

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC PRIVACY)	Civil Action
INFORMATION CENTER,)	19-2906
Plaintiff,)	
vs.)	
)	
NATIONAL SECURITY COMMISSION)	October 16, 2019
ON ARTIFICIAL INTELLIGENCE, et al.)	11:16 a.m.
Defendants.)	
)	Washington, D.C.
)	

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**TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN,
UNITED STATES DISTRICT COURT JUDGE**

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P R O C E E D I N G S

1
2 THE COURT: Good morning, folks.

3 Thank you for your patience.

4 THE DEPUTY: Your Honor, this is Civil
5 Case 19-2906, Electronic Privacy Information Center versus
6 National Security Commission on Artificial Intelligence.

7 Counsel, please come forward to identify
8 yourselves for the record.

9 MR. DAVISSON: Good morning, Your Honor.
10 John Davisson for the plaintiff EPIC.

11 THE COURT: Good morning, Mr. Davisson.

12 MR. FELDON: Good morning, Your Honor.
13 Gary Feldon for the Department of Defense and the National
14 Security Commission on Artificial Intelligence. I am joined
15 at counsel table by Elizabeth Shapiro.

16 THE COURT: Good morning, Mr. Feldon. Good
17 morning, Ms. Shapiro.

18 All right. We're here on plaintiff's motion for
19 an expedited preliminary injunction.

20 I will hear from the plaintiffs. Mr. Davisson.

21 MR. DAVISSON: Your Honor, in less than three
22 weeks, on November 5th, the National Security Commission on
23 Artificial Intelligence will issue a report to Congress and
24 the president setting forth its findings and recommendations
25 on the use of AI in the national security context. That

1 report, the work of an influential and publicly funded
2 commission, has been drafted in near total secrecy.

3 Although the commission has met numerous times --
4 it began its work in March -- it has published no minutes or
5 agendas. It has published no advanced notice of its
6 meetings, and it has disclosed none of the records provided
7 to members of the commission in the course of their work.
8 As a result, EPIC has filed FOIA requests with both the DoD
9 and the AI commission to obtain records about the
10 commission's ongoing activities. Both agencies, however,
11 have unlawfully failed to process EPIC's FOIA requests on an
12 expedited basis.

13 As a result, EPIC and the public have been denied
14 knowledge of who has spoken to the commission, what evidence
15 it's gathered, how the commission has arrived at its
16 findings, which recommendations have been proposed or,
17 perhaps, rejected, and even whether there may be conflicts
18 of interest between the work of the commission and the
19 business interests of individual members.

20 The commission's secrecy has also denied EPIC the
21 right to attend, follow, and participate in the proceedings
22 of the commission. Accordingly, EPIC now asks this Court to
23 issue a preliminary injunction requiring the agency
24 defendants to immediately process EPIC's FOIA requests.
25 EPIC readily satisfies the criteria for this injunction.

1 THE COURT: So can we talk about the irreparable
2 injury.

3 MR. DAVISSON: Yes, Your Honor.

4 THE COURT: Mr. Davisson, what would you be able
5 to do now with this information that you can't currently do?
6 I mean, it seems like there are plenty of ways to influence
7 the commission already.

8 MR. DAVISSON: So, Your Honor, several things.

9 First of all, it's impossible to know what is
10 before the commission, what evidence it is considering, who
11 is speaking to the commission, how it is arriving at its
12 findings. So, at the moment, there is really nothing for
13 EPIC to comment on when it comes to the commission's work.

14 We, of course, are a long-time leader as an
15 organization on the issue of AI policy, but we are unable to
16 determine specifically what the AI commission is
17 considering, what policy proposals it's moving for as it
18 drafts its report which, again, is coming on November 5th.

19 THE COURT: But it's an interim report. Isn't
20 that a great time to then interact with the report and
21 make -- raise your concerns and applaud things that you
22 agree with and push back on things you don't?

23 MR. DAVISSON: So, Your Honor, yes. It is one of
24 two reports -- substantive reports that the commission is
25 expected to produce; one, of course, is November 5th, the

1 other at the determination of the commission.

2 It's a report that will stand on its own for a
3 year. And, during that time, it's likely that Congress and
4 the president will take actions based on the recommendations
5 of the commission.

6 So, for example, Congress is in the process right
7 now of drafting the National Defense Authorization Act for
8 the next fiscal year, and will do so again in 2020 before
9 the final report is issued. And that sort of -- the purpose
10 of forming the commission in the first place was to inform
11 Congress about how to allocate resources and what regulatory
12 decisions to make regarding the use of AI in a national
13 defense context.

14 THE COURT: But, Mr. Davisson, I thought you said
15 in your briefing that your harm was solely based on the work
16 that was being done in the commission, that it had nothing
17 to do with what Congress or the president may do afterwards.

18 MR. DAVISSON: Not solely, Your Honor.

19 I think both provide a basis for irreparable harm
20 in this case. We cannot participate in the activities of
21 the commission, which is a right guaranteed to us by the
22 Federal Advisory Committee Act. We cannot comment on
23 records that we cannot access. We cannot provide input on
24 proposals that we are unable to see before this report is
25 finalized and transmitted by the commission to the president

1 and Congress.

2 THE COURT: So page 14 of your reply: EPIC's harm
3 arises from being denied information about the commission's
4 proceedings, not the actions of subsequent decision-makers.

5 That sounds very different from what you are
6 saying right now.

7 MR. DAVISSON: Well, Your Honor -- sorry, let me
8 find the passage.

9 THE COURT: That's at 14. When I say "14," 14 at
10 the bottom of the page. It's 19 on ECF, if you are --

11 MR. DAVISSON: I'm sorry.

12 Yes. So being denied information about the
13 commission's proceedings makes it impossible for EPIC to
14 provide input -- fully informed input on the recommendations
15 the commission makes to the president and Congress.

16 So it is -- irreparable harm does not require that
17 Congress or the president take some subsequent action, but
18 it does relate to the fact that the commission is providing
19 recommendations to high profile decision-makers; and we are
20 denied the ability to fully assess those because we don't
21 have access to the records detailing how the commission
22 arrived at those recommendations -- again, what evidence it
23 considered or rejected, who it obtained information from.

24 THE COURT: Didn't Judge Ketanji Jackson deny a
25 similar PI from you-all, I think, a few years ago with the

1 FISA reorganization bill where -- it strikes me as being a
2 pretty similar situation where you want information from the
3 executive branch about what they're planning to do because
4 you are concerned about actions that Congress may take based
5 on their recommendations; and she said that looming
6 potential legislation is not sufficient.

