IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. NATIONAL SECURITY COMMISSION ON ARTIFICIAL INTELLIGENCE, et al. Defendants.	Civ. Action No. 19-2906-TNM

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FACA CLAIMS AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") hereby opposes Defendants' Motion to Dismiss FACA Claims and moves for partial summary judgment with respect to Counts I–V of EPIC's Complaint for Injunctive, Mandamus, and Declaratory Relief. Fed. R. Civ. P. 56. The reasons are set forth in accompanying Memorandum of Points and Authorities.

Respectfully Submitted,

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Dated: February 14, 2020

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully opposes Defendants' motion to dismiss EPIC's claims brought under the Federal Advisory Committee Act ("FACA"), the Administrative Procedure Act ("APA"), and the Mandamus and Venue Act of 1962 ("Mandamus Act") and moves instead for partial summary judgment on the same claims.

Two months ago, this Court ruled that the National Security Commission on Artificial Intelligence ("AI Commission") is an "agency" subject to the Freedom of Information Act ("FOIA"). Mem. Op. & Order, ECF No. 26, at 5. In so holding, the Court rejected the Government's arguments from nebulous legislative history, relying instead on the "unambiguous text" of the FOIA and the AI Commission's organic statute. *Id.* at 11. "The Government has not convinced the Court that it should ignore what Congress said," the Court wrote. *Id.* at 19. Now the Government returns to seek dismissal of EPIC's FACA claims, once more inviting the Court to ignore what Congress said. The Court should again refuse that invitation.

The AI Commission is an "advisory committee" under the Federal Advisory Committee Act, 5 U.S.C. app. 2 § 3(2). As such, it must provide notice of its meetings, open those meetings to the public, and proactively publish its records. But the AI Commission has refused to comply with these requirements and now argues that the Commission is exempt from the FACA because it consists only of "permanent part-time . . . employees." *Id.* This argument is contrary to the facts and inconsistent with the plain text of the statute. Moreover, there is no rule—under the FACA, the FOIA, or the APA—that prevents an agency such as the AI Commission from simultaneously qualifying as an advisory committee. The Commission is subject to the transparency requirements of *both* the FOIA *and* the FACA. Accordingly, EPIC is entitled to relief under the APA and the FACA or, in the alternative, to writs of mandamus.

The Court should deny the Government's motion to dismiss, grant partial summary judgment in EPIC's favor, and order the AI Commission to immediately open its meetings, provide notice of future meetings, and make its records available to the public.

BACKGROUND

I. The Formation and Structure of the AI Commission

Congress established the National Security Commission on Artificial Intelligence in 2018 through section 1051 of the McCain Act. John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("McCain Act"), Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962–65 (2018). The McCain Act directs the AI Commission "to review advances in artificial intelligence, related machine learning developments, and associated technologies." *Id.* § 1051(a)(1). The AI Commission is both a "temporary organization" and "an independent establishment of the Federal Government" that is "in the executive branch." *Id.* § 1051(a). The Commission will terminate on October 1, 2021. National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), Pub. L. No. 116-92, § 1735(a), 133 Stat. 1198, 1819 (2019).

The AI Commission "shall be composed of 15 members" appointed "for the life of the Commission" by the Secretary of Defense, the Secretary of Commerce, and the chairs and ranking members of six congressional committees. *Id.* § 1051(a)(4). Commission members are employed on an "intermittent" basis pursuant to 5 C.F.R. § 340.403. Compl., ECF No. 1, ¶ 43 (quoting 5 C.F.R. § 340.403); Answer, ECF No. 29, ¶¶ 40–43 (failing to deny, and thereby admitting to, the allegations in ¶ 43 of EPIC's Complaint). The Chairman of the Commission is Defendant Eric Schmidt; Mr. Schmidt is the former executive chairman of Alphabet Inc. and the former chairman and chief executive officer of Google Inc. Ex. A at 2. The Vice Chairman of the Commission is Robert O. Work; Mr. Work is the former Deputy Secretary of Defense. *Id*. The

thirteen other members of the Commission include representatives of Google, Microsoft, Amazon, and Oracle. *Id.*

II. The Secrecy of the AI Commission's Proceedings

Since March 2019, the AI Commission has held more than twenty plenary and working group meetings and has received more than 200 briefings. Ex. I. None of these meetings have been noticed in the Federal Register or open to the public, nor has the Commission published any agendas in advance.

On March 11, 2019, the AI Commission held its first plenary meeting in Washington, DC. Ex. A at 1. The Commission did not publish a notice in the Federal Register or otherwise provide the public with an opportunity to participate in the meeting. Compl. ¶ 63; Answer ¶ 63 (admitting to the second sentence in ¶ 63 of EPIC's Complaint). Only after the fact—in a March 12, 2019 press release—did the Commission publicly acknowledge that the March 11 meeting had occurred. Ex. A.

On May 20, 2019, the AI Commission held its second plenary meeting in Cupertino, California. Ex. B at 2. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Compl. ¶ 67; Answer ¶ 67 (admitting to the second sentence in ¶ 67 of EPIC's Complaint). Only nine days after the fact—in a May 29, 2019 press release—did the Commission publicly acknowledge that the May 20 meeting had occurred. Ex. B at 2.

