ORAL ARGUMENT SCHEDULED FOR FEBRUARY 13, 2009

No. 08-5004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Plaintiff/Appellant,

v.

OFFICE OF MANAGEMENT AND BUDGET,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Adina H. Rosenbaum
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

January 12, 2009

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTE

GLOSSARY

APA	Administrative Procedure Act
FOIA	Freedom of Information Act
OMB	Office of Management and Budget
USIP	United States Institute of Peace

SUMMARY OF ARGUMENT

OMB makes two main arguments in its attempt to justify withholding records containing its policy on which agencies are allowed to bypass its legislative and/or budgetary clearance processes: that the records are just briefing materials containing OMB officials' perspectives and views, and that secret policies do not constitute secret law if they govern interactions between parts of the government, rather than between those inside and outside the government. But the withheld records contain a list of agencies OMB allows to bypass the clearance processes, which the Assistant Director for Legislative Reference gives to his staff to inform them about OMB's practices, and which the staff then actively applies. These records are not just internal perspectives, but OMB's policy on which agencies are "bypass agencies," and policies—no matter whom they regulate—are neither predominantly internal (as required under high Exemption 2) nor predecisional and deliberative (as required under the deliberative process privilege of Exemption 5). The withheld records are not exempt from disclosure, and they must be released.

ARGUMENT

I. The Withheld Records Are Not Exempt Under High Exemption 2.

A. The Withheld Records Are Not Predominantly Internal.

As Public Citizen explained in its opening brief (at 16-18), because the

records at issue govern the relationship between OMB and other agencies, they are not predominantly internal. OMB responds that the records are just "briefing materials" that "do not govern the actions of either OMB personnel or other agencies." OMB Br. 13. But the nature of the records belies OMB's claims that they contain just "deliberation, not definition, regulation, or instruction." *Id*. at 18. The withheld records contain a list of agencies, under either the heading "'Bypass' Agencies" (App. 108, 121, 131) or "Agencies Exempt from the Legislative Clearance Process." (App. 119). OMB's labeling of parts of these lists as "views of OMB officials regarding policy considerations," OMB Br. 8, does not change what they are: lists of agencies OMB allows to bypass the legislative and/or budgetary clearance processes, created by the Assistant Director for Legislative Reference, circulated to his staff to inform them of OMB's practices, OMB Br. 48, and actively used by his staff, presumably in checking whether particular agencies are among those allowed to bypass the clearance processes.[1]

---

[1]OMB (at 14) misunderstands Public Citizen's emphasis on James Jukes's assertions that records 1-2 "currently apply and are utilized by OMB employees." (App. 17). Public Citizen is not, of course, arguing that all records lose their internality through repeated use. But the normal way one would "apply" and "utilize" a list labeled "bypass agencies" would be to use it to check whether an agency is one of the agencies allowed to bypass the clearance processes. Mr. Jukes's use of the verbs "apply" and "utilize" accordingly indicates that the lists do, in fact, govern which agencies are allowed to bypass the clearance processes.

According to OMB, the records are predominantly internal because they contain "a description of the views and perspectives of OMB official's [sic] interpretations of the views of certain agencies regarding legislative clearance requirements" and "characterizations and perspectives concerning agencies' views regarding legislative clearance requirements applicable to their respective agencies." OMB Br. 12-13 (quoting App. 82-91). Public Citizen interprets these convoluted descriptions to mean that the withheld portions of the records list agencies that OMB considers bypass agencies because those agencies do not believe they are subject to the clearance processes and OMB has chosen not to challenge those agencies' interpretations. But the *reason* OMB placed an agency on its list of bypass agencies is irrelevant if that list governs which agencies are allowed to bypass the clearance processes. A policy that regulates those outside the agency is not predominantly internal just because the agency engaged in internal deliberations in crafting the policy.