7 MR. DAVISSON: Well, Your Honor, a couple of
8 points. First, the relief in that case -- the reason,
9 ultimately, the PI was denied was because the agency had
10 granted expedited processing and the dispute was over the
11 precise timing of that process.

12 So, in this case, there is no grant of expedited
13 processing by either agency. It's not simply a question of
14 whether the agency will be forced to move up its production
15 date; it's a question of whether there will be expedited
16 process at all.

17 THE COURT: Right. But, I mean, as you point out,
18 we're talking about a few weeks from now. I think expedited
19 processing or not, you probably will not get everything you
20 are seeking before November 5th.

21 MR. DAVISSON: That may be true, Your Honor, but
22 we would get, I would imagine, some important records
23 concerning what the commission has been up to for the past
24 six months.

25 THE COURT: Maybe. I mean, you haven't -- the

1 Government, anyway, suggests that you have asked for,
2 literally, every document that would relate to the
3 commission. And if they're trying to go through all that,
4 who knows what you get first. But if it's first-in,
5 first-out, you may be getting documents about how it was set
6 up for the next couple of months that, frankly, I don't see
7 how that would --

8 MR. DAVISSON: Well, we welcome proposals from the
9 commission and the DoD as to how it would prioritize
10 processing to disclose the most pertinent records first.

11 But these are records that, as we point out in the
12 reply, the AI commission was required to disclose on a
13 proactive basis under the Federal Advisory Committee Act.
14 These are records that Congress itself has identified as
15 being crucial to the understanding on the public's part of
16 what is going on in an advisory committee.

17 THE COURT: Do you disagree that you have asked
18 for, essentially, every document that has been created by
19 the commission?

20 MR. DAVISSON: That's the Government's own
21 characterization.

22 THE COURT: Right. Do you disagree with it?

23 MR. DAVISSON: Every record related to the
24 commission? A wide range. I don't know if it's every
25 single document.

1 It's records provided to or made available to or
2 prepared for by the commission and, then, the particular
3 categories of records. There may be records that escape
4 that --

5 THE COURT: But you can't think of any?

6 MR. DAVISSON: I can't identify specific records
7 because, again, we have very little understanding of what
8 records exist in the commission's files.

9 THE COURT: Okay.

10 MR. DAVISSON: If I may address the merits.

11 EPIC is likely to succeed on the merits of these
12 claims. And to get this out of the way up front, the AI
13 commission used an agency subject to FOIA. This is
14 something that Congress has clearly defined in
15 Section 1051 of the --

16 THE COURT: I am with you there. We'll see if the
17 Government can convince me otherwise.

18 MR. DAVISSON: Okay. Thank you.

19 THE COURT: You don't need to spend time on that.

20 MR. DAVISSON: I won't bother you with that for
21 now then.

22 I would just underscore, sort of, for the same
23 reasons that EPIC will suffer irreparable harm as a result
24 of not obtaining the injunction in question, EPIC has
25 demonstrated there is an urgency to inform the public about

1 specific ongoing or imminent government activities; that is,
2 the commission's ongoing proceedings, the commission's
3 issuance of a major report to Congress and the president on
4 November 5th, and the substance, the basis, and the origin
5 of the recommendations that it is about to submit to both
6 decision-makers; and, finally, the public interest, rather,
7 and the balance of equities favor EPIC as well.

8 The AI commission and the DoD have no valid
9 interest in unlawfully withholding expedited processing.
10 EPIC, on the other hand, has powerful equitable interests in
11 obtaining these records and using them to further EPIC's
12 mission of educating the public about AI policy and about
13 specific actions and policies that are being developed by
14 the Federal Government concerning AI and timely
15 disseminating that information to the public.

16 There is little risk that EPIC's injunction -- the
17 requested injunction will materially disadvantage other FOIA
18 requesters because, in the AI commission's case, it rejects
19 the notion even that it is subject to the FOIA, it's
20 unlikely there is any significant number of FOIA requests
21 that are also in the queue. Government counsel can perhaps
22 expand on that, but --

23 THE COURT: But DoD has a lot -- I am sure a
24 number from you-all.

25 You have also asked -- I can ask -- probably the

1 Government has a better sense of this than you do. But, I
2 mean, it sounds like they -- the AI commission doesn't even
3 have a FOIA office. I imagine that anything that you are
4 going to get would be from -- through DoD's apparatus. And
5 they're pretty busy, as I --

6 MR. DAVISSON: I couldn't speak to how exactly the
7 records would be delivered. The statute pretty clearly
8 defines it as an independent establishment, one that is not
9 part of DoD; so I would be surprised if DoD were in charge
10 of processing FOIA requests for the AI commission. But
11 truth be told, I don't know.

12 THE COURT: So why then do you seek out from the
13 DoD then? Why is the DoD a party to this?

14 MR. DAVISSON: So the DoD at the time -- in
15 February, it was not clear how the commission was situated
16 and whether the Government was going to be treated as part
17 of the DoD, what exactly its working relationship was with
18 the existing agency. All we knew at that point was the
19 statutory language and the fact that the DoD had transferred
20 \$10 million from its budget to the commission to fund
21 operations as required by the statute. So we sought records
22 through the DoD because it was the only contact information
23 that was available.

24 The AI commission had no public presence at that
25 point, no website, no regulations. It still has no

1 regulations under FOIA. So that was why, initially, we
2 sought records from the DoD, and why we continue to.

3 THE COURT: And I know you have gotten responses
4 back from the DoD.

5 Have you gotten anything back from the AI
6 commission?

7 MR. DAVISSON: We have had informal
8 communications. But we have received no determination on
9 our expedited processing request, and no determination
10 letter.

11 THE COURT: Okay. But right now you think -- I
12 guess I'm trying to understand why DoD is still part of
13 this, why you brought a PI against DoD.

14 MR. DAVISSON: It appears that there is a
15 significant relationship between the DoD and the AI
16 commission. And DoD would be in possession of records that
17 would clarify -- inform the public about the formation of
18 the commission, the direction of its proceedings. We don't
19 know, obviously, because the DoD has yet to produce any
20 records or to identify records. But based on the close
21 relationship between the two entities, it seems likely that
22 there are relevant records.

