



May 14, 2015

**via facsimile**

Office of Information Policy  
United States Department of Justice  
1425 New York Avenue, N.W., Suite 11050  
Washington, D.C. 20530  
Fax: (202) 514-1009

**Re: Freedom of Information Act Appeal  
FY15-041**

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

To whom it may concern:

The American Civil Liberties Union writes to appeal the denial of its Freedom of Information Act request for the Office of Legal Counsel's legal memorandum interpreting "common commercial service agreements," which was referred to in a letter sent by Senator Ron Wyden to Attorney General Eric Holder on February 3, 2015. A copy of the request, dated March 10, 2015, is attached as Exhibit A. A copy of the OLC's response, dated March 16, 2015, is attached as Exhibit B.

The OLC located the memorandum but withheld it under FOIA Exemption Five, 5 U.S.C. § 552(b)(5), based on its claim that the memorandum is "protected by the deliberative process and attorney-client privileges."

The OLC did not provide any explanation of how the document satisfies the prerequisites of either of those privileges. There is, in any event, a compelling reason to believe that the memorandum at one point reflected official administration policy rather than merely deliberative analysis or advice. In his letter to the Attorney General, Senator Wyden describes the memorandum in a way that suggests it reflected the administration's "understanding of the law" and the manner in which the administration understood its "common commercial services agreements" with private companies. In other words, it appears that the memorandum was operative, not merely advisory.

Moreover, in Senate testimony responding to questions from Senator Wyden, the deputy head of the OLC, Caroline Krass, stated that the OLC would not rely on the memorandum today, based on its age and other factors.<sup>1</sup> The implication of her statement is that the OLC did in fact rely upon the memorandum at one point.

In its denial, the OLC also gestured to the possibility that the memorandum is classified and perhaps withholdable under Exemptions 1 and 3. It is unclear whether the OLC has in fact invoked those exemptions. To the extent it has, we appeal those determinations as well.

Finally, even if the memorandum is technically withholdable, the agency should consider a discretionary release given the importance of the memorandum to the ongoing legislative debate about cybersecurity.

If you have questions, please contact me at [aabdo@aclu.org](mailto:aabdo@aclu.org) or (212) 549-2517.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Sincerely,



Alex Abdo

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<sup>1</sup> *Nomination of Caroline Diane Krass to be General Counsel of the Central Intelligence Agency: Hearing before the Senate Intelligence Committee, 113 Cong. (2013), available at <http://www.senate.gov/isvp/?type=live&comm=intel&filename=intel121713&stt=27:15> (1:24 - 1:25)*