OMB also claims that the records are not themselves OMB's policy on which agencies can bypass the clearance processes, but rather "discussion tools" used in "policy discussions." OMB Br. 18, 14. Although OMB does not make entirely clear what "policy" these discussions involve, it seems to be arguing that its staff uses the records to decide, each time an agency produces legislative or

budgetary materials, whether that agency has to run the materials by OMB for clearance. *See id*. at 13 (claiming records are used by OMB personnel in "fluid, candid discussion in order to determine the nature of their interactions with various other agencies during the legislative clearance process"). But OMB receives thousands of drafts of agency testimony, reports, and proposed legislation for its review each year. (App. 66-67). If it were correct that OMB makes a new decision about whether or not an agency is required to submit materials to it each time the issue arises, one would expect OMB to have found hundreds, if not thousands, of records discussing agencies' authority to bypass the clearance processes in response to Public Citizen's FOIA request; there would be correspondence back and forth every time any agency drafted testimony, proposals, or legislation, and all of the correspondence in which OMB determined that an agency was a bypass agency would be responsive to Public Citizen's request. (App. 37). OMB, however, only found eight pieces of correspondence between it and other agencies in response to the request (App. 71, 91-93), indicating that OMB does *not* decide whether an agency is a bypass agency each time an agency drafts testimony, proposals, or legislation, but rather operates under a policy governing which agencies are allowed to bypass the clearance requirements. Given that they are the only records that OMB found in response to

Public Citizen's FOIA request besides those pieces of correspondence, records 1-14 would seem to be that policy.

2. OMB also argues that even if the records do govern which agencies must clear their materials by OMB, they are not secret law because they regulate other agencies rather than "the public." *See* OMB Br. 23 (claiming the withheld records "are not secret law because they concern agencies and do not affect the public"). As explained in our opening brief (at 18 n.2), however, the "public," for Exemption 2 purposes, consists of everyone outside of the particular agency at issue, here OMB. Exemption 2 is concerned with records "related solely to . . . *an* agency," 5 U.S.C. § 552(b)(2) (emphasis added), not with records related to agencies overall. *See Cox v. U.S. Dep't of Justice*, 601 F.2d 1, 4 (D.C. Cir. 1979) ("This exemption applies to matters of merely *intra*-agency significance . . . .") (emphasis added). If withheld records are not predominantly internal to a single agency, they cannot be withheld under Exemption 2.

Judge Leventhal's concurrence in *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975)—which coined the term "predominantly internal," and whose usage of that term was explicitly adopted by the majority in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc)—confirms this reading of the text. In that opinion, Judge Leventhal concluded that Civil

Service Commission reports analyzing agency personnel policies were not exempt under Exemption 2 because they "relate predominantly to evaluation of government-wide personnel policy rather than policy implementation internal to an agency." *Vaughn*, 523 F.2d at 1147 (Leventhal, J., concurring). Judge Leventhal explained that "the (b)(2) exemption . . . comes into play for matters 'relating solely' to the internal practices of 'an agency'" and that because the studies were "not evaluations of the Commission's own personnel practices, but [we]re instead concerned with evaluating the implementation of government-wide personnel policies," they did not meet the test of predominant internality. *Id*. at 1150-51. In other words, the opinion made clear that records can lose their predominantly internal status even if they do not relate to people outside the federal government.

OMB's sole attempt to distinguish Judge Leventhal's opinion is to note that "[p]art of the rationale" for his conclusion "was very fact-specific." OMB Br. 19. But the adoption of Judge Leventhal's usage of the term "predominantly internal" in *Crooker* demonstrates that this Court has *not* viewed Judge Leventhal's opinion as limited to the facts of *Vaughn* or to cases involving the Civil Service Commission. Moreover, even if the "unique role of the Civil Service Commission in the federal government," *id*., were vital to Judge Leventhal's

opinion, the similarities between the Civil Service Commission's and OMB's roles would counsel towards releasing the withheld records. Like the Civil Service Commission in its role vis-a-vis personnel policy, OMB is primarily concerned with overseeing and regulating other agencies, rather than entities outside the government. Accordingly, if an agency policy did not need to be disclosed unless it regulated people outside of federal agencies, almost all OMB policies could be withheld without violating the prohibition on secret law. But OMB's managerial role is its "primary duty, not a necessary but secondary problem incidental to implementing executive policy in discrete areas of substantive national regulation." *Vaughn*, 523 F.2d at 1151 (Leventhal, J., concurring). And just as the Civil Service Commission should "not be totally immune from public awareness of and comment on its administration of Government personnel policy," *id.*, OMB should not be totally immune from public scrutiny of its implementation of its managerial policies.