23 THE COURT: You mentioned that you have had some
24 communication with the commission. It looked to me like
25 they invited you-all to participate; they wanted to sit down

1 with you. Did that occur?

2 MR. DAVISSON: We did sit down. Yes, Your Honor.

3 THE COURT: Okay. What did that look like?

4 MR. DAVISSON: We had a meeting at their offices.
5 We spoke about the work that the commission is engaged in.
6 We spoke a little bit about the structure of the commission.
7 And, then, we had a follow-up call later that day with the
8 general counsel for the AI commission to discuss the
9 disclosure of records. And we indicated at that time that
10 we were not interested in narrowing the scope of our request
11 because, again, we think these records are all potentially
12 vital to the public's understanding of the commission's
13 work.

14 Until the commission begins the process of
15 actually identifying the records in its possession, EPIC is
16 not in a position to say what would and would not be
17 relevant.

18 THE COURT: Okay. So your conversation was purely
19 about this FOIA request. They didn't ask for your input
20 regarding the commission's work; is that correct?

21 MR. DAVISSON: We discussed the possibility that
22 EPIC would provide input over time -- in the Government's
23 program.

24 THE COURT: Okay. You did.

25 MR. DAVISSON: I'm sorry.

1 There was a meeting earlier in the day, and there
2 was a phone call later on that was about the FOIA request.

3 THE COURT: Okay. So how does that fit into your
4 complaint about irreparable harm?

5 I mean, it sounds to me like the big thing is you
6 are saying: We have got a lot of expertise in this area,
7 here are these secret proceedings that are going on that are
8 going to influence policy and, under FACA, we should be part
9 of that. It sounds like they have reached out to you.

10 MR. DAVISSON: So to be clear, the FACA and the
11 FOIA don't allow an agency to dictate the terms on which the
12 public will be allowed to participate and learn about its
13 proceedings.

14 Both statutes set out quite specific terms that an
15 agency has to abide by, as far as disclosing records that
16 are reasonably described in a FOIA request and, on the FACA
17 side, providing contemporaneous access to records, public
18 access to meetings, an opportunity to be heard about the
19 specific proceedings and issues before an advisory
20 committee.

21 If all we are allowed to do is, sort of, comment
22 generally on AI policy without a target, without any sort of
23 indication of what exactly the AI commission is -- how it's
24 arriving at its opinions and what evidence is before it, and
25 so forth, and it's just a final report that's already sent

1 off to Congress -- the ink is already dry -- it's too late
2 to have any meaningful input.

3 THE COURT: What if it's an interim report?

4 MR. DAVISSON: But it's one of two reports. It's
5 an interim report that -- it's styled as an "interim
6 report," but it is a report that will be the only thing from
7 the commission to Congress and the president for a year. In
8 that time, Congress, as I say, is likely to enact one or
9 possibly two National Defense Authorization Acts; and the
10 president may issue a follow-up executive order or similar
11 guidance concerning AI policy in the defense context. So
12 there are decisions -- this is a fast-moving field that are
13 decisions that are likely to be made by decision-makers on
14 the basis of what the commission puts in a report three
15 weeks from now.

16 And if that is all final -- if EPIC has had no
17 opportunity to weigh in on the specifics of that report
18 until it's already been shipped off, then EPIC has been
19 denied its right under the FACA and the opportunity to learn
20 contemporaneously what the commission is up to.

21 THE COURT: That's not a right you would
22 traditionally have under FOIA, right?

23 I mean, you know as well as I do, FOIA documents
24 are rarely contemporaneous. Maybe there would be a right
25 under FACA.

1 MR. DAVISSON: But the FOIA does provide for
2 expedited processing for cases like this, where there is an
3 urgency to obtain the records that are relevant to an
4 imminent deadline; for example, the November 5th submission
5 of the report.

6 THE COURT: Sure.

7 And you-all probably know -- I know Ms. Shapiro
8 knows -- I mean, expedited -- there are probably expedited
9 requests that are due -- still five years-old, right? I
10 mean, some of these agencies -- given the backlog and the
11 breadth of requests -- expedited or not, it's not all that
12 fast.

13 MR. DAVISSON: Your Honor, that may be true.
14 But we would submit that the inability of the agency to
15 disclose all of the records, if that is the case, by
16 November 5th is not a grounds to allow them to just
17 indefinitely delay processing and put it on the nonexpedited
18 track when, in fact, EPIC has demonstrated its entitlement
19 to expedition.

20 THE COURT: Right. I hear you.

21 I am just saying that expedited in this area is
22 kind of a term of art, for better or worse. And,
23 unfortunately, that doesn't mean that you get documents
24 immediately.

25 MR. DAVISSON: I don't -- I wouldn't concede that

1 we wouldn't get any documents immediately. I think it's
2 entirely possible for the commission to disclose, for
3 example, its meeting agendas, minutes -- you know, some of
4 the meeting materials that have been packaged for the
5 commissioners; that sort of category of records that is
6 directly relevant to what happened in the meetings that were
7 held behind closed doors.

8 Of course, there is a larger universe of records
9 that we have requested and are seeking. But I see no reason
10 why the commission couldn't begin expediting -- an expedited
11 process of reviewing those records and disclosing them as
12 soon as practicable which is, of course, what the statute
13 requires.

14 THE COURT: So, I tell you, I mean, one of the
15 things that I am struggling with here, Mr. Davisson, is I
16 think you are relying a lot, implicitly, on this assertion
17 that the commission is bound by FACA, but the PI is on FOIA.

18 MR. DAVISSON: Correct.

19 THE COURT: The Government hasn't really said much
20 at all about FACA. I want to ask them about this in a
21 moment. But it's -- it feels a little like ships passing in
22 the night here where -- to ask for a PI in a FOIA case is --
23 it's a strong move.

24 I don't know -- FACA, at least according to your
25 briefing, does talk about a lot of rights. And there is, in

1 my mind, much more of a sense of instantaneous right to
2 participate in proceedings, right to attend proceedings,
3 right to view the documents very quickly.

4 You know, I am not sure if there is a question
5 here. I guess part of it is, really, I don't understand why
6 the PI is on FOIA and not FACA. But I am having a hard time
7 figuring out your irreparable harm under FOIA that -- where
8 there is really -- but, behind the scenes, it seems like
9 your FACA claim is doing a lot of the work.

