EXHIBIT A

POGO PROJECT ON GOVERNMENT OVERSIGHT
Exposing Corruption. Exploring Solutions.

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Melissa Golden (née Kassier)
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Room 5511, 950 Pennsylvania Avenue, N.W.
Department of Justice
Washington, DC 20530-0001
Delivered via email to: usdoj-officeoflegalcounsel@usdoj.gov

Subject: Freedom of Information Act Request

Dear Ms. Golden,

As a member of the news media, I am making this request under the Freedom Of Information Act ("FOIA"), 5 U.S.C. § 552. Please provide the following records in a digital format:

1. A list of all OLC opinions from January 1, 1998 through the present.

I am aware that the OLC has posted some of these records in its online reading room. However, the records as currently posted are not fully responsive to my request. For example, numerous entries—including the date of publication—are withheld in their entirety, citing exemption (b)(5), and it appears as though author's names are sometimes redacted under exemption (b)(6).

For the following reasons, the Project On Government Oversight (POGO) believes that these redactions are inappropriate and not justified by either federal law or Department of Justice (DOJ) policies:

OLC opinions, as described by the OLC itself, "provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."[1] The internal OLC guidance further indicates that:

> the Office operates from the presumption that it should make its significant opinions fully and promptly available to the public. This presumption furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action. Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress

[1] https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf; p.1.

> can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed. (p. 5)

POGO appreciates that the OLC appears to understand both the significance of their work as it relates to government operations as well as the importance of transparency in fostering a more effective, accountable, and trustworthy government.

POGO also acknowledges that, for various legitimate reasons, the content of certain opinions may need to be protected from immediate public disclosure. These legitimate reasons, however, do not extend to the titles of said memos. The current habit of complete redaction of most titles prevents the very accountability and public trust that the above-quoted guidance seeks to promote. The public deserves access to the titles of each opinion issued by the OLC, and the government has improperly attempted to withhold that information from the public and use secrecy to shield itself from the accountability it espouses.

The OLC has already released elsewhere at least one title that is currently withheld in the reading room list. Specifically, the OLC seems to have no problem publishing the title of the June 25, 1998 opinion to Charles F.C. Ruff, Counsel to the President, titled "*Re: Appointment of Deputy United States Trade Representative*," written by Beth Nolan, Deputy Assistant Attorney General.[2] This opinion, however, is redacted in its entirety on the list of opinions currently available in the OLC FOIA Reading Room. It is clear, therefore, that the entire list should be thoroughly reviewed for release.

Exemption (b)(5)

Deliberative Process

As mentioned in the Department of Justice's (DOJ) FOIA guidelines, the general purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).[3] This is based upon three policy purposes: "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) To protect against premature disclosure of proposed policies before they are actually adopted; and (3) To protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action."[4] The disclosure of the OLC opinion titles will do nothing to harm any of these three priorities.

Specifically, the courts have established two requirements for the invocation of the deliberative process privilege.[5]

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[2] Opinion title published on page 2 of the 3/13/2017 opinion, "Appointment of United States Trade Representative," https://www.justice.gov/olc/file/1078061/download; Redaction found on page 3 of the List of OLC Opinions 1998-2013, https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-ops-1998-2013-redacted.pdf
[3] https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf; p. 366.
[4] https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf; p. 366.
[5] https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf; p. 368.

> "First, the communication must be "predecisional, i.e., 'antecedent to the adoption of an agency policy.' Second, the communication must be deliberative, i.e., 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Jordan v. DOJ*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Furthermore, as Attorney General Michael Mukasey testified before House Judiciary Committee in 2008, "the Justice Department... could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion," even if the advice contained in the opinion is wrong.[6] Given that OLC opinions thereby effectively grant immunity from prosecution, it is clear that the opinions themselves are clear statements of established DOJ policy, and therefore cannot be deemed predecisional.

It is also important to note that the portions being withheld are from a list of the titles of final OLC opinions, not the opinions themselves. The titles of OLC opinions are not, by themselves, deliberative in nature, as they do not "make recommendations or express opinions on legal or policy matters." The titles are consistently of a factual nature and while they reveal the subject at hand, they do not "reveal the nature of the deliberations" or infringe upon the ability of the OLC to conduct its internal deliberations in an open and frank way. Additionally, disclosure of these titles could not result in any public confusion regarding the grounds for a decision, as no such grounds would be disclosed. Similarly, disclosure cannot be considered a "premature disclosure of a proposed policy," as the titles themselves do not generally propose policies. *Dudman Commc'ns Corp. v. Dep't of Air Force,* 815 F.2d 1565 (D.C. Cir. 1987).

