

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Argued: February 21, 2012 Decided: September 19, 2012)

5 Docket No. 11-4599

6 -----

7 Brennan Center for Justice at New York University School of Law,

8 Plaintiff-Appellee,

9 - v -

10 United States Department of Justice, United States Agency for  
11 International Development, United States Department of Health and  
12 Human Services,

13 Defendants-Appellants.\*

14 -----

15 Before: CALABRESI, SACK, and HALL, Circuit Judges.

16 Appeal from a judgment of the United States District  
17 Court for the Southern District of New York (Victor Marrero,  
18 Judge) granting the plaintiff's motion for summary judgment and  
19 denying the defendants' cross-motion for summary judgment. The  
20 court ordered disclosure by the defendants of three memoranda  
21 prepared by the Department of Justice's Office of Legal Counsel  
22 because they were not covered by the deliberative process

---

\* The Clerk of Court is respectfully directed to amend the caption as set forth above.

1 exemption, 5 U.S.C. § 552(b)(5), from the general requirement of  
2 disclosure contained in the Freedom of Information Act. We  
3 conclude that one such memorandum was incorporated by reference  
4 in a USAID document such that the protection of the exemption was  
5 surrendered, but that the other two were not and retain their  
6 exempt status.

7 Affirmed in part; reversed and remanded in part.

8 Appearances: DOROTHY HEYL (Elizabeth M. Virga, on the  
9 brief) Milbank, Tweed, Hadley & McCloy  
10 LLP, New York, New York, for Plaintiff-  
11 Appellee.

12 SHARON SWINGLE (Benjamin H. Torrance,  
13 Sarah S. Normand, Beth S. Brinkmann,  
14 Michael S. Raab, on the brief), for  
15 Preet Bharara, United States Attorney  
16 for the Southern District of New York,  
17 New York, New York, for Defendants-  
18 Appellants.

19 Melanie Sloan, Anne L. Weismann, Adam J.  
20 Rappaport, Citizens for Responsibility  
21 and Ethics in Washington, Washington,  
22 DC; David L. Sobel, Electronic Frontier  
23 Foundation, Washington, DC; Mark Rumold,  
24 Electronic Frontier Foundation, San  
25 Francisco, California, amici curiae.

26 SACK, Circuit Judge:

27 The defendants, the United States Department of Justice  
28 ("DOJ"), the United States Department of Health and Human  
29 Services ("HHS"), and the United States Agency for International  
30 Development ("USAID"), appeal from a judgment of the United  
31 States District Court for the Southern District of New York

1 (Victor Marrero, Judge) granting a motion for summary judgment by  
2 the plaintiff, the Brennan Center for Justice at New York  
3 University School of Law ("Brennan Center"), denying the  
4 defendants' cross-motion for summary judgment, and, pursuant to  
5 the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, ordering  
6 the release of three memoranda prepared by the DOJ's Office of  
7 Legal Counsel ("OLC"). For the reasons that follow, the judgment  
8 of the district court is affirmed with respect to one of these  
9 memoranda, and reversed and remanded with respect to the other  
10 two.

#### 11 **BACKGROUND**

12 In 2003, Congress enacted the two statutes that provide  
13 the factual backdrop for this litigation: the United States  
14 Leadership Against HIV/AIDS, Tuberculosis, Malaria Act, 22 U.S.C.  
15 §§ 7601-7682. ("Leadership Act"), and the Trafficking Victims  
16 Protection Reauthorization Act, 22 U.S.C. §§ 7101-7112.  
17 ("TVPRA"). Each included what has become known as the "pledge  
18 requirement," purporting to require all organizations that  
19 receive funds for HIV/AIDS and anti-trafficking work pursuant to  
20 the statutes to have "a policy explicitly opposing prostitution  
21 and sex trafficking." 22 U.S.C. § 7631(f); see also 22 U.S.C. §  
22 7110(g)(2).

23 After the Leadership Act was enacted, the  
24 [OLC] . . . warned that applying the Policy  
25 Requirement to U.S.-based organizations would  
26 be unconstitutional. Heeding that warning,

1 [the government] initially refrained from  
2 enforcing it against U.S.-based NGOs. OLC  
3 subsequently changed course and withdrew what  
4 it characterized as its prior "tentative  
5 advice," asserting that "there are reasonable  
6 arguments to support the constitutionality"  
7 of applying the Policy Requirement to  
8 U.S.-based organizations, and, starting in  
9 mid-2005, the Agencies began applying the  
10 Requirement to U.S.-based grantees.

11 Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l  
12 Dev., 651 F.3d 218, 225 (2d Cir. 2011).<sup>1</sup>

13 On July 14, 2005, the Brennan Center submitted FOIA  
14 requests to USAID, HHS, and the OLC for "any and all documents  
15 containing guidance" provided by the OLC to any representatives  
16 of HHS or USAID "relating to the enforcement" of the pledge  
17 requirement. FOIA Request from Brennan Center to HHS at 1 (July  
18 14, 2005), Brennan Center v. Dep't of Justice, No. 11-4599, Joint  
19 Appendix ("J.A."), at 248 (2d Cir. Jan. 6, 2012); FOIA Request  
20 from Brennan Center to OLC at 1, J.A. 270 (July 14, 2005); FOIA  
21 Request from Brennan Center to USAID at 1, J.A. 302 (July 14,  
22 2005). On March 7, 2007, HHS denied the request in its entirety

---

<sup>1</sup> Alliance for Open Society was brought by several organizations, including the Brennan Center, challenging the pledge requirement on First Amendment grounds. We affirmed the district court's decision to preliminarily enjoin that provision of the Leadership Act concluding that it "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds [because it] does not merely require recipients of Leadership Act funds to refrain from certain conduct, but goes substantially further and compels recipients to espouse the government's viewpoint." 651 F.3d at 223.

1 and referred it to USAID and the OLC, from which, it had  
2 determined, many of the requested documents originated.<sup>2</sup> The OLC  
3 denied the original request in its entirety, and denied the  
4 request referred from HHS except as to a nine-page letter  
5 commenting on the TVPRA that was already in the public record,  
6 which was sent in September 2003 from a DOJ official to  
7 Representative James Sensenbrenner, then-Chairman of the House  
8 Judiciary Committee. USAID did not respond to the referred  
9 request, and denied the original request in its entirety. The  
10 Brennan Center appealed the various denials with those agencies,  
11 and the agencies affirmed their denials, leaving the Brennan  
12 Center with the option of pursuing its claims in federal court.  
13 See 5 U.S.C. § 552(a)(4)(B).

14 On October 15, 2009, the Brennan Center brought this  
15 action in the United States District Court for the Southern  
16 District of New York broadly alleging that USAID, OLC, and HHS  
17 had violated FOIA by failing to identify responsive documents,  
18 failing to disclose records, failing to disclose reasonably  
19 segregable portions of otherwise withheld documents, and, with  
20 respect to the OLC and USAID, failing to respond to FOIA

---

<sup>2</sup> HHS located 231 pages of responsive documents, and withheld 46 pages in their entirety pursuant to FOIA's deliberative process exemption, see 5 U.S.C. 552(b)(5). It determined that of the remaining documents, 177 pages originated with the OLC, and 8 pages with USAID, and referred the Brennan Center's request to those agencies.

1 requests. On January 15, 2010, the defendants provided the  
2 plaintiff with an index of withheld documents as required by  
3 Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The Vaughn index  
4 included the date of each document withheld, the author and  
5 recipient(s), a brief description, the number of pages, and the  
6 reason for its being withheld. The district court judge met with  
7 the defendants on April 22, 2010, and May 5, 2010, and asked them  
8 to consider disclosing some or all of the documents in order to  
9 avoid further litigation. In response, the defendants released  
10 heavily redacted versions of several documents and associated  
11 emails. See Order, Brennan Center v. Dep't of Justice, No. 09  
12 Civ. 8756, at 1-3 (S.D.N.Y. July 1, 2010), ECF No. 16. To the  
13 extent that internal agency emails and memoranda are referenced  
14 in this opinion, they are part of the record by virtue of this  
15 disclosure.

16 On January 28, 2011, the plaintiff moved for summary  
17 judgment seeking release of the entirety of three memoranda that  
18 it alleges were improperly withheld pursuant to FOIA's "Exemption  
19 5," which shields from disclosure "inter-agency or intra-agency  
20 memorandums or letters which would not be available by law to a  
21 party other than an agency in litigation with the agency." 5  
22 U.S.C. § 552(b)(5). That exemption has been interpreted to  
23 encompass traditional common law privileges against disclosure,  
24 including the attorney-client and deliberative-process

1 privileges, and the work-product doctrine. Nat'l Council of La  
2 Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005). The  
3 three withheld documents that are the targets of the Brennan  
4 Center's objections are: (1) a one-page memorandum provided by  
5 the OLC to HHS and USAID on or about February 17, 2004, regarding  
6 the constitutionality of the pledge requirement (the "February  
7 Memorandum"); (2) a July 2, 2004, draft of a formal, but never-  
8 finalized, OLC opinion addressing the constitutionality of the  
9 pledge requirement (the "July 2 Memorandum"); and (3) a July 29,  
10 2004, draft memorandum similar to the July 2 Memo (the "July 29  
11 Memorandum").