10 MR. DAVISSON: Yes, Your Honor. I can sort of
11 comment on the interrelationship of those two things.

12 Yes. This is a PI based on ethics FOIA claims.

13 We are not currently seeking relief in the nature
14 of FACA. But the Government had argued, in its opposition,
15 that there was no right to participate in the proceedings on
16 the commission and that, therefore, EPIC can demonstrate no
17 irreparable harm. That is why we brought FACA fully into
18 the discussion in this briefing because as long as the
19 Government -- who is planning to contend that there is no
20 right to access its meetings and its records
21 contemporaneously -- it's worth noting that's not the case;
22 the FACA does, in fact, require those things.

23 But it is FOIA that provides a mechanism for
24 expedited processing. And it is -- even though, as we know,
25 the FACA is supposed to avoid the situation where a

1 requester, like EPIC, has to actually file a FOIA request,
2 rather than just accessing a central catalogue of records
3 that the advisory committee has proactively published --
4 because the AI commission had done none of that, we were
5 forced to resort to FOIA and to seek, in this case, the PI
6 given the urgency of obtaining records concerning this
7 report that will be submitted in three weeks.

8 THE COURT: Okay. I think I understand that.

9 In your reply, you say that delay will completely
10 prevent meaningful participation in the commission's
11 proceedings.

12 I tell you, it's hard for me to take that at face
13 value given that if there is going to be an interim report,
14 we all know nothing is going to happen immediately from
15 Congress.

16 MR. DAVISSON: Except, Your Honor, the submission
17 of this report. It's happening immediately; three weeks
18 from today.

19 THE COURT: No. I hear you.

20 That is not the end of the process. That is more
21 of the beginning of this next phase of the process with --
22 on Capitol Hill and in the executive branch; and EPIC is
23 certainly in a position to make its voice heard there.

24 You have had an opportunity to meet with the
25 commission. And there is still a final report, and you can

1 make your comments to the interim -- regarding the interim
2 report.

3 It just -- I have a hard time crediting that
4 assertion that you are completely denied meaningful
5 participation.

6 MR. DAVISSON: I would push back to say that we
7 are denied meaningful participation in the drafting of that
8 November 5th report.

9 Absent disclosure of records immediately, we will
10 have no participation in that process -- despite the urgency
11 of disclosing these records, despite EPIC's rights to
12 expedition under FOIA, despite what the FACA dictates in
13 terms of contemporaneous disclosure of records and
14 participation by the public in those meetings.

15 We simply -- the report will be finalized, the ink
16 will be dry; it will be shipped off to Congress and the
17 president, and that's that. That can't be wound back.

18 THE COURT: So what's the irreparable harm on
19 that?

20 If I am right, that you will still have an
21 opportunity to make your voice heard in the halls of
22 Congress, that you will still have your opportunity to
23 provide feedback to the commission before their final
24 report -- what's the irreparable harm in not having a say in
25 this interim report?

1 MR. DAVISSON: It's -- we identify several
2 irreparable harms. One is the denial of records that are
3 highly relevant to a highly public ongoing matter of
4 national importance.

5 Two is specific to EPIC. Because EPIC is an
6 organization with this long history of being involved in AI
7 policy and educating the public about the direction of
8 federal AI policy, we cannot do that right now with respect
9 to this report that is just about to head out of the door.

10 And, three, we will be denied the right, as I
11 mentioned under the FACA, to participate in the proceedings
12 of the commission and to have that contemporaneous access;
13 that right cannot be vindicated after the fact, after the
14 relevant proceedings have already concluded.

15 Just to be clear, we have already been denied
16 access to three and, possibly, four meetings at the AI
17 commission at this point, and it just continues to --

18 THE COURT: Right. Based on those -- the notes
19 that you provided, it sounds like they were mostly hearing
20 classified -- a lot of classified documents and briefing
21 that you wouldn't be -- ever be entitled to participate in,
22 right?

23 MR. DAVISSON: Your Honor, our understanding is
24 that there are both nonclassified and classified portions of
25 these meetings; that FACA has a procedure for dealing with

1 circumstances like this, for closing meetings when they
2 are -- concern classified material, material that's been
3 properly classified.

4 So it's one thing for the agency to say: We have
5 to close a portion of the meeting to protect classified
6 information; It's another to say: We have to not notice the
7 meetings at all and we have to proceed completely in secret,
8 and we will only tell you after the fact that we met and
9 give you sort of the vaguest outlines of what was actually
10 talked about at the meeting.

11 THE COURT: How does that interface with the FACA
12 rights? That looks to me like a fair amount of what is
13 going on here is classified. Does FACA account for that?

14 MR. DAVISSON: It does, Your Honor.

15 It has a provision that allows -- I'd have to go
16 back and look at the exact parameters of it.

17 But I believe it allows a committee -- when it is
18 considering properly classified material upon, I think, a
19 determination of an agency head, to close portions of a
20 meeting that concern that -- that material; but it doesn't
21 mean that the agency can simply proceed entirely in secret,
22 at least not in the way the AI commission has done.

23 If Your Honor has no further questions...

24 THE COURT: Let me take a look.

25 MR. DAVISSON: Sure.

1 THE COURT: Would you still be harmed if Congress
2 never acted on these recommendations?

3 MR. DAVISSON: Yes, because the right here is for
4 EPIC to participate in -- one of the rights here is for EPIC
5 to participate in the proceedings of the commission.

6 THE COURT: Based on the FACA?

7 MR. DAVISSON: Pardon?

8 THE COURT: Based on FACA?

9 MR. DAVISSON: Based on FACA. But, also, to have
10 access to records concerning this commission's role in
11 federal policy-making concerning AI. So even if Congress
12 didn't issue a statute based explicitly on the
13 recommendations of the commission, then it still represents
14 the conclusions of an expert panel convened and funded by
15 the Federal Government concerning AI in which EPIC has been
16 denied the right to participate and to learn in a timely
17 fashion how it's shaping its recommendations, what evidence
18 is weighed, and so forth.

19 THE COURT: Okay. Thank you, Mr. Davisson.

20 Mr. Feldon.

21 Maybe you can start by addressing this FACA issue.
22 Do you agree that the commission is covered by FACA? And
23 how should I be considering those concerns here in the FOIA
24 PI?

25 MR. FELDON: Well, initially, Your Honor, the

1 interaction between -- there really is no interaction
2 between FOIA and FACA here.