The titles of previous OLC opinions that have been released reflect this, as it is impossible to determine by the title what kind of deliberation has occurred, what various parties might have recommended, and what the final policy position that OLC is adopting might be. The only thing that can be determined is the subject matter at hand—factual information that is not protected by the (b)(5) exemption. This applies regardless of whether the OLC opinion is addressed directly to the President or to any other government official.

> That the President, rather than an agency, initiated the policy development process is of no moment; what matters is whether a document will expose the pre-decisional and deliberative processes of the Executive Branch. …the deliberative process privilege does not protect purely factual material contained in privileged documents if the disclosure of such information would not reveal the nature of the deliberations. *See EPA v. Mink*, 410 U.S. at 87-88, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973). *Judicial Watch, Inc., Appellee v. Department of Energy, et al., Appellants*, 412 F.3d 125 (D.C. Cir. 2005)

Attorney-Client Privilege

Per DOJ FOIA guidelines, "although attorney-client privilege fundamentally applies to facts divulged by a client to his attorney, this privilege "also encompasses any opinions given by

[6] Testimony of Attorney General Michael Mukasey, before the House Judiciary Committee, on "Justice Department Oversight," February 7, 2008.

an attorney to his client based upon, and thus reflecting, those facts" (p. 405). While the contents of any withheld OLC opinion may contain "facts divulged by a client to his attorney," the title does no such thing.

Furthermore, the titles are not generally based upon, nor do they generally reflect confidential facts conveyed by any potential clients of the OLC. The titles do not encompass any advice based on confidential facts supplied by a client, and thus do not run the risk of revealing facts that a client may have revealed in confidence. *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005); *MacLean v. DOD*, No. 04-2425, slip op. at 10 (S.D. Cal. June 6, 2005).

In the event that an OLC opinion is a binding determination, otherwise confidential records are not exempted. As determined in *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997), "Exemption 5 and the attorney-client privilege may not be used to protect... agency law from disclosure to the public." To the extent that an OLC opinion is binding, neither the title nor the contents of the opinion can be exempted under attorney-client privilege. This principle was unanimously upheld by the Second Circuit Court of Appeals quite recently, when the OLC was forced to disclose not only the existence but also the contents of its memo regarding the targeting killing of Anwar al-Awlaki.[7] The fact that the OLC has abused the (b)(5) exemption in the recent past lends even more weight to the case for transparency and accountability.

Even in the event that the government correctly applies the attorney-client privilege, the information is not protected unless the government identifies who its client is in order to sustain a claim of this privilege. *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 80 (D.D.C. 2008). For every determination of attorney-client privilege, we therefore require the government to disclose the client for whom the record was created.

The government therefore does not meet the requirements necessary in order to apply Exemption (b)(5) to the requested record.

Exemption (b)(6)

Regarding the use of the (b)(6) exemption, these records should be released if there is a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that there would be significant public benefit from the disclosure of the requested records. POGO believes that there is significant public interest at stake in the disclosure of these records, as they pertain to the individuals who are effectively making legal decisions for the entire executive branch. Furthermore, POGO holds that the records sought do not constitute an unwarranted invasion of privacy as the records relate not only to professional and business activities, but also to individuals who hold a position of public trust recognized in the U.S. Constitution and implied loyalty to the U.S. government that inherently limits the privacy of the individual. In fact, OLC

[7] https://epic.org/amicus/foia/new-york-times/2d-Cir-Opinion.pdf

has previously disclosed the names of opinion authors, demonstrating that there is no inherent or categorical invasion of privacy in disclosing their identities.[8]

It also appears as though the redaction of the author's name may be inconsistently applied, given the OLC has published the full contents of certain memos—including the signature blocks—while simultaneously using (b)(6) to redact names from titles in the currently available lists.[9]

The substantive test for whether disclosure would constitute a "clearly unwarranted invasion of privacy" requires a balancing test between "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Dep't of Air Force v. Rose,* U.S. 352, 372 (1976); *accord Dep't of State v. Ray,* U.S. 164 (1991). In this exemption, "the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir 1983).