In addition to conflicting with the language of Exemption 2 and Judge Leventhal's construction of the term "predominantly internal," OMB's claim that secret policy is not secret law if it regulates other agencies reflects a fundamental misunderstanding of FOIA's scope. According to OMB, "[p]ractices regarding the internal relationships among agencies and those agencies' relationships with

Congress (like the legislative clearance process) is not the kind of information that FOIA seeks to disclose because those practices have no effect on members of the public." OMB Br. 21; *see also id.* at 30 (claiming "there is no substantial, valid external public interest in these materials"). But the "core purpose of FOIA" is to contribute "to public understanding of the operations or activities of the government," *U.S Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (emphasis removed) (quoting 5 U.S.C. § 5 U.S.C. 552(a)(4)), and informing the public about the rules governing agencies' interactions with each other and with other branches of the government directly relates to that purpose. Moreover, it is not for the agency or court to decide whether the specific information at issue is of valid, public concern. *See Crooker*, 670 F.2d at 1074 n.60 ("[W]e reject language in *Cox*[, 601 F.2d at 5,] and in *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 783 (D.C. Cir. 1978) (en banc) (Leventhal, J., concurring) suggesting that the courts are to decide when there is a legitimate public interest in disclosure.").

In any event, the rules governing agencies' interactions *do* affect members of the general public: Here, for example, whether an agency with substantive expertise in an area can submit information directly to Congress or whether that information must first be edited by OMB has a direct effect on the public because

it affects what information is before Congress when it enacts generally applicable public laws. This Court should not adopt a definition of "predominantly internal" that fails to recognize FOIA's goal of allowing the public to oversee the government's activities and operations.

B. Releasing the Withheld Records Would Not Significantly Risk Circumvention of the Law.

Even if the records were predominantly internal, they would not be exempt under high Exemption 2 because their release would not significantly risk circumvention of the law. As Public Citizen explained in its opening brief (at 20-21), the government cannot withhold records based on the risk that the government itself will break the law if the records are released. A "very real" "danger" "that government agencies might break the law to further their agencies' interests," OMB Br. 24, is a reason to further "open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), not a justification for permitting government secrecy.

Even if OMB could base an assertion that the records are exempt on a claim that their release is likely to cause other agencies to circumvent the law, however, OMB still would not have met its burden in this case of showing the records are exempt under Exemption 2. OMB's claim that release of the records would risk

circumvention of the law rests on conclusory assertions that, if the records were released, agencies could use them "to impede and frustrate legislative clearance requirements." OMB Br. 26; *see also id.* (claiming disclosure of records "would benefit those agencies who are seeking to avoid their legislative clearance obligations"). But OMB has not explained *how* release of the redacted information in the records would help agencies impede the requirements. For example, OMB appears to be redacting the fact that the United States Institute of Peace (USIP) interprets Section 1709(a) of Pub. L. No. 98-525, 22 U.S.C. § 4608(a), as placing it outside the regular budget process (compare App. 115 with App. 136). But knowing how USIP interprets Section 1709(a) would not help any agency circumvent the law. USIP already knows how it interprets the law, so release of the records would not help USIP, and Section 1709(a) pertains particularly to USIP, so USIP's interpretation of that statute would not be relevant to any other agency. And even if the statute applied to other agencies, knowing how USIP interpreted the statute would not give those agencies any guidance on how to evade the law themselves. At most, knowledge of USIP's interpretation might cause the agencies' to change their own interpretations of the law, but the high 2 test is not whether disclosure changes people's views on what the law requires, but whether it gives them guidance on how to circumvent the law's

requirements—that is, on how to break the law. *See Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986) (explaining that the guiding principle of the high 2 exemption is similar to the principle that "an employee who seeks to embezzle money from a bank [should not] be given access to the examiner's special instructions for auditing his type of bank so that he can discover how to disguise his defalcations") (citation omitted).

Similarly, as Public Citizen noted in its opening brief (at 22), releasing the full list of agencies allowed to bypass the clearance processes would not facilitate any agency's circumvention of the law. If an agency is on the list, then knowing it is on the list would not help it evade requirements because OMB does not consider it bound by those requirements, and if it is not on the list, then knowing which other agencies are on the list will not provide it any guidance. And although OMB conclusorily claims that "[r]ecords 1-14 are essential to OMB officials and staff because they are confidential," OMB Br. 29, and implies, through its citation, that release would render them operationally useless, OMB has not explained why the records would not be able to fulfill their purpose if they were released in full. For example, if the goal of creating the list of bypass agencies is to "brief" OMB staff about which agencies are allowed to bypass the clearance processes, having other people know which agencies are on the list does not undermine that goal.