On July 11, 2019, the AI Commission held its third plenary meeting in Cupertino, California. Ex. C at 2. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Compl. ¶ 69; Answer ¶ 69 (admitting to the second sentence in ¶ 69 of EPIC's Complaint). Only after the fact—in a July 12, 2019 press release—did the Commission publicly acknowledge that the July 11 meeting had occurred. Ex. C.

On July 31, 2019, the AI Commission submitted its Initial Report to Congress—more than five months after the February 9 statutory deadline. Ex. D. The four-page document summarized the "[i]nitial [a]ctivities" of the Commission; broadly described the relationship of the Commission to industry, academia, and other federal AI efforts; and included two bullet points on the Commission's "[n]ext [s]teps." *Id.* at 1–4.

On October 24, 2019, the AI Commission held its fourth plenary meeting. Ex. H at 2. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Ex. K (Fed. Reg. listing zero notices for meetings of the "National Security Commission on Artificial Intelligence"). Only after the fact—in a press release published later that day—did the Commission publicly acknowledge that the October 24 meeting had occurred. Ex. H at 2. The Commission has not made the agenda or minutes of the meeting available to the public. Ex. L (listing no information for the October 24, 2019 plenary meeting).

The AI Commission published its Interim Report on November 4, 2019. Ex. I at 1. The Commission hosted a November 5, 2019 conference "in conjunction with the submission of NSCAI's interim report to Congress"—the Commission's first and only public event at the time. Ex. G.

On January 15, 2020, the AI Commission held its fifth plenary meeting in Cupertino, California. Ex. J. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Ex. K. Only after the fact—in a January 16, 2020 press release—did the Commission publicly acknowledge that the January 15 meeting had occurred. Ex. J. The Commission has not made the agenda or minutes of the meeting available to the public. Ex. L (listing no information for the January 15, 2020 plenary meeting).

III. EPIC's FOIA-FACA Request to the AI Commission

On September 11, 2019, EPIC submitted a combined FOIA-FACA Request via email to the AI Commission ("EPIC's FOIA-FACA Request"). Ex. E. Pursuant to the FACA, EPIC requested:

> (1) Copies of all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the National Security Commission on Artificial Intelligence and/or any subcomponent thereof;
>
> (2) Contemporaneous access to, and advance Federal Register notice of, all meetings of the National Security Commission on Artificial Intelligence and any subcomponent thereof, including but not limited to the Commission's September 2019 and November 2019 plenary meetings.

Id. at 11. The AI Commission acknowledged receipt of EPIC's FOIA-FACA Request by email dated September 12, 2019. Ex. F.

IV. EPIC's FOIA-FACA Lawsuit

On September 27, 2019, EPIC filed the instant lawsuit against the AI Commission, AI Commission Chairman Eric Schmidt, AI Commission Executive Director Ylli Bajraktari, and the Department of Defense ("DOD"). As relevant to this briefing, EPIC stated five claims for relief.

First, EPIC charged that the AI Commission, Chairman Schmidt, and Executive Director Bajraktari had unlawfully failed to notice and open the AI Commission's meetings to the public in violation of FACA § 10(a)(1) and FACA § 10(a)(2). Compl. ¶¶ 112–18 (Count I). EPIC sought mandamus relief pursuant to the Mandamus Act, 28 U.S.C. § 1361. Compl. ¶ 118.

Second, EPIC charged that the AI Commission had unlawfully failed to notice and open the AI Commission's meetings to the public in violation of FACA § 10(a)(1), FACA § 10(a)(2), and the APA, 5 U.S.C. § 706(1). Compl. ¶¶ 119–25 (Count II).

Third, EPIC charged that the AI Commission had unlawfully held multiple non-noticed, nonpublic meetings in violation of FACA § 10(a)(1), FACA § 10(a)(2), and the APA, 5 U.S.C. § 706(2). Compl. ¶¶ 126–33 (Count III).

Fourth, EPIC charged that the AI Commission, Chairman Schmidt, and Executive Director Bajraktari had unlawfully failed to make "available for public inspection and copying" numerous "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Commission in violation of FACA § 10(b). Compl. ¶ 135; *see also* Compl. ¶¶ 134–139 (Count IV). EPIC sought mandamus relief pursuant to the Mandamus Act, 28 U.S.C. § 1361. Compl. ¶ 139.

Finally, EPIC charged that the Commission had unlawfully failed to make "available for public inspection and copying" numerous "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Commission in violation of FACA § 10(b) and the APA, 5 U.S.C. § 706(1). Compl. ¶ 141; *see also* Compl. ¶¶ 140–145 (Count V).

EPIC also stated claims for relief against the AI Commission and the DOD under the FOIA, 5 U.S.C. § 552. Compl. ¶¶ 146–63 (Counts VI–VIII). On the same day that EPIC filed suit—September 27, 2019—EPIC filed a Motion for a Preliminary Injunction, ECF No. 4, seeking expedited processing of its requests pursuant to the FOIA.