3 Plaintiffs are proceeding for a preliminary
4 injunction under FOIA which is, obviously, an extremely rare
5 circumstance that we don't think the necessary predicate
6 exists for; and that's the sole basis of their claim. They
7 have FACA claims. They could have moved on those FACA
8 claims as part of their preliminary injunction or they
9 could, otherwise, seek relief under FACA.

10 So as an initial matter, for purposes of the
11 preliminary injunction, whether there is merit to their FACA
12 claims or not, it doesn't matter. But more to the point, it
13 is the Government's position -- and we think well supported
14 by the ethical precedent -- that the commission is not
15 subject to FACA.

16 Among other things, per the McCain act -- that is,
17 the National Security Defense Authorization Act [sic] -- all
18 of the commissioners of -- excuse me -- of the commission --
19 this is Section 1051 (a) (1) -- excuse me -- (a) (7) are
20 federal employees and as such -- when an entity is entirely
21 comprised of Government employees it is not subject to FACA.

22 But, Your Honor, we think that claim is best
23 addressed in the ordinary briefing that would occur absent
24 preliminary injunction and isn't really relevant at this
25 point.

1 THE COURT: So, I mean, is this a no-brainer on
2 the FACA? Or is there -- I have not dealt with FACA before.

3 MR. FELDON: Sure, Your Honor.

4 THE COURT: There is not a lot of briefing from
5 you -- and I get why; but I am struggling with this issue.

6 MR. FELDON: Your Honor, I hesitate to call it a
7 "no-brainer." That said, we think the precedent clearly
8 favors us for our FACA claim.

9 THE COURT: So there was this high profile
10 commission on voting integrity that the White House had
11 recently.

12 MR. FELDON: Yes, Your Honor.

13 THE COURT: That was covered by FACA, correct?

14 MR. FELDON: That was found to be covered by FACA,
15 yes.

16 No. Pardon me. I misspoke.

17 THE COURT: I am sure you-all were saying it
18 wasn't, that's why I am wondering.

19 MR. FELDON: It was the Government's position in
20 that case that FACA was not applicable. I was not directly
21 involved with that case, Your Honor. I will admit that I am
22 not as familiar with it as Ms. Shapiro.

23 MS. SHAPIRO: I can answer, Your Honor.

24 THE COURT: Sure. Yes. Ms. Shapiro.

25 If you could approach the bench.

1 MS. SHAPIRO: Sure.

2 That commission was based in the Office of the
3 Vice President, and it voluntarily conducted itself in
4 accordance with FACA, but it was not actually subject to
5 FACA; and that was the position that the Government took all
6 along.

7 THE COURT: Okay. So it's a tough -- it's not a
8 great exemplar.

9 MS. SHAPIRO: Right. Exactly.

10 Yes. It complied and said publicly that it would
11 be complying with FACA; but it was not actually, in our
12 view, subject to FACA.

13 THE COURT: And so were its commission members
14 employees of the Government?

15 MS. SHAPIRO: There were commission members who
16 were special -- special government employees. But it was
17 not the situation where they were full-time federal
18 employees in the same way that we're talking about here.

19 THE COURT: Okay. So the commission members -- I
20 figure, when Mr. Feldon said that the commission members
21 here -- federal government employees who are that same type
22 of special -- I mean, aren't most of these folks working for
23 Google and Facebook and all of those things?

24 MS. SHAPIRO: I believe in this case there is a
25 different setup that's set forth in the statute where

1 they're actually made -- government employees -- I guess
2 there is a subsection (7) here, "status as federal
3 employees." And then it addresses, "notwithstanding the
4 requirements of section 2105 of title 5" -- and then it
5 talks about their employment status. So they're actually
6 full-time employees that are temporary is my understanding.
7 But while they're with the government, they're full-time
8 with the government. They are not a special government
9 employee in the sense that they have some other job and then
10 they're acting part time on the commission.

11 THE COURT: Okay. Thank you, Ms. Shapiro.

12 So, Mr. Feldon, just some more background
13 information here. Is the commission under DoD -- is DoD a
14 proper party here? How does this function?

15 MR. FELDON: Your Honor, DoD was solely the
16 funding mechanic for the commission. That said, there is a
17 memorandum of understanding between the commission and DoD
18 where DoD provides some sort of administrative benefits, HR,
19 that kind of thing. But it's not substantively involved in
20 the commission's work.

21 That said, DoD -- while we think there is a --
22 well, we don't think there is merit to the claims brought by
23 plaintiff against DoD. It is a proper party in that it did
24 deny the motion for expedition and the administrative appeal
25 of that --

1 THE COURT: So would DoD be handling the FOIA
2 requests?

3 MR. FELDON: Your Honor, I do not believe so.

4 At this point, there has not been an established
5 procedure for the commission to undertake FOIA. Again, it's
6 the commission's position that it is not subject to FOIA.

7 Should a Court hold otherwise, the commission
8 would have to determine how it would handle FOIA requests;
9 and I can't speculate as to how it would do that.

10 THE COURT: Okay. So I have to say I thought the
11 plaintiff's argument on that was pretty convincing.

12 What am I missing?

13 MR. FELDON: Well, Your Honor, I think, first off,
14 we think -- and I think you do, too, based on your questions
15 to opposing counsel, is that the crux of this issue is
16 irreparable harm. That said, we understand that the merits
17 of a -- of whether or not the commission is subject to FOIA
18 really deserve more briefing than unfortunately we had time
19 to provide. We would think that that could be addressed
20 more fully and we could explain our position more fully on a
21 normal merits briefing schedule.

22 That said, the plaintiff's sole position, really,
23 is that the *Energy Research Foundation* case controls. That
24 is, the plain language of the FOIA status, definition of an
25 agency is all that the Court should look at.

1 Now, that case does stand for that proposition,
2 although I would note there was a functional analysis
3 conducted by the D.C. Circuit as well. But that case, which
4 is over 30 years-old, has been largely overruled *sub*
5 *silentio* by subsequent D.C. Circuit opinions.

6 The plain definition of agency under FOIA -- and
7 this is section 552(f)(1) -- states that it includes,
8 quote -- I'm sorry, "including the Executive Office of the
9 President," under the definition of agency.

10 Now, there is a long series of D.C. Circuit
11 opinions applying *Soucie*, the functional analysis to
12 entities within the Executive Office of the President. If,
13 as plaintiff contended, the definition in the statute was to
14 be read solely on its face, without any other
15 considerations, then all of those decisions would have been
16 unnecessary, and every decision holding the various entities
17 within the Executive Office of the President were not
18 subject to FOIA would be completely at odds with D.C.
19 Circuit precedent. But given there have been numerous
20 decisions upholding that entities within the Executive
21 Office are not subject to FOIA under the *Soucie* analysis,
22 it's clear that the functional analysis very much plays a
23 role, and that that limited sort of statutory interpretation
24 only analysis provided by the *Energy Research Foundation*
25 case is not applicable at the present.