Instead of demonstrating why Exemption 2 *does* exempt these records, OMB devotes most of its argument on circumvention of the law to arguing why, in its opinion, Exemption 2 *should* exempt the records. According to OMB, "[r]ecords 1-14 contain highly sensitive information, and high Exemption 2 should protect this information from disclosure." OMB Br. 27. But Exemption 2 does not protect any information deemed "sensitive" from disclosure. Congress did the "necessary balancing" of "the public interest in disclosure against any reason for avoiding disclosure" in enacting FOIA's exemptions, *Crooker*, 670 F.2d at 1074, and the high 2 exemption applies only where release of the requested records would risk circumvention of federal statutes and regulations. *See Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). OMB has not shown that disclosing the withheld records would risk such circumvention.

In any event, even if "sensitivity" of the records were the standard for determining whether the records were exempt under the high 2 exemption, OMB would not have met its burden of showing that the withheld records are so sensitive as to require confidentiality. OMB claims that the records are sensitive and must be kept confidential because they relate to "a core function of the agency" that OMB considers "deliberative through and through." OMB Br. 28-29. But many records related to core, deliberative functions are not themselves

sensitive, confidential, or deliberative. The Administrative Procedure Act (APA), for example, governs many important, deliberative proceedings, but no one would claim that the APA itself should be kept secret. Simply declaring that records are sensitive or confidential, or declaring that they relate to a sensitive, confidential, or deliberative process, is insufficient to demonstrate that release of those records would in fact cause harm. *Cf. Nat'l Treasury Employees Union*, 802 F.2d at 530 ("[A]n agency cannot be regarded as having satisfied the second prong of the *Crooker* test simply by promulgating a regulation designating certain material as confidential.").

OMB similarly misunderstands the requirements of the high 2 exemption in contending that Exemption 2 should apply because disclosure would chill communication by "inhibit[ing] OMB staff in their drafting of these . . . memoranda." OMB Br. 30 (quoting App. 77). OMB cannot make any record it chooses exempt from disclosure just by threatening that if the record is disclosed, it will not produce similar records in the future or will produce them less quickly or less thoroughly. The second prong of the high 2 test does not ask how disclosure of records will affect *OMB*'s behavior, but whether it will affect *others'* behavior by helping them evade the law. OMB has not demonstrated that releasing the withheld records would do so, and Exemption 2 does not apply.

II. The Withheld Records Are Not Exempt Under the Deliberative Process Privilege of Exemption 5.

1. OMB claims that the withheld records are "briefing materials" and that "briefing materials prepared by agencies for one purpose or another are properly protected under the deliberative process privilege." OMB Br. 33, 35. But the test for whether a record is exempt under the deliberative process privilege of Exemption 5 is not whether it is used to brief people. The test is whether it is predecisional and deliberative. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980). Because briefing materials are often predecisional and deliberative, they are often exempt under exemption 5. But where records are not predecisional and deliberative, such as records that inform staff about a decision that has already been made, the deliberative process privilege does not apply, whether or not those records can properly be called "briefing materials." Here, the withheld records are neither predecisional nor deliberative and, therefore, are not exempt under Exemption 5.

OMB describes the withheld documents as summaries of "the currently-held internal-OMB perspectives and views regarding which federal agencies have a basis—in statute or in prior agency and OMB practice—for not submitting to OMB, for interagency review, the drafts of their submissions to Congress." OMB

Br. 35. According to OMB, "[w]ords like 'views,' 'perspectives,' 'opinions,' 'advice,' 'recomendations,' and 'discussions,' suggest that these records do not represent the agency's final agency decision." *Id*. at 40. But "perspectives and views" are not magic words that turn policies into deliberative materials. To paraphrase OMB's description of the records, *see id.* at 35, they contain the person in charge of determining which agencies are allowed to bypass the clearance processes' "perspectives and views" on which agencies are bypass agencies. A policy-maker's perspectives on what the policy is, given by him to his staff, who apply those perspectives, is the agency's policy. *See Taxation With Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981) ("'[T]he paradigm of 'final opinions' (is that the documents) typically flow from a superior with policymaking authority to a subordinate who carries out the policy.'") (quoting *Brinton v. United States*, 636 F.2d 600 (D.C. Cir. 1980)).[2]

---

[2]OMB claims that Public Citizen's suggestion that a member of the legislative reference staff, upon being given a list of "bypass agencies" by the Assistant Director for Legislative Reference, would assume that the list was, in fact, the list of agencies allowed to bypass the clearance process, "reflects a misunderstanding of the OMB's unique role in the federal government." OMB Br. 45 n.5. Notably, OMB does not explain what it is about OMB's "unique role" that would cause members of the legislative reference staff to assume that the list of "bypass agencies" given to them by their boss was not, in fact, the list of agencies they should allow to bypass the clearance process, but just their boss's "personal opinions." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Coastal States*, 617 F.2d at 866).