On October 16, 2019, the Court denied EPIC's Motion for a Preliminary Injunction but ordered the parties to brief a "Partial Motion to Dismiss on the question whether the National Security Commission on Artificial Intelligence is an "agency" subject to FOIA[.]" Order, ECF No. 18.

Following briefing, the Court denied Defendants' Motion to Dismiss FOIA Claims, ECF No. 23, ruling that the AI Commission was an "agency" subject to the FOIA that EPIC's expedited processing claims should be allowed to continue forward. Mem. Op. & Order 5, 20. The Court wrote: "In sum, an 'agency' subject to FOIA includes 'any . . . establishment in the executive branch.' Congress chose to call the Commission an 'establishment in the executive branch.' The Government has not convinced the Court that it should ignore what Congress said." *Id.* at 19 (internal citations omitted).

On December 20, 2019, the Court ordered the Government to respond to the remainder of EPIC's Complaint by January 31, 2020. Minute Order (Dec. 20, 2019). On January 31, the Government moved to dismiss EPIC's FACA claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Mot. to Dismiss FACA Claims, ECF No. 28.

STANDARD OF REVIEW

I. Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Bowser v. Smith*, 314 F. Supp. 3d 30, 33 (D.D.C. 2018) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012)). The Federal Rules of Civil Procedure "do not require 'detailed factual allegations' for a claim to survive a motion to dismiss," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Though plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," it is not a "probability requirement." *Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint should be allowed to proceed 'even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

II. Fed. R. Civ. P. 12(b)(1)

Where a "claim arises under the laws of the United States," the Court's jurisdiction is established—and a motion under Fed. R. Civ. P. 12(b)(1) defeated—"[u]nless the alleged claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or [is] wholly insubstantial and frivolous." *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995). "To survive a Rule 12(b)(1) motion, a plaintiff must establish that the Court has jurisdiction by a preponderance of the evidence." *Lovelien v. United States*, No. 1:19-CV-00906 (TNM), 2019 WL 6117618, at *2 (D.D.C. Nov. 18, 2019) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "When ruling on such a motion, the Court must 'assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Id.* (quoting *Am. Nat'l Ins. Co. v. FDIC,* 642 F.3d 1137, 1139 (D.C. Cir. 2011)).

III. Fed. R. Civ. P. 56(a)

"To prevail on a motion for summary judgment, one must show that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Brett v. Brennan*, 404 F. Supp. 3d 52, 58 (D.D.C. 2019) (quoting Fed. R. Civ. P. 56(a)). "A factual

dispute is material if it could alter the outcome of the suit under the substantive governing law, and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b).

ARGUMENT

The Government's motion to dismiss should be denied, and summary judgment should be granted in EPIC's favor with respect to EPIC's FACA claims. First, the AI Commission is an advisory committee subject to the FACA. This follows from the plain text of the McCain Act, which establishes a "Commission" to "review advances in artificial intelligence" and issue recommendations to the President and Congress. McCain Act §§ 1051(a)(1), (c)(1). The "permanent part-time" exemption cited by the Government does not apply to the Commission, whose members are employed on a temporary, intermittent basis. FACA § 3(2). Nor does the FACA prohibit the AI Commission from being *both* an agency *and* an advisory committee. Accordingly, the Government's arguments for dismissal of EPIC's claims under the FACA, the APA, and the Mandamus Act fail in their entirety. The Court should deny the Government's motion and grant EPIC's motion for partial summary judgment.

I. THE AI COMMISSION IS AN ADVISORY COMMITTEE SUBJECT TO THE FACA.

A. The plain text of the FACA and the McCain Act dictates that the AI Commission is an advisory committee.

The AI Commission is subject to the FACA because it was established by statute to obtain advice and recommendations for the President and Congress. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner v. Dep't of Navy*, 562 U.S.

562, 569 (2011). The Court must therefore "start[] with [the] text" of the relevant statutes: the FACA and the McCain Act. *Id.*

The FACA "govern[s] the creation and operation of advisory committees in the executive branch of the Federal Government[.]" FACA pmbl. The FACA defines an advisory committee as "any . . . commission" that is "established by statute . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government[.]" FACA § 3(2). This definition indisputably covers the AI Commission. Congress "established" the AI "Commission" by statute, McCain Act § 1051(a)(1); instructed the AI Commission "to review advances in artificial intelligence, related machine learning developments, and associated technologies," *id.*; and required the AI Commission to "submit to the President and Congress" reports "on the findings of the Commission and such recommendations that the Commission may have for action by the executive branch and Congress," McCain Act § 1051(c)(1). Accordingly, the AI Commission is an advisory committee subject to the FACA.

The Government resists this conclusion, arguing that the AI Commission is exempt from "advisory committee" status because it is allegedly composed of "permanent part-time[] officers or employees of the Federal Government[.]" Defs.' Mem. 14 (quoting FACA § 3(2)). But the Government's contention rests on a false premise: in fact, the members of the Commission are neither "permanent" nor "part-time."