Personal Privacy

While individuals do not forfeit their privacy rights when they choose to work for the government, "their privacy interests are somewhat reduced," and they are reduced even further when the employee holds a high-level position. *Lissner v. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001); *Hardy v. Dep't of Def.,* No. CV-99-523-TUC-FRZ (D. Ariz. Aug. 27, 2001). The individuals who craft OLC opinions, which regularly determine the courses of action available to entire federal agencies, are most assuredly in high-ranking and influential positions and therefore have significantly reduced rights to privacy.

In addition, the requested records relate to professional activities, and thus do not significant impinge on personal privacy. As determined in *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983), "The privacy exemption does not apply to information regarding professional or business activities." The writing of OLC opinions is a clearly a professional activity, and "exemption 6 was developed to protect intimate details of personal and family life, not business judgements and relationships." *Sims v. CIA (I)*, 642 F.2d 562, 575 (D.C. Cir. 1980).

Furthermore, "without more, the disclosure of a document will not constitute a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate." *Schell v. Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988). Unless it can be demonstrated that the publication of the authors' names would cause direct and palpable harm to the authors, there is no privacy invasion at all and no need for a balancing test against the public interest. Note that exemption (b)(6) "does not apply to an invasion of privacy produced *as a secondary effect* of the release" (emphasis in original). *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir 1983).

[8] See: https://www.justice.gov/olc/page/file/965126/download
[9] For example: https://www.justice.gov/olc/file/971166/download as compared to https://www.documentcloud.org/documents/4917103-OLC-2017-List.html

Public Interest

There is significant public interest in knowing who is crafting the legal opinions that have the potential to change the course of our nation. This is no exaggeration of the importance of OLC's work; the issuance of what are now referred to as the "torture memos" have had dramatic effects in American foreign policy as well as national security. According to *Int'l Bd. of Elec. Workers, Local No. 41 v. Dep't of Hous. & Urban dev.,* 763 F.2d 435, 436 (D.C. Cir. 1985), "The purpose of FOIA is to permit the public to decide for itself whether government action is proper...." It is easy to conceive of a situation where those who are shaping the direction of the nation are either not properly qualified to do so or are subject to conflicts of interest that might cause others to discount their professional judgement. The public takes great interest in the individuals who shape public laws, and it stands to reason that the public has a great interest as well in the individuals who shape what is commonly referred to as "secret law," especially given the lack of alternative oversight mechanisms. The disclosure of the names of OLC opinion authors can also give additional credibility and weight to their opinions, should they be properly qualified, reassuring the public that their trust is not being misplaced.

The balancing test applied to Exemption (b)(6) is therefore sufficient justification to release the requested records without redactions under (b)(6).

I request a waiver of all costs associated with fulfilling this submission pursuant to 5 U.S.C. § 5 552(a)(4)(A)(iii). Disclosure of the requested records will further the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest" of the requester, the Project On Government Oversight (POGO). Specifically, POGO intends to use the requested records to educate the public about the subject matter that the OLC addresses. If the request for a fee waiver is denied, please contact me about any incurred expenses prior to supplying the requested records.

If this request is denied in full or in part, please cite each exemptions pursuant to 5 U.S.C. § 552(b) that justifies each denial. Please bear in mind that the foreseeable harm standard must be met before an exemption applies. If an exemption applies, however, please consider exercising the agency's discretionary release powers to disclose the records. Any such action supports the presumption of "openness" on which FOIA is based upon. Additionally, please release all reasonably segregable portions of the records that do not meet an exemption. 5 U.S.C. § 552(b).

I look forward to your response, including an individualized tracking number, within 20 days of the receipt of this request, unless, in the case of "unusual circumstances," the time limitation is "extended by written notice." 5 U.S.C. § 552(a)(6)(B). I am aware that all fees will be waived if specified time limits are not met. 5 U.S.C. § 552(a)(4)(A)(viii). I have a right to appeal if this request is wholly or partially denied or if the agency fails to respond within 20 days, and that, if successful, a federal district court may assess "reasonable attorney fees and other litigation costs." 5 U.S.C. § 552(a)(4)(E).

Please feel free to contact me if this request requires further clarification. I can be reached at (202) 347-1122 or via email at dvanschooten@pogo.org. Thank you for your prompt attention to this matter.

Sincerely,

Daniel Van Schooten
Investigator
Project On Government Oversight