OMB further overuses the term "perspectives and views" in claiming that the lists of bypass agencies are deliberative, rather than factual. OMB Br. 42. According to OMB, the lists of bypass agencies are deliberative because they are "overviews or summarizations of [OMB's] perspectives." *Id*. But the list of "bypass agencies" is not a list of "perspectives": It is a factual list of which agencies OMB allows to submit materials to Congress without first clearing them with OMB. *See* OMB Br. 28 (explaining that the records are designed to inform OMB staff about the legislative reference division's "activities and practices"). That OMB may have engaged in analysis and interpretations of other agencies' views in deciding whether to place certain agencies on the list does not make the list itself deliberative.

OMB similarly misses the point in claiming that the records are predecisional and deliberative because they are "part of the deliberative process of legislative clearance," OMB Br. 33, and predate decisions made during that process. *Id.* at 41 ("[T]hese documents preceded the formulation of final policy and were part of the . . . inherently deliberative process of legislative clearance."). That a record relates to a predecisional, deliberative process, or delineates the procedures to be used in the deliberative process, does not mean that the record itself is predecisional or deliberative. Final policies always predate the decisions

agencies make in applying those policies, but that does not make those policies themselves exempt from disclosure. *See Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (explaining that records were not predecisional even though they "may precede the field office's decision in a particular taxpayer's case" because "they do not precede the decision regarding the agency's legal position").

Likewise, that an agency tends to provide advice and recommendations does not mean that all records relating to that agency are exempt under the deliberative process privilege. According to OMB, because its role tends to be advisory, the secret law framework does not apply to it. OMB Br. 43-45. As OMB itself notes, however, in determining whether records are exempt under the deliberative process privilege, courts look at "the function and significance *of the document* in the *agency*'s decisionmaking process." *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981) (emphasis added) (quoted in redacted form at OMB Br. 43). Thus, what is relevant is not, as OMB claims, "OMB's role in the Executive Branch decisionmaking process," OMB Br. 43, but rather the *documents*' role in the relevant *OMB* decisionmaking process. Here, the relevant decision is which agencies are "bypass agencies," exempt from the clearance processes, and the withheld records are not deliberative and predecisional with regard to that decision. It is irrelevant that, generally, OMB's "documents are

likely, by their nature, to be both predecisional and deliberative," *id.* at 44 (quoting *United States v. Philip Morris USA Inc.*, 218 F.R.D. 312, 321 (D.D.C. 2003)), where, as here, the *actual* documents at issue are not predecisional and deliberative.[3]

Finally, OMB's claim that the documents' use "as a starting point for discussions on policy changes" "should not render them unprotected under Exemption 5" is a red herring. OMB Br. 39. Public Citizen is not arguing that the records must be released because they are used in discussions on policy changes; rather, it is arguing they cannot be withheld just because they are so used. Current policies are almost always going to be the starting point for discussing policy changes, but that does not justify the withholding of all policies.

Indeed, OMB's reiteration (at 35, 39, 41) of the records' role in discussions of potential changes in OMB policy and practice just highlights that OMB must

---

[3]OMB (at 43-45) quotes at length from *Philip Morris*, 218 F.R.D. 312, but *Philip Morris* appears not to have considered whether records containing the rules governing the coordination of agency policy—rather than records produced as part of a particular application of that process—fit into the secret law framework. Except for the fact that they regulate agencies instead of people outside the government (a distinction without a difference, as explained below), records containing such rules, unlike the records mentioned in *Philip Morris*, which were all produced by or given to OMB as part its coordination of particular policies, are not "different in kind" from the records considered in other secret law cases. *Id*. at 321.