First, the members of the AI Commission are temporary, not permanent, employees. Although Congress designated the Commission members as "federal employees," Congress also defined their employer—the Commission—as a "*temporary* organization" under 5 U.S.C. § 3161. McCain Act §§ 1051(a)(2), (7) (emphasis added). Logically, an employee "appointed for

the life of" a "temporary organization," *id.* §§ 1051(a)(2), (6), is not a "*permanent*" employee of the federal government. FACA § 3(2) (emphasis added); *see also Employment*, Black's Law Dictionary (11th ed. 2019) (defining "permanent employment" as "[w]ork that, under a contract, is to continue *indefinitely* until either party wishes to terminate it for some legitimate reason" (emphasis added)). By law, Chairman Schmidt and the other members of the AI Commission will cease to be federal employees when the Commission's temporary mandate expires on October 1, 2021. *See* McCain Act § 1051(a)(6); 2020 NDAA § 1735(a). Because the Commission members are not "permanent . . . employees," FACA § 3(2), the Commission is not exempt from the FACA.

The Government hurries past the text of the McCain Act and the FACA, arguing instead that the members of the AI Commission hold "permanent position[s]" within the meaning of 5 C.F.R. § 531.403. Defs.' Mem. 14–15. As an initial matter, the "ordinary meaning" of "the language employed by Congress" in the McCain Act and the FACA readily establishes that the Commission members are temporary employees—and that the Commission is therefore an advisory committee. *Milner*, 562 U.S. at 569. But even if the two statutes were ambiguous, section 531.403 would still have no bearing here. The definitions in section 531.403 apply only "[i]n this subpart"—that is, part 531, subpart D the Civil Service regulations, which implements a series of pay-grade statutes irrelevant to this case. The regulation has nothing to say about the meaning of the McCain Act or the FACA. And even if it did, section 531.403 only defines the phrase "permanent *position*" (emphasis added), not "permanent . . . employee[,]" the key phrase from the FACA. FACA § 3(2). The two terms are distinct, as demonstrated elsewhere in subpart D. *See* 5 C.F.R. § 531.402(a) (noting that some "employees" may "[o]ccupy permanent positions"). Finally, even if section 531.403 somehow dictated the employment status of the

Commission members for FACA purposes, the definition of "permanent position" specifically excludes "an employee whose appointment is . . . designated as temporary by law[.]" That exclusion applies to the members of the Commission, who are designated by law as "federal employees" "appointed for the life of" a "temporary organization." McCain Act §§ 1051(a)(2), (6), (7). Thus, even if section 531.403 did apply, the Commission would still be an advisory committee composed of temporary employees.

Second, because of their limited and irregular work schedule, the members of the AI Commission do not rise to the level of "part-time" federal employees. FACA § 3(2). Instead, the Commission employs its members on an "intermittent" basis pursuant to 5 C.F.R. § 340.403—a designation that is mutually exclusive with "part-time" status. Compl. ¶ 43 (quoting 5 C.F.R. § 340.403); Answer, ECF No. 29, ¶¶ 40–43 (failing to deny, and thereby admitting, the allegations in ¶ 43 of EPIC's Complaint). As stated in 5 C.F.R. § 340.403: "An intermittent work schedule is appropriate only when the nature of the work is sporadic and unpredictable so that a tour of duty cannot be regularly scheduled in advance." 5 C.F.R. § 340.403. The same regulation then goes on to distinguish between "intermittent" and "part-time or full-time" employment: "When an agency is able to schedule work in advance on a regular basis, it has an obligation to document the change in work schedule *from intermittent to part-time or full-time* to ensure proper service credit." *Id.* § 340.403(a) (emphasis added). Because Commission members are intermittent—not part-time—employees, the Commission is not exempt from the FACA.

Courts have previously rejected similar attempts by the Government to avoid FACA obligations based on a dubious reading of the "full-time[] or permanent part-time" exception. FACA § 3(2). For example, in *Association of American Physicians & Surgeons, Inc. ("AAPS") v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), the Government argued that several presidential

working groups on health care reform qualified for the exception, even though those working groups included 40 "special government employees" who "ha[d] been employed . . . for less than 130 days in a year, some without compensation." *Id.* at 914. Despite the limited work schedule of these 40 individuals, the Government argued that they qualified as "full-time" employees within the meaning of section 3(2). The D.C. Circuit was not persuaded. Explaining that "[w]e must construe FACA in light of its purpose to regulate the growth and operation of advisory committees," the court warned that "FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive the section 3(2) exemption as a body composed of full-time government employees." *Id.* at 915. The same holds here: the FACA would be "rather easy to avoid" if the AI Commission could "receive the section 3(2) exemption" simply by employing outside experts on a temporary, intermittent basis. *AAPS*, 997 F.2d at 915. The Court should not allow the exception to swallow the rule in section 3(2).