1 THE COURT: So I think the plaintiff's argument
2 was established within -- it kind of references established
3 within language that set up the commission --

4 MR. FELDON: Yes.

5 THE COURT: -- which I believe is in the FOIA
6 language as well.

7 MR. FELDON: The language is -- I don't know if
8 it's verbatim, but it's very similar to what is in the FOIA
9 statute, yes.

10 THE COURT: I didn't understand them to be making
11 so much of a case law argument as just a statutory --

12 MR. FELDON: Well, Your Honor, the case that they
13 rely on for the statute is as far as you need to go --
14 *Soucie* doesn't apply -- is the *Energy Research Foundation*
15 case; that's the one where the D.C. Circuit upheld that
16 because the statute -- the definition in the statute said
17 "X," then that was the end of the analysis. But that has
18 not been followed since -- rather, the D.C. Circuit and this
19 court have repeatedly looked to the *Soucie* analysis as a
20 functional analysis to determine whether entities that would
21 be covered under the plain language are, in fact, subject to
22 FOIA as agencies.

23 Plaintiff doesn't even argue that under the *Soucie*
24 analysis, that functional analysis, the commission would
25 qualify. It's purely a plain language analysis; and that

1 approach has been abandoned about 30 years ago. So that's
2 our position on the subject.

3 THE COURT: Okay. So in terms of the plaintiffs
4 actually getting documents absent a court order, I would
5 assume that even if you found -- DoD found they were
6 entitled to expedited treatment, I am sure they will join
7 hundreds, if not thousands, of other parties in that queue.
8 But with the AI commission, there are zero people in line
9 because they're not doing any FOIA.

10 MR. FELDON: Yes, sir.

11 THE COURT: And so if I found that they were
12 subject to FOIA, the plaintiffs could go to --

13 MR. FELDON: Well -- sorry, Your Honor. I didn't
14 mean to interrupt.

15 It's actually somewhat ironic that we're here on a
16 preliminary injunction motion about the expedition
17 because -- in some sense, because the commission isn't -- we
18 contend and it contends -- is not subject to FOIA, and there
19 have not been other FOIA requests -- expedition is
20 irrelevant.

21 Expedition just puts you at the front of -- ahead
22 of nonexpedited requests and behind other expedited
23 requests. Here there are no other requests, so the position
24 in line doesn't matter.

25 THE COURT: Right. Right. So if we

1 established -- if we figured out that the commission was
2 subject to FOIA, they could get the documents. But,
3 frankly, I think they're most interested in -- based on what
4 you are describing, I doubt that DoD has a whole lot that's
5 going to be very interesting to them.

6 MR. FELDON: I am -- that would be my assumption
7 as well. I would imagine that most of the documents, if not
8 all of the documents, at DoD would be primarily related to
9 the initial funding and, then, anything under the MOA, where
10 there is the administrative work being done on behalf of the
11 commission. But I know that DoD is currently processing it.

12 I spoke with agency counsel yesterday, and they
13 don't yet know the full scope of what they would be
14 processing.

15 THE COURT: Okay. So as I read the minutes from
16 the commission, it seems like a lot of what they have been
17 doing is classified; is that your impression as well?

18 MR. FELDON: They certainly have been taking in a
19 great deal of classified information, yes.

20 THE COURT: In some ways this -- doesn't this cut
21 against you, though? I mean, how is the plaintiff supposed
22 to be able to narrowly tailor their requests such that they
23 can show irreparable harm when there is so little of what's
24 apparent of what they're doing?

25 MR. FELDON: Yes, Your Honor.

1 Well, I don't think it runs counter to us at all.
2 I think there are actually two things -- one that plaintiffs
3 could have done on their face, and one -- on the face of
4 their request. As plaintiffs note, they, basically, copy
5 and paste the FACA statute in terms of what is being
6 provided. But it's clear that not everything that would
7 be -- that FACA -- something that is subject to FACA would
8 have to provide is actually what they're interested in.
9 What they would be interested in would be things like
10 statements -- I assume, like statements by outside parties
11 to the commission, or something to that effect.

12 It would have been perfectly possible, given --
13 without me having any direct knowledge of the documents, I
14 was able to infer, I think, what they would be interested
15 in. It would be just as easy for them to have submitted
16 FOIA requests saying: We want these 12 things; number 1 is
17 outside input from experts; number 2, minute meetings --
18 minutes from meetings; number 3 is agendas -- and then have
19 a catch-all at the end and say: We want numbers 1 through 3
20 to be expedited. They didn't do that.

21 They have asked for everything on an expedited
22 basis. So while we don't think there is a basis for any of
23 it on an expedited basis, they have certainly asked for far
24 too much to support expedition across the board.

25 And I'd point the Court to the *EPIC v DoD* case,

1 355 F. Supp. 2d 98; and that's from this court in 2004,
2 where the Court emphasized how important it was for the
3 subject of a FOIA request to be individually justified for
4 expedition; whereas, here, they have sort of asked for the
5 kitchen sink.

6 So, yeah, I think that not only is there -- I
7 apologize. I lost the question. I started on two points
8 and I got through one, and lost the rest of it.

9 I believe what you were asking for is whether the
10 classified information was sort of -- took some of the onus
11 off of them to be more narrow; and the answer is, I think,
12 no. I mean, even under -- even an entity subject to FACA --
13 if it's handling classified information, it's not publicly
14 available. So if -- this is not the case; but had the
15 commission only been dealing with classified information,
16 there is no chance it would have been involved. So the less
17 that even under a FACA subject entity would have to give
18 plaintiff, the less irreparable harm they have from not
19 getting it.

20 But I think something that the Court emphasized in
21 questioning opposing counsel is really important, which
22 is -- this is an interim report. There is no impending law
23 or regulation that is triggered by this. And plaintiff has
24 every opportunity to participate in the processes that are
25 available for public participation in drafting laws,

1 regulations, or even lobbying directly to the White House in
2 the event of an Executive Order or something.