already have a policy and practices regarding which agencies can bypass the legislative and budgetary clearance processes. However, neither OMB Circular A-19 nor the OMB Director's memorandum to agency heads of February 15, 2001—which OMB states are its "official policy on legislative bypass," OMB Br. 40—contain a list of agencies that are allowed to bypass the clearance processes. (App. 106). Thus, though they may contain OMB's policy on legislative clearance *in general*, they do not contain its policy on which agencies are bypass agencies. Given that OMB seems to have a policy and practices regarding which agencies are bypass agencies, yet, except for eight pieces of correspondence (App. 91-93), the records at issue in this appeal are the *only* records OMB has that list or explain that agencies or an agency can bypass the clearance processes (App. 37, 82-91), these records would seem to comprise OMB's policy and describe its practices on which agencies can bypass the clearance processes.

2. Unable to refute the logical conclusion that these records must contain the policy OMB in fact applies in its dealings with other agencies, OMB falls back, again, on the argument that secret policies are not impermissible secret law if they regulate other government agencies, rather than entities outside the government. OMB quotes a statement in *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1980), that Exemption 5 does not exempt "working law of the agency in

the form of final opinions, statements of policies and interpretations to staff affecting a member of the public," and argues that "the touchstone for determining whether a record constitutes secret law [is] its effect on members of the public." OMB Br. 38. That language from *Pies*, however, comes from *NLRB v. Sears, Roebuck & Co.*, 412 U.S. 132, 153 (1975), which explained that "Exemption 5, properly construed, calls for 'disclosure of *all* 'opinions and interpretations' which embody the agency's effective law and policy," *id*. (emphasis added) (citation omitted), making no mention of an exception for agency law and policy that regulates other agencies. And *Pies* itself goes on to state that "documents that . . . are protected under Exemption 5 are those that do not reflect agency policy or interpretations of the agency *and* which would obviously be of little or no assistance to members of the public," 668 F.2d at 1353 (emphasis added), demonstrating that if a record reflects agency law or policy, it must be disclosed whether or not it directly affects the public.

That *Coastal States*, *Tax Analysts*, and *Schwartz v. IRS*, 511 F.2d 303 (D.C. Cir. 1975), involved "the application of an agency's precedential decisions to members of the public," OMB Br. 37, similarly does not create an exception from the prohibition on secret law for administrative law that regulates agencies. Because most agencies regulate the public directly, secret law cases tend to

involve policies used in agencies' "dealings with the public." *Coastal States*, 617 F.2d at 867. Because OMB's duties involve regulating other agencies, its secret law concerns its dealings with those agencies. No matter whom it is regulating, however, "an agency will not be permitted to develop a body of secret law used by it in the discharge of its regulatory duties[.]'" *Leeds v. Comm'r of Patents and Trademarks*, 955 F.2d 757, 762 (D.C. Cir. 1992) (emphasis removed) (quoting *Coastal States*, 617 F.2d at 867). And no matter whom they govern, policies are by their nature not predecisional and deliberative and, therefore, whether or not they meet some definition of "secret law," are not exempt under the deliberative process privilege.

In any event, OMB's argument once again relies on an overly narrow view of what affects the public. As explained above (at 7-8), despite OMB's claim that the legislative clearance process "affects no individual citizens, only federal agencies," OMB Br. 37, the clearance process is not a subject in which "there is no real public interest . . . save perhaps for satisfying public curiosity." *Pies,* 668 F.2d at 1353. According to its declarations, OMB plays a "central role" in the development and implementation of federal policy in myriad areas, including "procurement, general management, financial management, and information and regulatory areas." (App. 62). In 2006 alone, it received for review approximately

1,153 drafts of agency testimony, 341 drafts of agency reports to Congress, and 144 drafts of agency proposed legislation. *Id*. at 66. Given the breadth of this review process, its "value and importance" to the executive branch, OMB Br. 25, and its potential to influence policies on numerous subjects that affect the public, the American people have an interest in understanding how it operates. *See Reporters Comm*., 489 U.S. at 773 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose.").

CONCLUSION

This Court should reverse the district court's decision and order OMB to release records 1-14.

Respectfully submitted,

/s/

Adina H. Rosenbaum
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

January 12, 2009

Counsel for Appellant

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 5,064 words.

/s/
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, January 12, 2009, I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for Defendant/Appellee as follows:

Alexander D. Shoaibi
Assistant United States Attorney
555 Fourth Street, N.W., Room E4218
Washington, D.C. 20530

/s/
Adina H. Rosenbaum