Finally, had Congress meant to exempt the AI Commission from the FACA, it could easily have done so on at least two occasions—but it did not. *Cf.* Mem. Op. & Order 7 ("[T]he Congress that created the AI Commission knew how to excuse it from FOIA, but did not do so."). First, Congress could have included a FACA exemption in the McCain Act, as it chose to do for the Cyberspace Solarium Commission. *See* McCain Act § 1652(m)(1) ("The provisions of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the activities of the [Cyberspace Solarium] Commission under this section."). Congress declined to do so. *See* McCain Act § 1051. Second, Congress could have added a FACA exemption to the 2020 NDAA when it extended the life of the AI Commission. *See* 2020 NDAA § 1735(a). When the 2020 NDAA was enacted in December 2019, EPIC's FACA claims against the Commission had been

pending before this Court for almost three months. And, as the Government notes, Congress was acutely aware of the legal disputes concerning the status of the Commission when it drafted the 2020 NDAA. *See* Defs.' Mem. 3 (quoting H.R. Conf. Rep. 116-333, at 1473). Despite the Commission's contested legal status, Congress declined—for a second time—to exempt the Commission from the FACA. The text of the FACA, the McCain Act, and Congress's subsequent actions are conclusive: the AI Commission is an advisory committee.

B. The AI Commission is both an agency and an advisory committee.

Undeterred by plain statutory language, the Government insists that the AI Commission cannot be both an "advisory committee" under the FACA and an "agency" under the FOIA and APA. Defs.' Mem. 7–11. But the Government cites no statutory support for this position, relying instead on a tenuous line of district court cases and unpersuasive policy arguments. The Court should reject these arguments and hold, consistent with the text of the FACA, that the AI Commission is an advisory committee.

First, some history is in order. The misconception that "agency" status and "advisory committee" status are mutually exclusive traces back to a district court ruling in *Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973). In *Gates*, the plaintiffs sought a preliminary injunction "requiring Defendant officials of the Department of Defense to open to the public a meeting of the Defense Advisory Committee on Women in the Services[.]" *Id.* at 797–98. The Government opposed the motion, arguing that the "internal views and proposals" to be discussed at the meeting were "inter-agency or intra-agency" matters exempt from disclosure under 5 U.S.C. § 552(b)(5) and FACA § 10(d). *Gates*, 366 F. Supp. at 798. The court disagreed, holding that the Committee was not was "not an 'agency'" in the first place, and thus could not assert an "inter-*agency* or intra-*agency*" exemption to conceal its internal deliberations. *Id.* at 799 (emphases added). The court based its "agency" analysis on the "substantial independent

authority" test of *Soucie v. David*, 448 F.2d 1067 (1971), concluding—on the particular facts of the case—that the Defense Advisory Committee on Women in the Services was "advisory only[.]" *Id.* at 799. Thus, the Committee did not qualify as an agency.

In the half-century since *Gates* was decided, however, several district courts have keyed in on a different passage of the opinion: "It is significant that the Federal Advisory Committee Act contains a separate and distinct definition of an 'advisory committee,' thus supporting the proposition that an advisory committee is not an 'agency.'" *Gates*, 366 F. Supp. at 799. The court in *Gates* did not elaborate further on this observation, nor did the court explain why the plain-text definitions of "agency" under 5 U.S.C. § 551(1) and "advisory committee" under FACA § 3(2) were (supposedly) in conflict. The *Gates* court's cursory analysis of this point—written in the expedited context of a preliminary injunction proceeding—was limited to a single, inconclusive sentence.

Nevertheless, the line was soon borrowed by another court. In *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.D.C. 1975), the district court rejected another assertion of the (b)(5) exemption by an advisory committee. The court quoted the above sentence from *Gates*, recasting it as a general rule that "an advisory committee cannot have a 'double identity' as an agency[.]" *Wolfe*, 403 F. Supp. at 241. The court also opined that the FACA "specifically excludes 'any committee which is composed wholly of fulltime officers or employees of the Federal Government,' thus providing further evidence that 'agency' and 'advisory committee' were not meant by Congress to be congruent concepts." *Id.* (citing FACA § 3(2)). But just like the court in *Gates*, the court in *Wolfe* did not identify an actual conflict between the statutory definitions of "agency" and "advisory committee." Nor did the court account for the possibility that an agency—like the AI

Commission—could have as its sole mission the administration of a committee of *non*-full-time employees, which meets the statutory definition of an advisory committee.

Three decades later, several district courts resurrected the rule that *Wolfe* extracted from *Gates*—first in *Heartwood, Inc. v. United States Forest Service*, 431 F. Supp. 2d 28 (D.D.C. 2006), and then in *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28 (D.D.C. 2011). In both cases, the court simply quoted from *Gates* and *Wolfe* without identifying a textual basis for the alleged prohibition on dual agency-advisory committee status. *See Heartwood*, 431 F. Supp. 2d at 36; *Freedom Watch*, 807 F. Supp. 2d at 33. Most recently, the district court in *EPIC v. Drone Advisory Committee*, 369 F. Supp. 3d 27 (D.D.C. 2019), relied on *Heartwood* and *Freedom Watch* to hold that the Drone Advisory Committee was "not capable of 'agency action' under the APA." *Id.* at 41. Once again, the court made no attempt to ground this asserted rule in the text of the FACA or the APA.