#### 12 The February Memorandum

13 On February 12, 2004, the General Counsel of HHS asked  
14 the OLC to provide, on a "very short timeframe," "advice on the  
15 constitutional issues raised by the grant restrictions under the  
16 two statutes." Memorandum from Renee Lettow Lerner at 2, J.A. 55  
17 (March 12, 2004) (describing HHS request).

18 In response, on February 17, Renee Lettow Lerner, an  
19 OLC attorney, sent an email to HHS Deputy General Counsel Paula  
20 M. Stannard and USAID employee John Gardner attaching a one-page  
21 memorandum containing at least some of the requested advice.<sup>3</sup>

---

<sup>3</sup> All correspondence regarding the February Memorandum involved both USAID and HHS, although the March 12, 2004, letter suggests the advice was provided only at the behest of HHS. We have not found any explanation in the record for this

1 The memorandum explained that "[i]n the limited time available to  
2 us, we have not been able to conduct a comprehensive analysis,  
3 but we have reached the following tentative views, which might  
4 need to be altered after further analysis." February Memorandum  
5 at 1, J.A. 37. The document, the first of the three memoranda  
6 that are the subject of this litigation, was supplied to the  
7 plaintiff during the course of this litigation with all analysis  
8 redacted.

9 In an email later that evening, Stannard conveyed  
10 "draft language for the HIV/AIDS and trafficking grant  
11 awards/agreements" to Lerner. Email from Stannard, "Re: OLC's  
12 advice on grant announcements," J.A. 40 (Feb. 17, 2004). She  
13 also sent a copy to the USAID employee. Again, a copy of the  
14 email was supplied to the Brennan Center, but most of it was  
15 redacted. Lerner replied to Stannard the following day, February  
16 18, in an email that was, in effect, withheld from disclosure,  
17 i.e., it is redacted in its entirety.

18 On February 19, a USAID employee, acting on behalf of  
19 USAID employee Gardner, sent that agency's revised "Acquisition &  
20 Assistance Policy Directive" ("AAPD")<sup>4</sup> to Lerner, Stannard, and

---

discrepancy.

<sup>4</sup> "AAPDs serve as official sources for the latest updates in acquisition and assistance (A&A) policy and requirements. AAPDs provide information of significance including, but not limited to, advance notification of changes or implementation of



1 other HHS and State Department employees. Later that day,  
2 Stannard and HHS employee Demetrios Kouzoukas sent "a final draft  
3 of the language" to Lerner, Gardner, and other HHS, USAID, and  
4 State Department employees, and thanked those on the email chain  
5 for their comments. Email from Demetrios Kouzoukas, "Language in  
6 HHS HIV/AIDS award instruments," J.A. 48 (Feb. 19, 2004).

7 One week later, on February 26, 2004, USAID issued an  
8 AAPD intended to "provide clauses to be included as new standard  
9 provisions for assistance agreements and contracts that include  
10 FY 2004 HIV/AIDS funds." USAID AAPD 04-04 Revised,  
11 "Implementation of the United States Leadership Against HIV/AIDS,  
12 Tuberculosis and Malaria Act of 2003" at 2, J.A. 167 (Feb. 26,  
13 2004) ("February 26 AAPD"). The February 26 AAPD included the  
14 pledge requirement only for "Non-U.S. Non-Governmental  
15 Organizations and Public International Organizations." Id. at 5.  
16 That meant that any grant to a foreign organization would include

---

new requirements to A&A regulations and procedures." Acquisition and Assistance Policy Directives (AAPDs) and Contract Information Bulletins (CIBs), available at [http://transition.usaid.gov/business/business\\_opportunities/cib/](http://transition.usaid.gov/business/business_opportunities/cib/) (last visited August 3, 2012). "Acquisition refers to obtaining goods and services, through various types of contracts, for the use or benefit of the Agency. Assistance refers to transferring funds (or other valuables) from USAID to another party for the implementation of programs which will contribute to the public good . . . ." Doing Business with USAID, available at <http://transition.usaid.gov/business> (last visited August 8, 2012). No evidence in the record of which we are aware refers to any formal process that might exist for the creation or approval of AAPDs.

1 a clause explaining that "[a]s a condition of entering into this  
2 agreement, the recipient agrees that it has a policy explicitly  
3 opposing, in its activities outside the United States,  
4 prostitution and sex trafficking." Id. at 6. No similar  
5 language would be included in the grant language required with  
6 respect to U.S. organizations. An AAPD that had been issued on  
7 January 15, 2004, prior to the OLC's February memorandum, did  
8 include the pledge requirement language for both U.S. and non-  
9 U.S. organizations. USAID AAPD 04-04, "Implementation of the  
10 United States Leadership Against HIV/AIDS, Tuberculosis and  
11 Malaria Act of 2003" at 3, J.A. 162 (Jan. 15, 2004).

12 On June 24, 2004, HHS issued a grant proposal that  
13 required "any foreign recipient [to] have a policy explicitly  
14 opposing, in its activities outside the United States,  
15 prostitution and sex trafficking." HHS Funding Announcement,  
16 "HIV Treatment for Research Subjects or by Researchers in Kenya"  
17 at 7, J.A. 176 (June 24, 2004). A July 22, 2004, USAID document  
18 contained a footnote explaining that the OLC "in a draft opinion  
19 determined that this provision only may be applied to foreign  
20 non-governmental organizations and public international  
21 organizations because of the constitutional implications of  
22 applying it to U.S. organizations." USAID FY 2004 Update,  
23 "Guidance on the Definition and Use of the Child Survival and  
24 Health Programs Fund and the Global HIV/AIDS Initiative Account"

1 at 35 n.10, J.A. 197 (July 22, 2004) ("July 22 USAID Update").  
2 On August 3, 2004, USAID issued another AAPD explaining that  
3 "[t]he US Government has determined that it is appropriate to  
4 apply the [pledge] requirement . . . only to foreign  
5 organizations, including public international organizations."  
6 USAID AAPD 04-09, "Anti-Trafficking Activities -- Limitation on  
7 the Use of Funds; Restriction on Organizations Promoting,  
8 Supporting or Advocating Prostitution" at 3, J.A. 200 (Aug. 3,  
9 2004) ("August 3 AAPD").

10 The July Memoranda

11 In a July 2, 2004 email, the OLC provided HHS with a  
12 thirty-page draft opinion -- the second document the plaintiff  
13 seeks. Another version of that draft, dated July 29, the third  
14 document that the plaintiff contends must be disclosed, was  
15 emailed to HHS on July 30. In the record on appeal, both draft  
16 opinions are redacted with the exception of a date, title, and  
17 introductory sentence. After an in camera review, however, the  
18 district court concluded that contrary to the OLC's view conveyed  
19 in February, those drafts counseled implementation of the pledge  
20 requirement for both U.S.-based and foreign organizations.<sup>5</sup>

---

<sup>5</sup> Despite the July 2004 memoranda that opined that the pledge requirement could constitutionally be applied to domestic activities, in July and August, USAID continued to advise that the requirement would only be applied to foreign organizations, as evidenced by the July 22 USAID Update and August 3 AAPD.

1 Brennan Center v. Dep't of Justice, No. 09 Civ. 8756 at 17-18,  
2 2011 WL 4001146, at \*7, 2011 U.S. Dist. LEXIS 99121, at \*19  
3 (S.D.N.Y. Aug. 30, 2011). No formal OLC opinion on the issue was  
4 ever finalized or issued.

5 In September 2004, Daniel Levin, the Acting Assistant  
6 Attorney General for the OLC, wrote to the general counsel of HHS  
7 confirming that "earlier this year . . . [DOJ] gave its tentative  
8 advice" that the pledge requirement could only be applied to  
9 foreign organizations overseas, but explained that "[w]e have  
10 reviewed the matter further and we are withdrawing that tentative  
11 advice. . . . [T]here are reasonable arguments to support [the  
12 domestic pledge requirement's] constitutionality." Letter from  
13 Levin to HHS General Counsel Alex M. Azar, II at 1, J.A. 207  
14 (Sept. 20, 2004)("Levin Letter"). This letter was not released  
15 by either the OLC or HHS, but, according to the defendants, it  
16 was "improperly leaked . . . [and] later made public by members  
17 of Congress." Defs.' Br. at 13.

18 The first public discussion of the agencies'  
19 deliberations concerning the pledge requirement was held during a  
20 March 2005 hearing of the Foreign Operations Subcommittee of the  
21 House Appropriations Committee. Randall Tobias, who was then  
22 U.S. Global AIDS coordinator, testified that

23 [t]he [OLC] provided some tentative advice  
24 initially that those restrictions should be  
25 applied only to foreign organizations.

1           Sometime mid- to late- . . . September of  
2           2004, [the OLC] withdrew that earlier  
3           tentative advice and advised that that  
4           provision was intended by the Congress to  
5           apply without that limitation to both  
6           domestic organizations as well as foreign  
7           organizations. And so I'm simply following  
8           the legislation and the advice to implement  
9           that.

10          Foreign Operations, Export Financing, and Related Programs  
11          Subcommittee Hearing Testimony of Randall L. Tobias, J.A. 236  
12          (March 2, 2005)("Tobias Testimony").

13                 In May 2005, HHS announced that it would apply the  
14          pledge requirement to domestic organizations, and USAID did the  
15          same in June 2005.

