

DOJ's OLC was not adopted by the FBI because the FBI never publicly invoked or relied upon the OLC opinion as the basis for an agency decision.²¹⁰ While DOJ's Office of the Inspector General had referenced the OLC opinion in a public report, and the FBI had answered Congressional inquiries about the OLC opinion, the court found that this did not demonstrate that the FBI adopted the OLC opinion.²¹¹

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation.²¹² As its purpose is to protect the adversarial trial

expressly adopted the [HLCG's] negotiating positions in any publicly-available document or publication"); Pub. Emps. for Env't Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, 3223 (D.D.C. 2012) (holding that public citation of "a few lines of text" from otherwise predecisional document was insufficient to prove that agency had adopted document). But cf. Sussman v. DOJ, No. 03-3618, 2006 WL 2850608, at *18 (E.D.N.Y. Sept. 30, 2006) (denying summary judgment where government had "not addressed" whether predecisional, deliberative documents were adopted); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (citing Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 261 (D.D.C. 2004), for same proposition); Jud. Watch, Inc., 297 F. Supp. 2d at, 261 (ruling that agency had affirmative obligation to explicitly deny that draft documents had been adopted as agency policy).

²¹⁰ Elec. Frontier Found., 739 F.3d at 11-12; see also Samahon v. DOJ, No. 13-6462, 2015 WL 857358, at *23 (E.D. Pa. Feb. 27, 2015) (finding that two OLC opinions "do not constitute 'working law'" because "[t]hey are not an expression of final agency policy because they are advisory and cannot bind the President in his decisionmaking").

²¹¹ Elec. Frontier Found., 739 F.3d at 11 ("The OIG's references to the OLC Opinion do not establish that *the FBI* adopted the Opinion as *its own* reasoning. Nor does [the FBI's] response to inquiries from members of Congress establish that the FBI adopted the OLC opinion's reasoning as *its own* reasoning. . . . Far from publicly using the OLC Opinion to justify the FBI's positions, [the FBI's] testimony [before Congress] indicates that the OLC Opinion *did not* determine the FBI's actions or policy.").

²¹² See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Wisdom v. USTP, 266 F. Supp. 3d 93, 108 (D.D.C. 2017) ("Because the 'need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress,' . . . the Court has little difficulty finding that the discussions between the AUST and the Acting AUST about Plaintiff's ongoing related litigation are exempt from disclosure." (quoting FTC v. Grolier Inc., 462 U.S. 19, 30 (1983))); Adionser v. DOJ, 811 F. Supp. 2d 284, 297 (D.D.C. 2011) (concluding that EOUSA properly invoked attorney work-product privilege "to protect records reflecting 'such matters as trial preparation, trial strategy, interpretations, and personal evaluations and opinions pertinent to Plaintiff's criminal case'" (quoting Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980))); Jud. Watch, Inc. v. DOJ, 800 F. Supp. 2d 202, 212-13 (D.D.C. 2011) (concluding that documents created in reasonable anticipation of motion to be filed in ongoing case were properly

process by insulating the attorney's preparation from scrutiny,²¹³ the Court of Appeals for the District of Columbia Circuit has held that the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.²¹⁴ The privilege is not limited to civil proceedings, but rather extends to administrative

withheld under work-product privilege); Amnesty Int'l USA v. CIA, No. 07-5435, 2010 WL 5421928, at *4 (S.D.N.Y. Dec. 21, 2010) (holding that attorney work-product privilege protects documents constituting mental impressions of federal prosecutor about anticipated or ongoing litigation); Citizens for Resp. & Ethics in Wash. v. NARA, 715 F. Supp. 2d 134, 138-39 (D.D.C. 2010) (protecting "documents prepared in contemplation of litigation" (citing Coastal States, 617 F.2d at 864)); Wolfson v. United States, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (concluding that attorney work-product privilege was properly invoked to withhold information whose disclosure "would reveal . . . attorneys' thought processes and litigation strategy and would reveal the agency's deliberations prior to the decision to seek authorization for continued monitoring of oral communications"); see also Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure).