Thus, when the Government argues that the AI Commission cannot be both an "agency" and an "advisory committee," it does so based on a handful of opinions that are (1) nonbinding; (2) unmoored from the key definitions in the FACA, the FOIA, and the APA; and (3) predicated on a single sentence from a preliminary injunction ruling issued 47 years ago. Given this, the Court should reject the Government's emphasis on the *Gates* line of cases and rely instead on the plain language that Congress enacted. And indeed, textual analysis of the FACA, the FOIA, and the APA reveals no conflict between the definitions of "agency" and "advisory committee." An entity can, on the one hand, operate a "commission . . . established by statute . . . in the interest of obtaining advice or recommendations" for President and other federal officers, FACA § 3(2), while on the other hand constituting an "establishment in the executive branch," 5 U.S.C. § 552(f)(1), and an "authority of the Government," 5 U.S.C. § 551(1). In defining the terms

"agency" and "advisory committee," Congress evinced no intention to make these designations incompatible. Thus when this Court ruled—correctly—that the AI Commission is an "agency," that did not preclude EPIC's claim that the Commission is an advisory committee subject to the FACA. Mem. Op. & Order 5.

The Government complains, however, that the FOIA and the FACA impose "differen[t]" and "independent" transparency requirements on the AI Commission. Defs.' Mem. 7–8. True enough: as is often the case for federal entities, the AI Commission must comply with two (or three, or more) statutory obligations at the same time. *See also* McCain Act § 1051(c)(3) (dictating that the AI Commission's reports "shall be made publically [sic] available"). But contra the Government, the disclosure obligations of the FOIA and the FACA are not "mutually exclusive." Defs.' Mem. 7. Each of the Government's arguments to this effect fails.

First, the Government misleadingly quotes from *Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125 (D.C. Cir. 2005), to suggest that advisory committee records under the FACA cannot be agency records under the FOIA. Defs.' Mem. 8. That is not at all what *Judicial Watch* says. The D.C. Circuit simply held that records "created or obtained [by DOE employees] while on detail" to a particular advisory committee—the National Energy Policy Development Group—were "not 'agency records' within the meaning of the FOIA" because "*the NEPDG is not itself an 'agency' subject to the FOIA*[.]" *Judicial Watch*, 412 F.3d at 129, 132 (emphasis added). Of course, that is not the scenario here: this Court has already ruled that the AI Commission is an agency, meaning its records are subject to the FOIA *in addition to* the FACA. The court in *Judicial Watch* certainly did not establish a universal division between advisory committee records and agency records.

The Government also argues that the FOIA is broader in scope than the FACA, the latter of which—in the Government's estimation—does not require disclosure of "staff work" or "documents not directly considered by the committee members." Defs.' Mem. 8. This is a curious argument, given the Government's prior concession that the language of FACA § 10(b) covers every single record pertaining to or controlled by the AI Commission. In arguing that EPIC's FOIA Requests—which exactly track the language of FACA § 10(b)—were "overbroad," the Government previously claimed that "[t]here are literally no records relating to, or possessed by, the Commission that would not be covered by these requests." Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. 16, at 11–12; *see also* Ex. E at 11 (requesting "[a]ll records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the AI Commission). Having conceded this point, the Government cannot now argue that the same disclosure language in section 10(b) silently exempts "staff work" or "documents not directly considered by the committee members." Defs.' Mem. 8. Moreover, the supposed "staff work" exception that the Government reads into the FACA's transparency requirements—if the exception exists at all[1]—would extend only to staff *meetings*, not documents. *See EPIC. v. Drone Advisory Comm.*, 369 F. Supp. at 48 (rejecting the Government's argument that an advisory committee could withhold records which are "preparatory or of an administrative nature," as "the broad list of documents

[1] The Government's assertion of a "staff work" exception rests principally on the D.C. Circuit's affirmance of a lower court decision in *Nat'l Anti-Hunger Coal.("NAHC") v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983). However, as the D.C. Circuit has since clarified, the Court of Appeals in *NAHC* "did not explicitly approve the [district] judge's reasoning relating to the supposed staff groups," but rather "rejected an effort to challenge [the district court's] decision based on new information not in the record." *AAPS*, 997 F.2d at 912. Thus, *NAHC* is of little relevance here.

required to be made public by the [FACA], including preparatory documents such as drafts or agendas, suggests that there is no such exception").

In any case, even if the Government's reading of FACA § 10(b) were correct, there is nothing inconsistent about requiring the AI Commission to disclose *additional* records pursuant to the FOIA that are not subject to publication under the FACA. Congress may add to the transparency requirements of a federal entity as it desires; there is no provision or rule that limits disclosure obligations to *just* the FOIA or *just* the FACA for a particular entity. Because the AI Commission satisfies the definition of both an "agency" and an "advisory committee," it must fulfill the transparency requirements of both statutes.