16                 In a July 17, 2007, letter from Principal Deputy  
17          Assistant Attorney General Brian Benczkowski to Congressman Henry  
18          Waxman, Benczkowski further explained the OLC's positions on the  
19          pledge requirement. "[I]n February 2004, the [OLC] provided  
20          tentative advice [to HHS and USAID] that the [pledge  
21          requirement] . . . could, under the Constitution, be applied only  
22          to foreign organizations acting overseas." Letter from Brian  
23          Benczkowski to Congressman Waxman at 1, J.A. 230 (July 17,  
24          2007)("Benczkowski Letter"). But Benczkowski explained that the  
25          OLC had thereafter changed its mind and advised in the September  
26          2004 letter that the pledge requirement could be applied  
27          domestically because there were "reasonable arguments to defend"  
28          doing so. Id. at 1-2. The letter also noted that the OLC would

1 not turn over its internal documents on the issue because of  
2 "substantial confidentiality interests."<sup>6</sup> Id. at 2.

3 The District Court Opinion

4 The district court considered the foregoing evidence in  
5 analyzing the question of whether the agencies had  
6 "expressly . . . adopt[ed] or incorporate[d]" the memoranda  
7 sufficiently to waive the protection of Exemption 5. Brennan  
8 Center, 2011 WL 4001146, at \*3, 2011 U.S. Dist. LEXIS 99121, at  
9 \*8-\*9 (quoting La Raza, 411 F.3d at 356); see also discussion of  
10 Exemption 5, at Part II of the Discussion section of this  
11 opinion, below. In ordering disclosure of the memoranda, the  
12 court concluded that the deliberative-process privilege did not  
13 apply.

14 It is clear from the various AAPDs, internal  
15 government letters and memoranda, public

---

<sup>6</sup> Several news articles -- at least one of which was published before the agencies themselves had spoken publicly -- also noted the OLC's advice on this issue. A February 28, 2005, Wall Street Journal article explained that "[t]he Bush Administration had previously applied the requirement only to overseas groups because the Justice Department initially advised that it would be an unconstitutional violation of free speech to demand that American grant applicants support Mr. Bush's policy. But the Justice Department reversed itself last fall." Michael M. Phillips, Bush Ties Money for AIDS Work to a Policy Pledge, WALL ST. J., Feb. 28, 2005. A May 18, 2005, Washington Post article similarly said that "[i]nitially, the policy was applied only to foreign organizations operating overseas. U.S.-based charities were exempt because the Justice Department believed that forcing them to make the declaration might infringe their First Amendment right of free speech." David Brown, U.S. Backs Off Stipulation on AIDS Funds, WASH. POST, May 18, 2005.

1 statements made by Government officials, and  
2 other materials reviewed by the Court in  
3 camera that, between February and September  
4 2004, USAID and HHS adopted as agency policy  
5 both the conclusions provided in the February  
6 Memo that the Pledge Requirement should be  
7 applied to foreign organizations only, as  
8 well as OLC's reasoning and analysis that  
9 application of the Pledge Requirement to  
10 domestic organizations would violate the  
11 First Amendment. Indeed, from the public  
12 record alone, there can be little doubt that  
13 this was the case. . . .

14 Further, the record also reveals that the  
15 conclusions and analysis contained in the  
16 July Memoranda, which the Court has examined  
17 in camera, were the basis for the  
18 Government's determination to alter its  
19 policy and apply the Pledge Requirement to  
20 U.S.-based organizations. . . . [A]lthough  
21 the documents were never mentioned  
22 specifically by name, the Government  
23 incorporated the July Memoranda by reference  
24 [in the relevant public statements].

25 Brennan Center, 2011 WL 4001146, at \*6-\*7, 2011 U.S.  
26 Dist. LEXIS 99121, at \*17-\*19.

27 The court also concluded that because the memoranda had  
28 been "incorporated . . . into HHS's and USAID's official policy"  
29 they were not protected by the attorney-client privilege. Id. at  
30 \*7, 2011 U.S. Dist. LEXIS 99121, at \*20. The court therefore  
31 granted the plaintiff's motion for summary judgment, denied the  
32 defendants' cross-motion for summary judgment, and ordered the  
33 disclosure of all three memoranda.

34 The defendants appeal.





1 enumerated exemptions set forth in the Act. Consistent with  
2 FOIA's purposes, these statutory exemptions are narrowly  
3 construed." Id. at 355-56 (citations omitted). The agency bears  
4 the burden of demonstrating that an exemption applies. Id. at  
5 356.

6 The memoranda being sought by the Brennan Center in  
7 this case were withheld by the government defendants pursuant to  
8 FOIA Exemption 5, which exempts "inter-agency or intra-agency  
9 memorandums or letters which would not be available by law to a  
10 party other than an agency in litigation with the agency" from  
11 the disclosure otherwise required under the Act. 5 U.S.C.  
12 § 552(b)(5). The privilege is based "on the policy of protecting  
13 the decision making processes of government agencies." NLRB v.  
14 Sears, Roebuck, & Co., 421 U.S. 132, 150 (1975) (internal  
15 quotation marks omitted). Prior case law examining it "focuses  
16 on documents reflecting advisory opinions, recommendations and  
17 deliberations comprising part of a process by which governmental  
18 decisions and policies are formulated." Id. (internal quotation  
19 marks and alteration omitted).

20 "[T]here are enough incentives as it is for  
21 playing it safe and listing with the wind,"  
22 Ackerly v. Ley, 137 U.S. App. D.C. 133, 138,  
23 420 F.2d 1336, 1341 (1969), and as [the Court  
24 has] said in an analogous context, "[h]uman  
25 experience teaches that those who expect  
26 public dissemination of their remarks may  
27 well temper candor with a concern for  
28 appearances . . . to the detriment of the

1           decisionmaking process." United States v.  
2           Nixon, 418 U.S. 683, 705 (1974) . . . .

3           Sears, 421 U.S. at 150-51 (emphasis omitted; second alteration in  
4           original); see also Wolfe v. Dep't of Health & Human Servs., 839  
5           F.2d 768, 773 (D.C. Cir. 1988)(en banc)("Congress adopted  
6           Exemption 5 because it recognized that the quality of  
7           administrative decision-making would be seriously undermined if  
8           agencies were forced to operate in a fishbowl.").

9           "An inter- or intra-agency document may be withheld  
10          pursuant to the deliberative process privilege [i.e.,  
11          section 552(b)(5)] if it is: (1) 'predecisional,' i.e., 'prepared  
12          in order to assist an agency decisionmaker in arriving at his  
13          decision,' and (2) 'deliberative,' i.e., 'actually . . . related  
14          to the process by which policies are formulated.'" La Raza, 411  
15          F.3d at 356 (quoting Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d  
16          473, 482 (2d Cir. 1999)); see also Grand Cent. P'ship, 166 F.3d  
17          at 482 ("The privilege protects recommendations, draft documents,  
18          proposals, suggestions, and other subjective documents which  
19          reflect the personal opinions of the writer rather than the  
20          policy of the agency." (internal quotation marks omitted)).

21          However, even if the documents at issue are  
22          "predecisional" and "deliberative," and thereby fall under the  
23          scope of Exemption 5, there are circumstances under which they  
24          will be found outside the scope of that protection. As discussed

1 more thoroughly below, these exceptions include: (1) when the  
2 contents of the document have been "adopted, formally or  
3 informally, as the agency position on an issue or [are] used by  
4 the agency in its dealings with the public," La Raza, 411 F.3d at  
5 356-57 (quoting Coastal States Gas Corp. v. Dep't of Energy, 617  
6 F.2d 854, 866 (D.C. Cir. 1980)); and (2) when the document is  
7 more properly characterized as an "opinion[] [or]  
8 interpretation[] which embod[ies] the agency's effective law and  
9 policy," in other words, its "working law," Sears, 421 U.S. at  
10 153 (internal quotation marks omitted).

11 In short, the document claimed to be exempt will be  
12 found outside Exemption 5 if it closely resembles that which FOIA  
13 affirmatively requires to be disclosed: "final opinions . . .  
14 made in the adjudication of cases," "statements of policy and  
15 interpretations which have been adopted by the agency and are not  
16 published in the Federal Register," and "administrative staff  
17 manuals and instructions to staff that affect a member of the  
18 public." 5 U.S.C. § 552(a)(2)(A)-(C).<sup>7</sup>

19 2. The Scope of Exemption 5. Although Exemption 5 is  
20 set out by statute, it is the Supreme Court's decision in Sears

---

<sup>7</sup> The litigation posture of Exemption 5 cases, the present one being no exception, focuses on the government proving the applicability of an exemption rather than the plaintiff proving applicability of one of the affirmative provisions because the burden rests on the government to shield documents from disclosure otherwise to be disclosed under FOIA.

1 that delineates the limits of that exemption, and which has been  
2 the starting point for all of our discussions of it, as it is in  
3 this case.

4 The Sears Court explained the circumstances under which  
5 a document otherwise subject to Exemption 5 might lose its  
6 protection. The plaintiff had submitted a FOIA request for  
7 "Advice and Appeals Memoranda" prepared by the General Counsel of  
8 the National Labor Relations Board ("NLRB") discussing potential  
9 charges against various employers. 421 U.S. at 142-43.