²¹³ See Jordan v. DOJ, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc); Stein v. DOJ, 134 F. Supp. 3d 457, 479 (D.D.C. 2015) (determining that if opposing party could obtain monographs that contain legal strategies, it would give them benefit of agency's legal and factual analysis and reasoning and thus an unfair advantage in litigation).

²¹⁴ Coastal States Gas Corp., 617 F.2d at 865.

proceedings²¹⁵ and to criminal matters as well.²¹⁶ Similarly, the privilege has also been held applicable to documents generated in preparation of an amicus brief.²¹⁷

²¹⁵ See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 159-60 (1975) (assuming without analysis that proceeding before NLRB constitutes litigation for purposes of attorney work product privilege); Schoenman v. FBI, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) (upholding use of privilege for documents "created by an attorney in the context of an ongoing administrative proceeding that eventually resulted in litigation"); Nevada v. DOE, 517 F. Supp. 2d 1245, 1260 (D. Nev. 2007) (noting that privilege applies to administrative proceedings, as long as they are "adversarial"); Env't Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W. Va. 2005) (protecting documents prepared in advance of EPA administrative enforcement proceeding); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999) (allowing withholding of documents prepared by attorneys in anticipation of INS deportation proceeding), amended (S.D.N.Y. Oct. 29, 1999); Williams v. McCausland, No. 90-7563, 1994 WL 18510, at *10 (S.D.N.Y. Jan. 18, 1994) (MSPB proceeding); Exxon Corp. v. DOE, 585 F. Supp. 690, 700 (D.D.C. 1983) (upholding use of privilege for documents prepared for regulatory audits and investigations); see also Jud. Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 30-31 (D.D.C. 2003) (applying privilege to memorandum written by IRS associate chief counsel that discussed private financial information concerning prospective IRS employee).

²¹⁶ See, e.g., Liounis v. Krebs, No. 18-5351, 2019 WL 7176453, at *1 (D.C. Cir. Dec. 19, 2019) (per curiam) (finding that "government properly invoked Exemption 5 to withhold the draft indictment, draft information, and handwritten attorney notes on the indictment under the attorney work-product privilege as those documents were prepared by attorneys in connection with a criminal prosecution"); Sorin v. DOJ, 758 F. App'x 28, 32 (2nd Cir. 2018) (per curiam) (holding that emails concerning legal theories and litigation strategies and attorney notes "fall within the work-product privilege as communications within and among federal law enforcement agencies created in anticipation of a criminal prosecution and for the purpose of furthering that prosecution"); Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (applying privilege in case involving prosecution of environmental crimes); Nadler v. DOJ, 955 F.2d 1479, 1491-92 (11th Cir. 1992) (applying privilege in bribery investigation), abrogated on other grounds, DOJ v. Landano, 508 U.S. 165 (1993); Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983) (ruling privilege applicable in bank-fraud prosecution); Lazaridis v. DOJ, 766 F. Supp. 2d 134, 143 (D.D.C. 2011) (holding that agency properly asserted Exemption 5 to withhold "predominantly as attorney work-product but also as deliberative process material" various records prepared by the U.S. Attorney's Office pertaining to plaintiff's "pending kidnapping case") (internal citations omitted); Miller v. DOJ, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (protecting documents created in considering whether to bring criminal charges against requester); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 517 (S.D.N.Y. 2007) (protecting documents that "'provid[ed] guidance for responding to motions made in criminal litigation") (internal citation omitted); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *5-6 (D.D.C. Jan. 30, 2007) (upholding use of privilege to withhold criminal case history report); Butler v. DOJ, 368 F. Supp. 2d 776, 785-86 (E.D. Mich. 2005) (applying privilege to prosecution memorandum and draft indictment prepared as part of narcotics investigation); Slater v. EOUSA, No. 98-1663, 1999 U.S. Dist. LEXIS 8399, at *9 (D.D.C. May 24, 1999) (protecting portions of letter from Assistant United States Attorney to FBI revealing investigative strategy in criminal case).