Second, the Government insists that the FACA and the FOIA cannot apply to the same entity because Exemption 5 of the FOIA "appl[ies] differently to agencies and advisory committees[.]" Defs.' Mem. 8. This Court has yet to determine when, if it all, the AI Commission may rely on Exemption 5 to withhold records. *See* Defs.' Mem. Ex. A, ECF No. 28-2, at 1 (asserting FOIA Exemption 5 to withhold a record from EPIC). But Congress is well within its rights to modify the transparency obligations of a particular federal entity through overlapping statutes. As a both an agency and an advisory committee, the AI Commission's disclosure requirements will necessarily differ from entities that are *solely* agencies or *solely* advisory committees. That does not make the FOIA and FACA incompatible with one another, nor does it excuse the Commission from complying with the disclosure mandates of either statute.

Third, the Government protests that the FACA requires "continual supplementation of the documents that must be made available for public inspection," in contrast to the time-limited disclosure obligations of the FOIA. Defs.' Mem. 9. But these are complementary—not "mutually

exclusive"—commands. Defs.' Mem. 7. The AI Commission must *both* disclose records pursuant to FOIA requests *and* publish documents on a rolling basis pursuant to the FACA. Nothing prevents the Commission from carrying out both functions.

Fourth, the Government laments that the FACA requires advisory committees to produce "[d]etailed minutes of each meeting," whereas the FOIA does not require the same of agencies. Defs.' Mem. 9 (quoting FACA § 10(c)). Once again, the Government does not bother to explain how these requirements are in conflict—because they are not.

Finally, the Government goes to great lengths to distinguish this case from prior cases in which an "agency's involvement with an advisory committee [permitted] a plaintiff to assert a valid APA claim against the agency for violations of FACA." Defs.' Mem. 10. EPIC agrees that the AI Commission is different from other entities insofar as the Commission is *both* an agency *and* an advisory committee rolled into one. Thus, EPIC need not bring an APA action against a parent agency to enforce the FACA; it may do so in a suit against the AI Commission itself. But even if the Government's FACA arguments had merit, cases like *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp. 2d 20 (D.D.C. 2002), illustrate an alternative way of understanding the Commission's dual status as an agency and advisory committee. The Court could simply recognize that the AI Commission as a whole (including its Executive Director and support staff) constitutes an "agency," while the appointed Commission members make up a subcomponent of the agency—i.e., the AI Commission "advisory committee." Here, as in *Judicial Watch*, EPIC would be able to enforce the advisory committee's FACA obligations through EPIC's APA claims against the parent agency.

The Court need not rely on this analysis, however, as the Government's "dual identity" arguments fail across the board. Because the AI Commission is both an agency *and* an advisory committee, it must comply with the FACA.

II. EPIC IS ENTITLED TO SUMMARY JUDGMENT ON ITS FACA CLAIMS.

As an advisory committee subject to the FACA, the AI Commission is required to open its meetings to the public, to provide timely notice of its meetings, and to publish records made available to or prepared for or by the Commission. Because the Commission has failed to take these legally required steps, EPIC is entitled to summary judgment on its FACA-APA claims. Alternatively, EPIC is entitled to summary judgment on its FACA-mandamus claims.

A. EPIC is entitled to summary judgment on its FACA-APA claims.

EPIC is entitled to summary judgment on its FACA-APA claims because the AI Commission, as a federal agency and advisory committee, has violated the transparency requirements of the FACA in multiple respects. First, the AI Commission has unlawfully failed to notice and open the AI Commission's meetings in violation of FACA § 10(a)(1), FACA § 10(a)(2), and 5 U.S.C. § 706(1) (Count II). *See, e.g.*, Compl. ¶¶ 63, 67, 69; Answer ¶¶ 63, 67, 69. Second, the AI Commission has unlawfully held multiple non-noticed, nonpublic meetings in violation of FACA § 10(a)(1), FACA § 10(a)(2), and 5 U.S.C. § 706(2) (Count III). *See, e.g.*, Compl. ¶¶ 63, 67, 69; Answer ¶¶ 63, 67, 69. And third, the AI Commission has unlawfully failed to make "available for public inspection and copying" numerous "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Commission in violation of FACA § 10(b) and 5 U.S.C. § 706(1). *See, e.g.*, Ex. K; Ex. L. EPIC sought, and was denied access to, the meetings and records of the AI Commission, and is therefore aggrieved by the Commission's unlawful conduct. Ex. E at 11. As relief, EPIC is entitled to an order directing the AI Commission to open

its meetings to the public, to provide timely notice of its meetings, and to publish records made available to or prepared for or by the Commission.

The Government does not dispute that the AI Commission is an "agency" subject to the APA. Mem. Op. & Order 5. Nor does the Government dispute that—if the AI Commission is subject to the FACA—the Commission has failed to comply with the FACA's transparency requirements. Instead, the Government simply argues that AI Commission is not an "advisory committee." Defs.' Mem. 7. But as established above, the Government is wrong. The AI Commission satisfies the definition of an advisory committee under FACA § 3(2), and nothing prevents the Commission from constituting both an agency and an advisory committee. Thus, EPIC is entitled to summary judgment on its FACA-APA claims, and the Government's motion to dismiss those claims must be denied.