10 The Court began by analyzing the process by which such  
11 memoranda were created. Typically, the NLRB General Counsel  
12 required certain charging decisions from its regional offices  
13 first to be submitted to its central office so that the agency  
14 had an "opportunity to formulate a coherent policy, and to  
15 achieve some measure of uniformity, in enforcing the labor laws."  
16 Id. at 141. A regional director submitted a memorandum that  
17 "set[] forth the facts of the case, a statement of the issues on  
18 which advice [was] sought, and a recommendation." Id. The  
19 General Counsel's office then assigned the case to a staff  
20 attorney who assisted in preparing the "Advice and Appeals  
21 Memorandum" that "briefly summarize[d] the facts, . . . set forth  
22 the . . . legal or policy issue submitted together with a  
23 detailed legal rationale, and contain[ed] instructions for the  
24 final processing of the case." Id. at 142 (internal quotation

1 marks omitted). Based on that memorandum, the regional director  
2 then decided whether or not to prosecute the charge. Id.

3 The Court observed that while "the public is vitally  
4 concerned with the reasons . . . [for] an agency policy actually  
5 adopted," or "those communications which explain [a] decision,"  
6 "[t]he public is only marginally concerned with reasons  
7 supporting a policy which an agency has rejected, or with reasons  
8 which might have supplied, but did not supply, the basis for a  
9 policy which was actually adopted on a different ground." Id. at  
10 152.

11 The reasons for a decision made by an agency, or a  
12 policy actually adopted, however, "constitute the 'working law'  
13 of the agency." Id. at 153. Therefore, the exemption "properly  
14 construed, calls for 'disclosure of all opinions and  
15 interpretations which embody the agency's effective law and  
16 policy, and the withholding of all papers which reflect the  
17 agency's group thinking in the process of working out its policy  
18 and determining what its law shall be.'" Id. (quoting Kenneth  
19 Culp Davis, The Information Act: A Preliminary Analysis, 34 U.  
20 Chi. L. Rev. 761, 797 (1967)) (some internal quotation marks  
21 omitted). "This conclusion is powerfully supported by . . .  
22 [t]he affirmative portion of the Act, [which] expressly  
23 requir[es] indexing of 'final opinions,' 'statements of policy  
24 and interpretations which have been adopted by the agency,' and

1 'instructions to staff that affect a member of the public.'"<sup>8</sup>  
2 Sears, 421 U.S. at 153 (quoting 5 U.S.C. § 552(a)(2)). Those  
3 affirmative provisions, it reasoned, "represent[] a strong  
4 congressional aversion to secret agency law, and represent[] an  
5 affirmative congressional purpose to require disclosure of  
6 documents which have the force and effect of law." Id. (internal  
7 quotation marks, alterations, and citations omitted).

8 The Court concluded that NLRB memoranda that advised no  
9 action be taken, and thereby ended the inquiry and left the  
10 responsible regional director with "no decision to make," fell  
11 outside of Exemption 5 and therefore had to be disclosed. Id. at  
12 155. They "are precisely the kind of agency law in which the  
13 public is so vitally interested and which Congress sought to  
14 prevent the agency from keeping secret." Id. at 156.

15 After determining that these memoranda were the type of  
16 "agency law" which it concluded were non-exempt, the Court then  
17 explained that "[f]or essentially the same reasons, these  
18 memoranda are 'final opinions' made in the 'adjudication of

---

<sup>8</sup> The Sears Court subsumed into its "working law" or "agency law" analysis all three of section 552(a)(2)'s affirmative provisions, and did not, for example, discuss "final opinions" separately from "statements of policy and interpretations which have been adopted by the agency." In many cases, as in Sears, the line between a "final opinion" and a "statement of policy and interpretation[]" is blurry, and the "working law" analysis therefore provides an interpretation aimed at aiding courts when presented with documents that fall between these categories.

1 cases' . . . pursuant to 5 U.S.C. § 552(a)(2)(A)," and thus must  
2 be disclosed. Id. at 158. By contrast, the reasoning and  
3 conclusions behind memoranda that advise prosecution "will come  
4 out in the course of litigation before the Board; and . . . the  
5 'law' with respect to these cases will ultimately be made not by  
6 the General Counsel but by the Board or the courts." Id. at 160.

7 The Court then addressed a separate path towards the  
8 loss of Exemption 5's protection -- whether predecisional and  
9 deliberative documents fall outside of that exemption if  
10 "adopt[ed] or incorporate[d] by reference" into "what would  
11 otherwise be a final opinion," in other words, in a document that  
12 has already been found to be nonexempt. The Court concluded that  
13 they did.

14 The probability that an agency employee will  
15 be inhibited from freely advising a  
16 decisionmaker for fear that his advice if  
17 adopted, will become public is slight.  
18 First, when adopted, the reasoning becomes  
19 that of the agency and becomes its  
20 responsibility to defend. Second, agency  
21 employees will generally be encouraged rather  
22 than discouraged by public knowledge that  
23 their policy suggestions have been adopted by  
24 the agency. Moreover, the public interest in  
25 knowing the reasons for a policy actually  
26 adopted by an agency supports . . . [the  
27 decision to order disclosure]. Thus, we hold  
28 that, if an agency chooses expressly to adopt  
29 or incorporate by reference an intra-agency  
30 memorandum previously covered by Exemption 5  
31 in what would otherwise be a final opinion,  
32 that memorandum may be withheld only on the  
33 ground that it falls within the coverage of  
34 some exemption other than Exemption 5.

1 Id. at 161 (emphasis in original).

2 On the same day that the Supreme Court decided Sears,  
3 it also decided Renegotiation Board v. Grumman Aircraft  
4 Engineering Corp., 421 U.S. 168 (1975), a companion case further  
5 exploring the limits of Exemption 5. Grumman had requested  
6 documents created during the Renegotiation Board's process of  
7 "deciding whether certain Government contractors have earned, and  
8 must refund, 'excessive profits' on their Government contracts."  
9 Id. at 170. After exhaustively reviewing the process by which  
10 these documents were created, the Court explained that if a  
11 "Division Report" was created recommending a course of action, it  
12 would be given to the Renegotiation Board for its review. Id. at  
13 176-77. But "[n]either the Board nor any of its members were  
14 bound by any prior recommendations. The Board was free, after  
15 discussion, to reject the proposed conclusion reached in the  
16 Division Report, or to accept it for reasons other than those set  
17 forth in the report." Id. at 177. Similarly, although under a  
18 different process, a "Regional Board Report" could be created.  
19 Id. at 178-79.

20 The Court concluded that these reports were not subject  
21 to disclosure because "the evidence utterly fails to support the  
22 conclusion that the reasoning in the reports is adopted by the  
23 Board as its reasoning, even when it agrees with the conclusion  
24 of a report." Id. at 184 (emphasis in original). The reports  
25 themselves had "no operative effect," and therefore could not be



1 characterized as "final opinions," within the meaning of FOIA's  
2 affirmative disclosure provisions. Id. at 187. "[A]bsent  
3 indication that [a report's] reasoning has been adopted, there is  
4 little public interest in [its] disclosure." Id. at 186. The  
5 reports therefore retained their protection under Exemption 5.

6 The Grumman Court acknowledged that some agency  
7 decisions may simply not have any accompanying public rationale.  
8 "The effect of this decision [then] is that, in those cases in  
9 which [the Renegotiation Board does not offer a summary of its  
10 reasoning], the public will be largely uninformed as to the basis  
11 for [its] decisions." Id. at 191.

12 The Freedom of Information Act imposes no  
13 independent obligation on agencies to write  
14 opinions. It simply requires them to  
15 disclose the opinions which they do write.  
16 If the public interest suffers by reason of  
17 the failure of the Board to explain some of  
18 its decisions, the remedy is for Congress to  
19 require it to do so. It is not for us to  
20 require disclosure of documents, under the  
21 purported authority of the Act, which are not  
22 final opinions, which do not accurately set  
23 forth the reasons for the Board's decisions,  
24 and the disclosure of which would impinge on  
25 the Board's predecisional processes.

26 Id. (citation omitted).

27 Although Grumman did not explain its reasoning using  
28 the same terminology as Sears, it also provided two somewhat  
29 distinct paths through which Exemption 5's protections could be  
30 lost: (1) if the reports had "operative effect" and were  
31 therefore akin to "final opinions" -- the equivalent of "working

1 law" in Sears's language; or (2) if the reports' reasoning and  
2 conclusions had been adopted by the Board in issuing its own  
3 decision -- the equivalent of "express adoption or incorporation  
4 by reference" in Sears.

5 3. Express Adoption or Incorporation by Reference. We  
6 have had several occasions on which to apply the Supreme Court's  
7 Exemption 5 jurisprudence, in particular Sears's "express  
8 adoption" or "incorporation by reference" holding, on which the  
9 district court relied. The most relevant for present purposes  
10 was our decision in La Raza. There we considered whether the  
11 FOIA required disclosure of an OLC memorandum prepared for the  
12 DOJ on the subject of whether state and local law enforcement  
13 officials could lawfully enforce certain provisions of federal  
14 immigration law. La Raza, 411 F.3d at 352. The DOJ argued that  
15 "it did not expressly adopt or incorporate the OLC memorandum"  
16 into a final opinion, and it was therefore protected by the  
17 deliberative-process exemption, or the attorney-client privilege.  
18 Id.

