executive Branch officials in connection with that decisionmaking. Requiring disclosure of documents of this sort would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that OLC's development and provision of candid and complete legal advice not be inhibited by concerns about compelled public disclosure. Protecting such legal advice from compelled disclosure is also central to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

23. The attorney-client privilege protects documents that contain or reflect confidential legal advice provided by an attorney to a client, and confidential client requests for legal advice and other confidential communications and facts conveyed by the client to the attorney for the purpose of receiving legal advice.

24. The withheld document is protected by the attorney-client privilege. The responsive document (a) contains confidential legal analysis prepared for and shared in draft form with OLC's client, the CIA; and (b) reflects confidential communications between OLC

and its client made for the purpose of seeking and providing that legal advice. The document thus falls squarely within the attorney-client privilege. Having been asked to provide legal advice, OLC attorneys stood in a relationship of trust with their client. Just as disclosure of client confidences provided in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice for their clients, so too would disclosure of the legal advice itself undermine that trust.

*Withholding Pursuant to Exemptions One and Three*

25. In connection with seeking advice from OLC, OLC's Executive Branch clients sometimes provide OLC with classified information or other information specifically protected from disclosure under FOIA by statute. OLC does not have original classification authority, but when it receives or makes use of classified information provided to it by its clients, OLC is required to mark and treat that information as derivatively classified to the same extent as its clients have identified such information as classified. Accordingly, all classified information in OLC's possession or incorporated into its records has been classified by another agency or component with original classifying authority.

26. The draft OLC opinion is marked as classified because it contains some information OLC received from the CIA that was marked as classified. OLC has also been informed by the CIA that the classified information contained in the document is protected from disclosure under FOIA by Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. § 3024(i)(1).

27. Accordingly, OLC is also withholding portions of the draft opinion pursuant to Exemptions One and Three. Exemption One, 5 U.S.C. § 552(b)(1), exempts documents classified in the interest of national defense or foreign policy pursuant to an Executive Order

from disclosure under FOIA. Exemption Three, 5 U.S.C. § 552(b)(3), exempts documents “specifically exempted from disclosure by statute” from disclosure under FOIA. The application of these exemptions to portions of the document is addressed in the declaration filed in connection with this motion on behalf of the CIA.

***Segregability, Adoption, and Waiver***

28. I have personally reviewed the draft OLC opinion to determine whether any portion or portions could be released without divulging information protected by one or more of the applicable FOIA exemptions. The document does not contain reasonably segregable, nonexempt information.

29. To my knowledge, the draft opinion has never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision.

30. To my knowledge, neither the draft opinion nor any of its contents have ever been disclosed publicly by any Executive Branch official. In addition, I am not aware of any public statements by government officials that could constitute waiver of the privileges applicable to the document.

***Discretionary Release***

31. OLC has determined that the draft opinion is not appropriate for discretionary release.

\* \* \* \* \*

32. In conclusion, I respectfully submit that the draft memorandum described herein is covered by the deliberative process and attorney-client privileges. Accordingly, the withheld document falls squarely within Exemption Five. The compelled disclosure of this document would harm the deliberative processes of OLC and the government as a whole, and would

disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 14, 2016, Washington, D.C.

A handwritten signature in black ink, appearing to read "Paul P. Colborn", written over a horizontal line.

PAUL P. COLBORN