3 Whether they can look at documents before the ink
4 is dry is not going to affect what they can do after the ink
5 is dry. And to the extent that the final report has some
6 sort of huge impact that they seem to think that it has on
7 Congress and the White House, all -- they will have access
8 to the interim report in a matter of weeks; and they will
9 have all of the time that is necessary to prepare any sort
10 of public action to review that report, report on it.

11 And in the event -- and we don't think this is the
12 appropriate thing; but in the event that we are ordered to
13 produce documents, they will have documents in due course to
14 do that in the same way that any other FOIA requests, or who
15 wants to participate in public debate, will have the
16 documents in the ordinary course as they wait their turn in
17 line.

18 The defendants really want to emphasize that a
19 preliminary injunction is an extraordinary motion; and this
20 is a very ordinary situation. They submitted FOIA requests;
21 they asked for expedited processing. DoD said: We have
22 accepted your FOIA requests; we're processing your
23 documents. We're denying you expedited processing. And the
24 FOIA statute already provides an accelerated path for
25 challenging that denial.

1 A preliminary injunction is elevating this from an
2 ordinary run-of-the-mill case and trying to make it into
3 something that it's just not; and that's why we think
4 that -- if for no other -- well, there are many other
5 reasons. If for no other reason, this motion should be
6 denied for lack of irreparable harm.

7 THE COURT: Do you agree that the interim report
8 is coming out on November 5th; is that your understanding?

9 MR. FELDON: It is my understanding that it's
10 coming out in early November. I am not aware of the
11 specific date; but I believe that the commission is on track
12 to release on time, yes.

13 THE COURT: Okay.

14 I lost my train of thought. I'm sorry. Let me
15 see if there is anything else I wanted to ask you.

16 What about this point that it's kind of too late
17 to meaningfully participate in the debate once the interim
18 report is out, that that has already had such an imprimatur
19 of the commission and just the way things run around here;
20 that it's going to be too late for them, and now is the best
21 chance for them to have a meaningful input?

22 MR. FELDON: Well, Your Honor, I think that it's
23 very telling that the commission statute, that is, the
24 section of the appropriate -- excuse me -- not
25 appropriations bill -- the McCain act that created the

1 commission doesn't really contemplate at least, at this
2 point, a public involvement.

3 And I can tell you based on -- the commission
4 intends to open -- once it's released, it's in a report --
5 which is primarily an interim report based on information
6 it's gathered within the Government and thoughts exchanged
7 among commission members, to then open it, once it's
8 released -- it will be released to the public
9 simultaneously, with it being delivered to Congress and
10 being delivered to the president, and then to continue to
11 conduct meetings where the public will have an opportunity
12 to provide feedback in advance of its final report.

13 I think Congress and the White House are savvy
14 enough to know the difference between: Here is an interim
15 report and here is the final report; and neither of those
16 entities will be acting immediately or is compelled to act
17 based on either the interim report or the final report.

18 So it takes laws a very long time to be formed.
19 There is a very well-established process for registering
20 reviews lobbying for or against -- in the case of a
21 regulation, to submit comments on the record; and those are
22 the proper means that you should be going through.

23 There is nothing that's magical about the next
24 three weeks that will alter EPIC's ability to participate in
25 the debate about anything that has an actual impact and,

1 honestly, nothing in the next three weeks that will
2 substantively impact the ultimate -- that would have a
3 unique impact on the commission's ultimate report which
4 won't be released until the commission is wrapping up.

5 THE COURT: How should I consider the 2006 *EPIC v*
6 *DoD* case? I mean, that was one that Mr. Davisson points to
7 where one of my colleagues did grant them preliminary
8 injunction; and I believe it was in part -- kind of a
9 similar concern about upcoming legislation?

10 MR. FELDON: Yes, Your Honor.

11 I mean, I think the key cases to look at here are
12 the *Landmark* case, *Long v DHS*, and *Leadership Conference On*
13 *Civil Rights v Gonzales* -- all of which we cite in our
14 brief -- which held that -- in the case of *Landmark*, there
15 was no urgent need for expedition before publishing a
16 proposed rule because, again, there would be opportunity for
17 comment on public record.

18 There was no urgency in the *Long* case when
19 plaintiff just pointed to the possibility of filing an
20 amicus brief in a Supreme Court case when the window was
21 closing on that.

22 And in the *Leadership Conference On Civil Rights*
23 case, this Court said, quote: The request focuses on issues
24 relating to election monitoring processes in the current
25 administration and the recently completed federal election,

1 rather than in future elections; and that's really what we
2 have here.

3 Plaintiff is asking: How did you craft this
4 interim report, and doesn't really have the right to or even
5 the avenue to force the committee somehow to change its
6 report. Again, the statute that creates the commission
7 doesn't contemplate public involvement at this point. So
8 having those documents and being able to publish them to the
9 world or write an op-ed or something doesn't affect the
10 commission's writing of its report, which is only three
11 weeks away. Rather, what they're really concerned about is
12 possible action that actually has impact on legal rights or,
13 at best, the final report, which is still a long way off.

14 So just like the Court denied the motion to
15 expedite or the appeal -- the denial of expedition in that
16 case, where the real concern was about future elections
17 rather than the immediate past election; here, they're
18 really concerned about future actions and not what is about
19 to happen in the next three weeks.

20 THE COURT: Okay. Do you -- the fact that the
21 plaintiffs were able to meet with the commission, does that
22 factor into the irreparable harm analysis in your mind?

23 MR. FELDON: I think it does, although it's not
24 the predominant factor.

25 I think that the fact is plaintiffs have painted

1 the commission as this ominous super-secret entity that is,
2 you know, plotting behind the scenes to rewrite American
3 policy; and it's obvious that is just not the case.

4 Again, they have actively reached out to
5 individuals and organizations in this field. They intend to
6 conduct meetings to solicit feedback on their interim
7 report. And, regardless, none of the -- again, just -- the
8 next three weeks and this PI which -- over something that
9 should be handled in the ordinary course of FOIA litigation,
10 it just doesn't exist in this context. This is not an
11 unusual circumstance; it's just -- they had a request for
12 expedition denied.