19 Since 1996, the DOJ had been of the view that state and  
20 local law enforcement could not enforce the civil provisions of  
21 federal immigration law -- "such as overstaying one's visa or  
22 entering the United States without proper documentation." Id. at  
23 352-53 & n.1. The OLC had issued a memorandum supporting this  
24 position, which it had released publicly. Id. at 353.

1           In 2002, under a new presidential administration, the  
2 DOJ changed its policy. Id. Then-Attorney General John Ashcroft  
3 announced an immigration initiative employing state and local  
4 agencies to enforce specified civil provisions of federal  
5 immigration law. In a June 5, 2002, press conference explaining  
6 the new initiative, the Attorney General reported that "[OLC] has  
7 concluded that this narrow, limited mission we are asking state  
8 and local police to undertake voluntarily -- arresting aliens who  
9 have violated . . . civil provisions that render an alien  
10 deportable [--] is within the inherent authority of the states."  
11 Id.

12           On March 11, 2003, General Ashcroft wrote a letter to  
13 an organization that had expressed an interest in the matter  
14 explaining that "[OLC] previously opined that state and local law  
15 enforcement officials have inherent authority to make arrests for  
16 criminal immigration law violations generally." Id. At least  
17 three other letters from the Attorney General and an Acting  
18 Assistant Attorney General containing similar language were  
19 submitted to members of Congress. Id. at 354. And in June 2003,  
20 another member of the Attorney General's office, speaking to a  
21 group of local and state police department officials who were  
22 part of an FBI advisory board, offered a detailed explanation of  
23 the policy in which he repeatedly referenced the OLC's advice.  
24 Id. at 354-55.

1           We concluded that the "repeated references" made by the  
2 Attorney General and high-ranking DOJ officials to the document  
3 "demonstrate[d] that the Department regarded the [m]emorandum as  
4 the exclusive statement of, and justification for, its new  
5 policy . . . ." Id. at 357. The DOJ thus "made a practice of  
6 using the OLC Memorandum to justify and explain the Department's  
7 policy and to assure the public and the very state and local  
8 government officials who would be asked to implement the new  
9 policy that the policy was legally sound." Id. at 358. The  
10 memorandum was, indeed, the "primary legal authority justifying  
11 and driving" the change in policy.<sup>9</sup> Id.

12           We thus concluded that the document had been expressly  
13 adopted or incorporated by reference, and ordered it to be  
14 released. Id.

15           Our decision in Wood v. FBI, 432 F.3d 78 (2d Cir.  
16 2005), rested on a rationale similar to that employed by the  
17 Supreme Court in Grumman. There, a reporter sought disclosure of  
18 a memorandum prepared by DOJ trial attorneys related to an  
19 investigation of FBI agents alleged to have lied in affidavits  
20 supporting arrest warrant applications. Id. at 80. We affirmed

---

<sup>9</sup> Referring to Grumman, we noted that "there must be evidence that an agency has actually adopted or incorporated by reference the document at issue; mere speculation will not suffice." La Raza, 411 F.3d at 359 (emphasis in original). We also observed that "a casual reference to a privileged document does not necessarily imply that an agency agrees with the reasoning contained in those documents." Id.

1 the district court's conclusion that the memorandum was properly  
2 withheld under the work-product privilege pursuant to Exemption  
3 5,<sup>10</sup> and had not been incorporated by reference or expressly  
4 adopted by the agency. Id. at 84.

5 The plaintiff had argued that a note on the memorandum  
6 by a high-ranking DOJ official indicating that he would decline  
7 prosecution constituted express adoption or incorporation by  
8 reference of the memorandum itself. But, we said:

9 This brief notation does not indicate that  
10 DOJ adopted the reasoning of the . . .  
11 [m]emo. Neither [the endorsing official] nor  
12 any other high-level DOJ officials made any  
13 public references to the . . . [m]emo. There  
14 is no evidence in the record from which it  
15 could be inferred that DOJ adopted the  
16 reasoning of the [m]emo, and, as we explained  
17 in . . . La Raza, this failure is fatal.

18 Id. at 84.<sup>11</sup>

---

<sup>10</sup> The court did "not reach the question of whether [the La Raza] doctrine would require the disclosure of otherwise exempt attorney work-product," as opposed to documents exempt under the deliberative process exemption. Wood, 432 F.3d at 84.

<sup>11</sup> Shermco Industries Inc. v. Secretary of Air Force, 613 F.2d 1314 (5th Cir. 1980) is similar. The court reversed a district court's conclusion that a memorandum discussing a bid award, which had been forwarded to the GAO as part of bid protest proceedings, lost its deliberative character. Id. at 1320. First, the court noted that "the decision [on to whom to award the bid] was not yet final." Id. at 1319. Second, "even if it were a final decision, these memoranda were not expressly incorporated by reference into the [final decision by the Air Force to award the contract]. They had been used by the Air Force internally in reaching their initial conclusion that [a Shermco competitor] was the lowest bidder, and they were produced to the GAO in aid of their defense against Shermco's protest, but they were never attached to any formal written decision by the Air Force." Id. at 1320.

1           4. The "Working Law" Principle. While our previous  
2 cases and the proceedings thus far in this one have largely  
3 focused on the issue of whether a memorandum has been expressly  
4 adopted or incorporated by reference, Sears also requires us to  
5 ask whether the OLC opinion constitutes the "working law of the  
6 agency" and therefore must be disclosed.

7           If an agency's memorandum or other document has become  
8 its "effective law and policy," it will be subject to disclosure  
9 as the "working law" of the agency, Sears, 421 U.S. at 153, much  
10 the same as it would be if expressly adopted or incorporated by  
11 reference into a nonexempt document, id. at 161-62. The Sears  
12 Court explained that the purposes undergirding FOIA required  
13 disclosure in either instance. Compare id. at 152 (explaining  
14 that "working law" should be disclosed because "the public is  
15 vitally concerned with the reasons which did supply the basis for  
16 an agency policy actually adopted"), with id. at 161 (explaining  
17 that documents expressly adopted or incorporated should be  
18 disclosed in part because of "the public interest in knowing the  
19 reasons for a policy actually adopted by an agency"). As  
20 explained above, the "working law" analysis is animated by the  
21 affirmative provisions of FOIA, see 5 U.S.C. § 552(a)(2)(A)-(C),  
22 and documents must be disclosed if more akin to that which is  
23 required by the Act to be disclosed than that which may be

1 withheld under Exemption 5. Sears separately analyzed each of  
2 these two means by which Exemption 5 protection may be lost.<sup>12</sup>

3 Not surprisingly given the nature of much of its  
4 caseload, the D.C. Circuit has become something of a specialist  
5 in the "working law" exception. The circuit analyzed it at some  
6 length in Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d  
7 854 (D.C. Cir. 1980). There, the plaintiff sought copies of  
8 Department of Energy interpretations of its regulations,  
9 specifically "memoranda from regional counsel to auditors working  
10 in [the Department of Energy ("DOE")]'s field offices, issued in  
11 response to requests for interpretations of regulations within  
12 the context of particular facts encountered while conducting an  
13 audit of a firm." Id. at 858. The agency argued against  
14 disclosure, contending that the memoranda were not binding on the

---

<sup>12</sup> The Eleventh Circuit is one of the few courts to have examined the link between these two elements of Sears.

[D]ata "expressly adopt[ed] or incorporate[d] by reference" means predecisional deliberative material which is adopted and approved by the agency as its "effective law and policy." By expressly adopting the reasoning of her subordinate, the decisionmaker has in effect converted a rejected proposal into the rationale for the agency's working law. As a consequence, the documents are no longer considered predecisional[,] for they now support and explain the agency's position in the same manner a postdecisional document explains an agency decision.

Fla. House of Representatives v. Dep't of Commerce, 961 F.2d 941, 945 n.4 (11th Cir.) (citation omitted), cert. dismissed, 506 U.S. 969 (1992).

1 audit staff -- the staff was free to disregard the conclusions  
2 reached in those memoranda. Id. at 859. The court disagreed.  
3 It noted that the memoranda were "at times 'amended' or  
4 'rescinded,' which would hardly be necessary if the documents  
5 contained merely informal suggestions to staff which could be  
6 disregarded . . . ." Id. at 860.

7 After examining the particular role that the documents  
8 played in the audit process, the court concluded that they  
9 were not suggestions or recommendations as to  
10 what agency policy should be. . . . [T]he  
11 memoranda are not advice to a superior, nor  
12 are they suggested dispositions of a case, as  
13 in Grumman. They are not one step of an  
14 established adjudicatory process, which would  
15 result in a formal opinion, as were the  
16 documents held exempt in [Sears].

17  
18 Id. at 868.

19 [T]hese opinions were routinely used by  
20 agency staff as guidance in conducting their  
21 audits, and were retained and referred to as  
22 precedent. If this occurs, the agency has  
23 promulgated a body of secret law which it is  
24 actually applying in its dealings with the  
25 public but which it is attempting to protect  
26 behind a label. This we will not permit the  
27 agency to do. Tentative opinions are not  
28 relied on as precedent; they are considered  
29 further by the decisionmaker.

30 Id. at 869.<sup>13</sup>

---

<sup>13</sup> In Coastal States, there was no allegation by the plaintiff that the memoranda had been expressly adopted or incorporated by reference, suggesting that in some cases disclosure is required even without public reliance on a document otherwise exempt from disclosure under Exemption 5.