B. In the alternative, EPIC is entitled to summary judgment on its FACA-mandamus claims.

If the Court finds that relief is not available under the APA, EPIC is alternatively entitled to summary judgment on its FACA-mandamus claims (Counts I & IV). EPIC has established a "clear and indisputable" right to access the records and meetings of the AI Commission pursuant to the FACA. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *see also* FACA §§ 10(a)–(b). EPIC has also shown that the AI Commission, Chairman Schmidt, and Executive Director Bajraktari are "violating [their] clear duty" to publish Commission records and open Commission meetings pursuant to FACA § 10. *Burwell*, 812 F.3d at 189; *see also* Compl. ¶¶ 63, 67, 69; Answer ¶¶ 63, 67, 69; Ex. K; Ex. L. Finally, EPIC will have "no adequate alternative remedy" for accessing the records and meetings of the AI Commission if the Court finds that relief is unavailable under the APA. *Burwell*, 812 F.3d at 189. EPIC would therefore be entitled to writs of mandamus directing the AI Commission, Chairman Schmidt, and Executive Director

Bajraktari to open the Commission's meetings to the public, to provide timely notice of the Commission's meetings, and to publish all records made available to or prepared for or by the Commission. *See, e.g.*, *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F. Supp. 3d 96, 109 (D.D.C. 2017); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 35 (D.D.C. 2011).

The Government raises three objections to EPIC's entitlement to mandamus relief. First, the Government makes the perplexing claim that "it is impossible to know what counts Plaintiff intended to pursue under" the Mandamus Act. Defs.' Mem. 11. But EPIC's Complaint is quite clear on this point: EPIC sought mandamus relief under Count I for violations of the FACA's open meeting requirements ("Plaintiff is entitled to a writ of mandamus compelling Defendants AI Commission, Eric Schmidt, and Ylli Bajraktari to timely notice and open the meetings of the Commission to EPIC and the public") and under Count IV for violations of the FACA's records disclosure requirements ("Plaintiff is entitled to a writ of mandamus compelling Defendants AI Commission, Eric Schmidt, and Ylli Bajraktari to make available for copying and inspection the Commission records described by 5 U.S.C. app. 2 § 10(b)."). Compl. ¶¶ 118, 139. EPIC also incorporated the factual allegations of paragraphs 1-111 into both Counts. Compl. ¶¶ 112, 134. Indeed, the Government seems to have had little difficulty recognizing the grounds on which EPIC sought mandamus. *See* Defs.' Mem. 12 ("Insofar as Plaintiff relies on the Mandamus Act to seek to redress the Commission Defendants' alleged violations of FACA . . . ."). The source of the Government's purported confusion is unclear, but in any event, the Court should not reward the Government with a "triumph of technical pleading[.]" *Oncor Elec. Delivery Co. LLC v. Nat'l Labor Relations Bd.*, 887 F.3d 488, 495 (D.C. Cir. 2018) (quoting *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981)).

Second, the Government argues that AI Commission is not an "advisory committee," and thus has no obligations under the FACA. Defs.' Mem. 13–15. Again, that argument is wrong. The AI Commission qualifies as an advisory committee under FACA § 3(2), and nothing in the FACA, the FOIA, or the APA undermines the Commission's dual status as agency and an advisory committee. Thus, EPIC is entitled to summary judgment on its FACA-mandamus claims, and the Government's motion to dismiss those claims must be denied.

Finally, contra the Government, EPIC is not judicially estopped "from advancing its claims that the AI Commission is subject to FACA": EPIC's FACA arguments are perfectly compatible with the Court's prior ruling in this case. Defs.' Mem. 16. The Government's estoppel theory rests on the faulty premise that "an entity cannot be both an agency and an advisory committee." *Id.* As explained above, that assumption is meritless: the same entity may be subject to *both* the FOIA *and* the FACA. Thus, there is nothing "clearly inconsistent"—or indeed, inconsistent at all—about EPIC's arguments concerning the application of the FACA to the AI Commission. Defs.' Mem. 15 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). What the Government decries as "gamesmanship" is simply the enforcement of a second, independent transparency statute that governs the AI Commission. *Id.* at 17. The Court should therefore reject the Government's estoppel arguments and grant the writs of mandamus that EPIC seeks.[2]

[2] The Government devotes significant space to arguing that EPIC lacks a cause of action under the FACA, Defs.' Mem. 6–7, and the Declaratory Judgment Act, 28 U.S.C. § 2201, Defs.' Mem 11–12. However, EPIC does not assert that it has a cause of action under either statute. Rather, EPIC relies on the APA and the Mandamus Act to enforce the FACA's transparency requirements and seeks declaratory relief as a remedy authorized by 28 U.S.C. § 2201(a).

CONCLUSION

For the above reasons, the Court should deny the Government's partial motion to dismiss; grant summary judgment in EPIC's favor with respect to EPIC's FACA claims; and order Defendants to open the AI Commission's meetings to the public, provide timely notice of the Commission's meetings, and publish all records made available to or prepared for or by the Commission.

Respectfully Submitted,

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