1           In Public Citizen, Inc. v. Office of Management and  
2 Budget, 598 F.3d 865 (D.C. Cir. 2010), the court considered the  
3 plaintiff's request for documents created by the White House  
4 Office of Management and Budget ("OMB") describing the  
5 circumstances under which an agency might "bypass" OMB and submit  
6 their budget materials directly to Congress. Id. at 867. The  
7 documents at issue "summariz[ed]" OMB's understanding of which  
8 agencies had such bypass authority and the bases for that  
9 authority. Id. at 868. The court concluded that the documents  
10 did not enjoy the protection of Exemption 5 because "[d]ocuments  
11 reflecting OMB's formal or informal policy on how it carries out  
12 its responsibilities fit comfortably within the working law  
13 framework." Id. at 875. As in Coastal States, the documents  
14 were referred to as precedent, and not part of an ongoing  
15 deliberative process.

16           Similarly, in Tax Analysts v. IRS, 294 F.3d 71 (D.C.  
17 Cir. 2002), the court ordered release of IRS documents explaining  
18 whether certain tax exemptions applied to specific taxpayers,  
19 concluding that they constituted "working law" because their  
20 "tone . . . indicate[d] that they simply explain[ed] and  
21 appl[ied] established policy." Id. at 80-81 (internal quotation  
22 marks omitted). Those documents included the phrases "It is the  
23 position of the Treasury Department that" and "We conclude,"  
24 while the exempt documents contained "such phrases as 'We

1 believe' and 'We suggest.'" Id. at 81. To qualify as working  
2 law, "[i]t is not necessary that the [documents] reflect the  
3 final programmatic decisions of the program officers who request  
4 them. It is enough that they represent [the Office of the  
5 Comptroller of the Currency]'s final legal position concerning  
6 the Internal Revenue Code, tax exemptions, and proper  
7 procedures." Id. (emphasis in original).

8           Our Court has relatively little case law examining the  
9 "working law" principle. In La Raza, we made passing reference  
10 to Sears's conclusion that the public was "vitaly concerned"  
11 with the reasons for a policy actually adopted, and that these  
12 reasons constituted the "working law" of the agency. 411 F.3d  
13 360. We did so, however, in the context of explaining the  
14 relevance of the public adoption of the OLC memorandum at issue  
15 to the question of whether it should be disclosed, noting that  
16 "the public can only be enlightened by knowing what the [agency]  
17 believes the law to be." Id. (quoting Tax Analysts v. IRS, 117  
18 F.3d 607, 618 (D.C. Cir. 1997)). In that context, we agreed with  
19 the district court's conclusion that "[t]he Department's view  
20 that it may adopt a legal position while shielding from public  
21 view the analysis that yielded that position is offensive to  
22 FOIA." Id. (internal quotation marks omitted).

23           The question of whether a document constitutes "working  
24 law," or has been expressly adopted or incorporated by reference,

1 then, are two paths to determining whether a withheld document  
2 constitutes what FOIA affirmatively requires to be disclosed --  
3 "'final opinions,' 'statements of policy and interpretations  
4 which have been adopted by the agency,' and 'instructions to  
5 staff that affect a member of the public.'" Sears, 421 U.S. at  
6 153 (quoting 5 U.S.C. § 552(a)(2)). Most Exemption 5 cases are  
7 not framed in this manner because it is the government's burden  
8 to prove that the privilege applies, and not the plaintiff's to  
9 demonstrate the documents sought fall within one of the  
10 enumerated section 552(a)(2) categories. Nevertheless, the  
11 appropriate analysis requires us to determine whether the  
12 documents sought more closely resemble the type of internal  
13 deliberative and predecisional documents that Exemption 5 allows  
14 to be withheld, or the types of documents that section 552(a)(2)  
15 requires be disclosed. To do that, the Supreme Court and our  
16 court have asked whether the documents fit within the description  
17 of "working law," in addition to whether they have been expressly  
18 adopted or incorporated by reference into a nonexempt  
19 communication.

## 20 B. Analysis

21 1. The February 2004 Memorandum. We begin our  
22 analysis of the status of this document, as we must with respect  
23 to all three memoranda at issue, by examining the process by  
24 which the memorandum was created. See Tique v. Dep't of Justice,

1 312 F.3d 70, 78 (2d Cir. 2002) ("[W]hether a particular document  
2 is exempt . . . depends not only on the intrinsic character of  
3 the document itself, but also on the role it played in the  
4 administrative process.") (internal quotation marks omitted),  
5 cert. denied, 538 U.S. 1056 (2003). We do so because "Exemption  
6 5, properly construed, calls for disclosure of all opinions and  
7 interpretations which embody the agency's effective law and  
8 policy . . . ." Sears, 421 U.S. at 153 (internal quotation marks  
9 omitted).

10 The emails in the record indicate that USAID and HHS  
11 officials asked the OLC for advice on the constitutional and  
12 legal propriety of the implementation of the pledge requirement.  
13 They then incorporated that advice into their decision as to  
14 whether the language of the grants for HIV/AIDS and anti-  
15 trafficking work would in fact require "an explicit and  
16 affirmative policy opposing prostitution." It also appears that  
17 the OLC reviewed USAID's proposed grant language before the AAPD  
18 that contained it was issued.

19 It is not disputed that the February 2004 memorandum  
20 was predecisional and deliberative. See Public Citizen, 598 F.3d  
21 at 874 ("We deem a document predecisional if it was generated  
22 before the adoption of an agency policy and deliberative if it  
23 reflects the give-and-take of the consultative process.")  
24 (internal quotation marks omitted).

1 [A]n agency may meet its burden of proof  
2 under the 'predecisional document' test by  
3 demonstrating that the preparer was not the  
4 final decisionmaker and that the contents  
5 confirm that the document was originated to  
6 facilitate an identifiable final agency  
7 decision. . . . A predecisional document  
8 will qualify as 'deliberative' provided  
9 it . . . formed an essential link in a  
10 specified consultative process, . . .  
11 reflects the personal opinions of the writer  
12 rather than the policy of the agency,  
13 and . . . if released, would inaccurately  
14 reflect or prematurely disclose the views of  
15 the agency.

16 Providence Journal Co. v. Dep't of the Army, 981 F.2d 552, 559  
17 (1st Cir. 1992) (citations, internal quotation marks, and  
18 brackets omitted).

19 The "decision" being made by USAID and HHS was whether  
20 they were constitutionally bound to disregard a duly enacted  
21 statute's command that domestic organizations be subject to the  
22 pledge requirement. Although this may not properly be referred  
23 to as an "adjudication," it was a firm and concrete decision  
24 regarding the agency's policy.<sup>14</sup> See Cmty. Television of S.

---

<sup>14</sup> In this sense, the "decision" made differs from one in which an agency considers and rejects a policy that it was never required to consider or implement. In Common Cause v. IRS, 646 F.2d 656 (D.C. Cir. 1981), the court considered whether documents related to the IRS's decision not to implement a plan it had proposed, which would have disclosed "the names of federal officials who had approached the IRS about the tax matters of third parties, as well as the subjects of such contacts," should have been released per FOIA. Id. at 658. The court rejected the plaintiffs' argument that the documents "constitute[d] the reasons which suppl[ied] the basis for the agency policy actually adopted." Id. at 659. "The proposed disclosure plan remained

1 Cal. v. Gottfried, 459 U.S. 498, 515-516 (1983) ("[H]owever broad  
2 an administrative agency's discretion in implementing a  
3 regulatory scheme may be, the agency may not ignore a relevant  
4 Act of Congress. . . . [T]he agency cannot simply 'close its  
5 eyes' to the existence of the statute." (citation omitted));  
6 Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("[A]n agency is not  
7 free simply to disregard statutory responsibilities . . . .");  
8 see also Presidential Authority to Decline to Execute  
9 Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994)  
10 (explaining the president's ability to decline to enforce  
11 statutes he views as unconstitutional); Bristol-Meyers Co. v.  
12 FTC, 598 F.2d 18, 25 (D.C. Cir. 1978) (concluding that an  
13 agency's decision not to proceed with rulemaking is analogous to

---

just that. Its rejection did not, therefore, constitute the making of law or policy by an agency. The exchange of ideas and proposals which took place within the Service with respect to the proposed plan is precisely the type of communication which Congress meant to protect in enacting Exemption 5." Id. The court considered and rejected the argument that the memoranda should be disclosed because they contained the "written reasons for the agency's final decision not to implement the proposed plan." Id. "This case differs from Sears in many important respects. The present case involves the voluntary suggestion, evaluation, and rejection of a proposed policy by an agency, not the agency's final, unappealable decision not to pursue a judicial remedy in an adversarial dispute . . . . No statute demands that the IRS voluntarily disclose information about third-party contacts . . . ." Id. at 659-60. The court also considered the broader implications of the plaintiffs' argument, concluding that it would "virtually eliminate the governmental privilege" as "[e]very rejection of a proposal, no matter how infeasible or insignificant, would become a 'final decision' of an agency." Id. at 660.

1 the NLRB's non-charging decision in Sears, and thus would not  
2 enjoy the protection of Exemption 5). We find no other evidence  
3 concerning this decisionmaking process in the record.

4 No one at the OLC made the decision that the pledge  
5 requirement as it pertained to domestic organizations would not  
6 be implemented. As Paul Colborn, special counsel to the OLC,  
7 explained to the district court by affidavit, "OLC does not  
8 purport, and in fact lacks authority, to make policy decisions.  
9 OLC's legal advice and analysis informs the decisionmaking of  
10 Executive Branch officials on matters of policy, but OLC's legal  
11 advice is not itself dispositive as to any policy adopted."  
12 Decl. of Paul P. Colborn at 2, J.A. 318 (March 11, 2011). The  
13 plaintiff does not submit contrary evidence suggesting that the  
14 OLC's recommendation was effectively binding on the agency, as in  
15 Coastal States, 617 F.2d at 869, or left it with "no decision to  
16 make," as in Sears, 421 U.S. at 155. The February Memorandum  
17 does not constitute "working law," or "the agency's effective law  
18 and policy." Id. at 153. We nonetheless conclude that the OLC's  
19 views were adopted by reference by USAID in nonexempt  
20 communications, and therefore must be disclosed.

21 The first explicit reference to the OLC advice came in  
22 a July 22, 2004, USAID document entitled "Guidance on the  
23 Definition and Use of the Child Survival and Health Programs Fund  
24 and the Global HIV/AIDS Initiative Account." There the agency

1 explained that the funding statute "requires non-U.S. non-  
2 governmental organizations . . . receiving HIV/AIDS funds to  
3 agree that they have a policy explicitly opposing, in their  
4 activities outside of the United States, prostitution and sex  
5 trafficking." July 22 USAID Update at 35. In a footnote, the  
6 document explained that "[t]he Office of Legal Counsel, U.S.  
7 Department of Justice in a draft opinion determined that this  
8 provision only may be applied to foreign non-governmental  
9 organizations and public international organizations because of  
10 the constitutional implications of applying it to U.S.  
11 organizations." Id. at 35 n.10.<sup>15</sup>

12 Then, in March 2005, after HHS and USAID had shifted  
13 their positions, tentatively deciding to apply the pledge  
14 requirement domestically, Randall Tobias, the USAID Global AID

---

<sup>15</sup> Plaintiff urges us also to consider the September 20, 2004, letter from an OLC official to the general counsel of HHS explaining that the "tentative advice" offered earlier was being "withdraw[n]." Levin Letter at 1-2. Because there were "reasonable arguments" to support the constitutionality of the policy, the OLC official stated, "we believe that HHS may implement these provisions." Id. at 1. Because this letter was neither written by a decisionmaker nor released publicly by the decisionmaking agency, its relevance is limited. It does not aid in establishing either express adoption or incorporation by reference, and neither does it suggest that the February 2004 OLC opinion was considered the "working law" of the agency. Rather, it suggests that even after the February memorandum was sent to HHS, a deliberative process continued, and advice was later offered again to HHS that was also non-binding. In this sense, it supports the defendant's contention that the February memorandum should have been considered exempt from disclosure.



1 Administrator, made a second reference to the February  
2 Memorandum. When asked in a Congressional hearing about the  
3 agency's change in positions, he explained:

4           The [OLC] . . . provided some tentative  
5           advice initially that those restrictions  
6           should be applied only to foreign  
7           organizations. Sometime mid- to late-, I  
8           think, in September of 2004, they withdrew  
9           that earlier tentative advice and advised  
10          that that provision was intended by the  
11          Congress to apply without that limitation to  
12          both domestic organizations as well as  
13          foreign organizations. And so I'm simply  
14          following the legislation and the advice to  
15          implement that.

16 Tobias Testimony, J.A. 236.<sup>16</sup>

17           Thus, there were two public statements referencing the  
18 February 2004 memorandum -- the July 22 footnote, and the Tobias  
19 testimony. We conclude that these references taken together  
20 establish express adoption or incorporation by reference.

---

<sup>16</sup> An additional "public" reference was made to the February 2004 memorandum, in a July 2007 letter from an OLC official to Congressman Henry Waxman. Waxman had requested an explanation from the OLC regarding its interpretation of the pledge requirement. The OLC wrote that in February 2004 it had provided "tentative advice" to HHS and USAID that the pledge requirement "could, under the Constitution, be applied only to foreign organizations acting overseas." Benczkowski Letter at 1. The letter then went on to explain the subsequent change in advice. This letter is also of limited relevance in determining whether or not the February 2004 opinion should be subject to disclosure because it was not authored by a decisionmaker from USAID or HHS. (Again, this would be different had plaintiff adduced evidence that OLC opinions were essentially binding upon the agencies.)

1           To be sure, neither the July 22 footnote nor Tobias's  
2 testimony discussed at length the rationale provided by the OLC  
3 for its conclusion as to the propriety of applying the pledge  
4 requirement to domestic grantees. Noting that the advice itself  
5 was limited to one page in the first instance, we conclude that  
6 the July 22 footnote's explanation that the pledge requirement  
7 would not be enforced "because of the constitutional implications  
8 of applying it to U.S. organizations," July 22 USAID Update at 35  
9 n.10, at least when reenforced by the Tobias reference,  
10 demonstrates sufficient reliance on both the conclusion and  
11 reasoning of the OLC memorandum to remove the protection of the  
12 deliberative-process exemption.<sup>17</sup>

---

<sup>17</sup> In a pre-Sears case, the D.C. Circuit ordered disclosure pursuant to Exemption 5 based on reasoning similar to what we apply here.

We do not feel that [the agency] should be required to 'operate in a fishbowl,' but by the same token we do not feel that [the party seeking disclosure] should be required to operate in a darkroom. If the [agency] did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action 'as a matter of convenience' the memorandum lost its intra-agency status and became a public record, one which must be disclosed . . . .

Am. Mail Line, Ltd. v. Gulick, 411 F.2d 696, 703 (D.C. Cir. 1969) (citation omitted).

1           Any agency faces a political or public relations  
2 calculation in deciding whether or not to reference what might  
3 otherwise be a protected document in explaining the course of  
4 action it has decided to take. In many cases, as here, the  
5 agency is not required to explain its reasons publicly.  
6 Nonetheless, where it determines there is an advantage to doing  
7 so by referencing a protected document as authoritative, it  
8 cannot then shield the authority upon which it relies from  
9 disclosure.

10           2. The July 2004 Memos. As outlined above, on July  
11 2, 2004, OLC lawyer Lerner sent an email to HHS and USAID  
12 officials attaching a 30-page draft memorandum with the  
13 statement, "Any comments you have would be much appreciated."  
14 Email from Lerner, "OLC draft opinion on Sex Trafficking, AIDS  
15 Act grant restrictions." J.A. 92 (July 2, 2004). On July 30,  
16 2004, another OLC lawyer sent an updated draft of the memorandum  
17 to the HHS general counsel.

18           On September 20, 2004, an OLC official explained in  
19 response to the original February inquiry from USAID and HHS as  
20 to the constitutionality of the pledge requirement that "we  
21 believe that HHS may implement these provisions. If the  
22 provisions are challenged in court, the Department stands ready  
23 to defend their constitutionality, in accordance with its  
24 longstanding practice of defending congressional enactments under

1 such circumstances." Levin Letter at 1-2 (footnotes omitted).  
2 That letter made no reference to the July OLC memos. It offered  
3 only sparse explanation of the legal basis for OLC's conclusion  
4 that the pledge requirement could be defended. Id.

5 On May 3, 2005, HHS issued a new policy outlining its  
6 updated "funding restrictions," which explained that "any  
7 recipient must have a policy explicitly opposing prostitution and  
8 sex trafficking." HHS Funding Announcement, "Increasing Access  
9 to HIV Counseling and Testing (VCT) and Enhancing HIV/AIDS  
10 Communications, Prevention, and Care in Botswana, Lesotho, South  
11 Africa, Swaziland and Cote d'Ivoire" at 10, J.A. 218 (May 3,  
12 2005). The document does not explain the basis for that policy,  
13 nor refer to it as a change in policy.

14 On June 9, 2005, USAID issued an updated AAPD that  
15 required domestic grantees to "have a policy explicitly opposing  
16 prostitution and sex trafficking." USAID AAPD 05-04,  
17 "Implementation of the United States Leadership against HIV/AIDS  
18 Tuberculosis and Malaria Act of 2003 - Eligibility Limitation on  
19 the Use of Funds and Opposition to Prostitution and Sex  
20 Trafficking" at 5, J.A. 225 (June 9, 2005).

21 In this AAPD, USAID did state that "[c]onsistent with  
22 guidance from the U.S. Department of Justice," USAID would "now  
23 apply [the pledge requirement] to U.S. organizations as well as  
24 foreign organizations." June 2005 AAPD at 2, J.A. 223. Such

1 reference to guidance from the DOJ does not, however, indicate  
2 that USAID (or HHS) adopted the reasoning of the July memoranda.  
3 Nor does the fact that the agencies acted in conformity with the  
4 July memoranda establish that the agencies adopted their  
5 reasoning. Grumman, 421 U.S. at 184. "Mere reliance of a  
6 document's conclusions does not necessarily involve reliance on a  
7 document's analysis: both will ordinarily be needed before a  
8 court may properly find adoption or incorporation by reference."  
9 La Raza, 411 F.3d at 358.

10 When Tobias testified before Congress that USAID had  
11 changed its policy, he explained that the OLC's tentative advice  
12 had been withdrawn in mid- to late-September 2004. See Tobias  
13 Testimony, J.A. 236. That appears to be a reference to the  
14 September 2004 OLC letter, not to either of the July 2004 draft  
15 memoranda.

16 On the record before us, then, Tobias's testimony  
17 referenced the September 2004 letter. The lack of any specific  
18 reference to the July 2004 memoranda by either USAID or HHS are  
19 further indications that the July memoranda were in fact parts of  
20 the predecisional and deliberative process that yielded the  
21 September 2004 letter.

22 The July 2007 letter to Congressman Waxman also  
23 explained the change in policy solely by reference to the  
24 September 2004 letter. Although the July 2007 letter was not

1 written by a decisionmaker and therefore could not have served as  
2 a basis for express adoption or incorporation by reference, it  
3 serves as evidence that it was the September 2004 letter, and not  
4 the July 2004 draft memoranda, that led to HHS and USAID's  
5 decisions to implement the pledge requirement with respect to  
6 U.S.-based organizations.

7           In sum, there is no evidence that the USAID or HHS  
8 based its change in policy on the draft memoranda it seeks. We  
9 therefore cannot conclude, as did the district court, that either  
10 agency expressly adopted or incorporated by reference these  
11 drafts in explaining their policy change. In such a  
12 circumstance, ordering release of these never-finalized memoranda  
13 would fail to "safeguard and promote agency decisionmaking  
14 processes" by, for example, not "protect[ing] against confusing  
15 the issues and misleading the public by dissemination of  
16 documents suggesting reasons and rationales for a course of  
17 action which were not in fact the ultimate reasons for the  
18 agency's action," and failing to "assure that subordinates within  
19 an agency will feel free to provide the decisionmaker with their  
20 uninhibited opinions and recommendations without fear of later  
21 being subject to public ridicule or criticism . . . ."  
22 Providence Journal, 981 F.2d at 557 (quoting Coastal States, 617  
23 F.2d at 866); see also Grumman, 421 U.S. at 184-85 ("[If] the  
24 evidence utterly fails to support the conclusion that the

1 reasoning in the reports is adopted by the Board as its  
2 reasoning, even when it agrees with the conclusion of a  
3 report, . . . the reports are not final opinions and do fall  
4 within Exemption 5.").

5 We conclude that the district court erred in ordering  
6 disclosure of the July memoranda because there is insufficient  
7 evidence that those memoranda were expressly adopted or  
8 incorporated by reference by USAID, or became the "working law"  
9 of the agency, sufficient to remove the deliberative-process  
10 protection.

### 11 **III. Attorney-Client Privilege**

12 The defendants argue that even if the February 2004  
13 memorandum is otherwise subject to disclosure, it is protected  
14 from such disclosure by the attorney-client privilege, Defs.' Br.  
15 at 51-52, which is encompassed by Exemption 5, La Raza, 411 F.3d  
16 at 360.<sup>18</sup> "The attorney-client privilege protects communications  
17 (1) between a client and his or her attorney (2) that are

---

<sup>18</sup> In its reply brief, the defendants for the first time argue that the plaintiff has waived its argument that the February 2004 document is not protected by the attorney-client privilege because the argument was not raised below. Defs.' Reply at 20-21. A review of the plaintiff's motion for summary judgment establishes otherwise. See Mem. in Supp. of Pl.'s Mot. for Summ. J., Brennan Center v. DOJ, No. 09 Civ. 8756, at 17-19 (S.D.N.Y. Jan. 28, 2011), ECF No. 21. Indeed, the district court considered this argument, concluding that the defendants' argument that the attorney-client privilege protected that document from disclosure "must fail."

1 intended to be, and in fact were, kept confidential (3) for the  
2 purpose of obtaining or providing legal assistance." United  
3 States v. Mejia, 655 F.3d 126, 132 (2d Cir.), cert. denied, 132  
4 S. Ct. 553 (2011). "[T]he attorney-client privilege protects  
5 most confidential communications between government counsel and  
6 their clients that are made for the purpose of obtaining or  
7 providing legal advice." In re County of Erie, 473 F.3d 413, 418  
8 (2d Cir. 2007).

9 In La Raza, we explained that "[l]ike the deliberative  
10 process privilege, the attorney-client privilege may not be  
11 invoked to protect a document adopted as, or incorporated by  
12 reference into, an agency's policy." 411 F.3d at 360. The  
13 reasons underlying the absence of Exemption 5 protection for such  
14 a document otherwise covered by the deliberative-process  
15 exemption also underlie the agency's loss of the protection of  
16 the attorney-client privilege.

17 [O]nce an agency adopts or incorporates [a]  
18 document, frank communication will not be  
19 inhibited. Indeed, once an attorney's (or  
20 employee's) recommendation becomes agency  
21 law, the agency is then responsible for  
22 defending that policy, and the attorney (or  
23 employee) 'will generally be encouraged  
24 rather than discouraged' by public knowledge  
25 that their policy suggestions or legal  
26 analysis have been adopted by the agency."  
27

28 Id. (quoting Sears, 421 U.S. at 161). As we explained, "We  
29 cannot allow the Department to make public use of the Memorandum



1 when it serves the Department's ends but claim the attorney-  
2 client privilege when it does not." Id. at 361.

3 As with respect to the lawyer-client privilege in other  
4 contexts, "it is vital to [such] a claim . . . that the  
5 communications between client and attorney were made in  
6 confidence and have been maintained in confidence." Mejia, 655  
7 F.3d at 134 (quoting In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.  
8 1973)). And "[c]ourts have found waiver by implication when a  
9 client testifies concerning portions of the attorney-client  
10 communication, . . . and when a client asserts reliance on an  
11 attorney's advice as an element of a claim or defense . . . . "  
12 In re County of Erie, 546 F.3d 222, 228 (2d Cir. 2008) (internal  
13 quotation marks omitted). A party's reliance on an otherwise  
14 privileged communication to assert a claim or defense is similar  
15 to the type of express adoption or incorporation by reference  
16 that vitiates Exemption 5 protection -- in either case the party  
17 cannot invoke that relied-upon authority and then shield it from  
18 public view. The references to the February 2004 memorandum that  
19 served to remove the deliberative-process privilege thus also  
20 constitute waiver of the attorney-client privilege.

21 On this score, the defendants invoke the same argument  
22 as they did with regard to the deliberative-process exemption --  
23 that the instances of express adoption or incorporation cited by  
24 the plaintiff are not sufficient to withdraw the protection of

1 Exemption 5. We have concluded to the contrary with respect to  
2 the deliberative process exemption for the reasons set forth  
3 above.

4 The defendants urge us to revisit our holding in La  
5 Raza, contending that there we misconstrued Sears. La Raza is  
6 the law of this Circuit and this panel, acting as a panel cannot  
7 change it. See, e.g., City of New York v. Mickalis Pawn Shop,  
8 LLC, 645 F.3d 114, 131 n.18 (2d Cir. 2011) (acknowledging that we  
9 are bound by the law of the Circuit as established by one or more  
10 previous panel decisions); European Cmty. v. RJR Nabisco, Inc.,  
11 424 F.3d 175, 179 (2d Cir. 2005) ("We are bound by the decisions  
12 of prior panels until such time as they are overruled either by  
13 an en banc panel of our Court or by the Supreme Court.")  
14 (internal quotation marks omitted), cert. denied, 546 U.S. 1092  
15 (2006).

16 We note nonetheless that the government focuses on the  
17 Sears Court's statement that "[t]echnically, of course, if a  
18 document could be, for example, both a 'final opinion' and an  
19 intra-agency memorandum within Exemption 5, it would be  
20 nondisclosable, since the Act 'does not apply' to documents  
21 falling within any of the exemptions." 421 U.S. at 154 n.21.  
22 That footnote was employed in the context of the Court's  
23 observation that "Exemption 5 can never apply" to "working law."  
24 Id. at 153-54. By prefacing its comment with the term

1 "technically" the Court suggested that this observation in Sears  
2 left the holding of Sears undisturbed -- that when what would  
3 otherwise be an exempt memorandum becomes non-exempt because of  
4 its status as "working law," or through express adoption or  
5 incorporation by reference, for all practical purposes it falls  
6 outside of Exemption 5. We are, in other words, inclined to  
7 agree with the plaintiff that "[t]he text [of Sears] makes clear  
8 that the footnote is contemplating a logical impossibility."  
9 Pl.'s Br. at 52.

10 The government points to Federal Open Market Committee  
11 v. Merrill, 443 U.S. 340 (1979), for further support. Merrill  
12 recognized an Exemption 5 privilege for "confidential commercial  
13 information," but noted that "[i]t should be obvious that the  
14 kind of mutually exclusive relationship between final opinions  
15 and statements of policy, on one hand, and predecisional  
16 communications, on the other, does not necessarily exist between  
17 final statements of policy and other Exemption 5 privileges."  
18 Id. at 360 n.23. But La Raza establishes that when a document  
19 has been relied upon sufficiently to waive the deliberative-  
20 process privilege, that reliance can have the same effect on the  
21 attorney-client privilege. 411 F.3d at 360-61. We conclude that  
22 it does so here.

1 **CONCLUSION**

2 For the foregoing reasons, the district court's grant  
3 of summary judgment for the plaintiff is affirmed with respect to  
4 the February 2004 memorandum, and reversed and remanded with  
5 respect to the July memoranda with instructions to the district  
6 court to enter summary judgment for the defendants as to them.