13 THE COURT: Okay. Thank you, Mr. Feldon.

14 MR. FELDON: Thank you, Your Honor.

15 THE COURT: Mr. Davisson, I will give you the last
16 word.

17 MR. DAVISSON: Several points, Your Honor.

18 So, first, this report is styled as an "interim
19 report," but it is one of two major reports that the
20 commission will submit. So if, on November 5th, the
21 commission submits to Congress a report that says the
22 Federal Government should collect a full facial scan of
23 every person in the country in the name of national security
24 so that it can conduct, you know, facial recognition
25 scanning on the street and use artificial intelligence to

1 improve national security -- well, EPIC would have a great
2 deal to say about that, and would have a great deal to say
3 about that before the recommendation is transmitted to
4 Congress. But if it's already -- if the ink is already dry,
5 there is nothing EPIC can do to influence that process.
6 That is a right that the FACA entitles EPIC to, to
7 participate, to be heard before an advisory committee, like
8 the commission, takes these steps.

9 Rewinding to the question of whether this is a
10 commission under the FACA -- so that is something that the
11 Government has denied. The exception that they are relying
12 on, this full-time or permanent part-time employee
13 exception, it's exception 2 -- I'm sorry -- section 3,
14 subsection (2) of the FACA. I will just read this briefly.

15 It says -- it defines an advisory committee as a
16 committee or other similar group which is established by
17 statute -- and then it comes to this exception. It says:
18 Except that such term excludes any committee that is
19 composed wholly of full-time or permanent part-time officers
20 or employees of Federal Government.

21 Now, it's our understanding from the commission
22 that the members of the commission are intermittent
23 employees. That term is defined in 5 CFR section 340.403.
24 That regulation says: An intermittent work schedule is
25 appropriate when the nature of the work is sporadic and

1 unpredictable so that a tour of duty cannot be regularly
2 scheduled in advance. So that is what describes the members
3 of the commission. They are not full-time employees, and
4 they are surely not permanent part-time employees. This is
5 a temporary organization.

6 THE COURT: But I understood from the Government
7 that the statute defined them as full-time employees.

8 MR. DAVISSON: Defines them as federal employees,
9 not full-time employees.

10 THE COURT: I see.

11 MR. DAVISSON: They are inserting those words into
12 the statute; they are not there.

13 Our understanding is that in practice they are not
14 full-time employees. I mean, it's kind of absurd to suggest
15 that Eric Schmidt is a full-time employee of the Federal
16 Government or the president of a university or high-ranking
17 officers of tech firms that sit on this commission are
18 full-time federal employees; that just doesn't pass the
19 smell test and, in fact, it's not consistent with the law on
20 this.

21 So the notion that this commission fits into this
22 full-time or permanent part-time employees exception just
23 doesn't hold up.

24 As far as the FOIA agency, we are surprised to
25 hear that the plain text analysis went out the door 30 years

1 ago. It sounds like Your Honor is on the same page here.
2 But just to be clear, Congress sets the terms of when
3 something is an agency subject to the FOIA and Congress sets
4 the terms of when something is an advisory committee subject
5 to the FACA.

6 Here it has defined the commission in a way that
7 clearly relies on the language from that definition 552(f)
8 in the FOIA and section 32 in the FACA in a way that
9 subjects this commission to both statutes.

10 The *Soucie* test that the Government is trying to
11 bring in here is just an irrelevant line of analysis. It is
12 something that the court resorts to when it is not clear
13 based on statutory language whether something is or is not
14 an agency. So if there is an advisory committee established
15 by the executive branch, for example, the Presidential
16 Advisory Commission on Election Integrity, and the question
17 is whether that's an agency; well, it may be appropriate
18 under the circumstances for the Court to conduct a *Soucie*
19 analysis.

20 But if Congress had established that same
21 commission and said: This is an establishment in the
22 executive branch, that is the end of the analysis. That's
23 what *Energy Research Foundation* stands for, and that's what
24 *Dong v Smithsonian*, a more recent case, stands for. Those
25 are separate analyses, whether something is an establishment

1 and whether something satisfies the *Soucie* test. The *Soucie*
2 test does not come into play here. Plain text answers this
3 question.

4 Actually, there is one more piece of icing on the
5 cake here; that the Government, in addition to using all of
6 these -- I'm sorry, the statute, rather -- in addition to
7 using all of these terms in 1051(a) establish with the
8 executive branch, all of this language that is reflected in
9 552(2)(f) in FOIA, it refers to 5 U.S.C. 104 and defines the
10 commission as an independent establishment.

11 Well, if you look to 5 U.S.C. 104 -- I had it in
12 front of me and now I don't. It defines an independent
13 establishment as an establishment in the executive branch of
14 government for purposes of title 5. Title 5 includes the
15 FOIA. It's established in the executive branch. Congress
16 really couldn't have said it much clearer. So it is an
17 agency subject to the FOIA.

18 The Government suggested that it doesn't really
19 matter because it would only be one request in the queue in
20 the AI commission's case whether it's expedited or not; but
21 the statute requires the agency to produce a request as soon
22 as practicable. That's a higher standard -- a more exacting
23 requirement than is available to a particular FOIA
24 requester; so it does, in fact, matter whether the agency is
25 forced to do it as soon as practicable.

1 As far as classified material, again, I would just
2 point Your Honor to the provisions in the FACA and the FOIA
3 that handle -- that allow for the handling of classified
4 materials. So when there is properly classified material
5 that the agency cannot publicly disclose, there are
6 procedures in the book for how that is done, and the AI
7 commission has not observed those.

8 I had one other point. Forgive me.

9 The agency had suggested at one point that EPIC
10 should avail itself of expedited processing, rather than a
11 preliminary injunction, which struck us as a strange
12 argument because the agency -- the AI commission denies it
13 is, in fact, subject to the FOIA and then, I think, has
14 satisfied the standard for expedited processing, and that's
15 why we're here today.

16 So, ultimately, if the agency is subject to the
17 FOIA, it's a question of how quickly, not whether this
18 request will be processed; that's what we're here to seek a
19 preliminary injunction from the Court to establish. And the
20 obligation is on the AI commission as an agency to process
21 the request; and there is no indication that the commission
22 can't do so on as soon as a practicable basis.

23 So we would ask the Court to issue the request for
24 an injunction.

25 THE COURT: Okay. Thank you, Mr. Davisson.

1 Why don't we take about ten minutes.

2 (Recess taken, 12:14 to 12:25 p.m.)

3 THE DEPUTY: All rise. This Honorable Court is
4 again in session.

5 THE COURT: All right. Before me is the
6 plaintiff's motion for preliminary injunction. I have
7 considered the parties' briefs, the relevant law, and the
8 counsels' oral arguments today. For the reasons I will
9 explain, I will deny the plaintiff's motion.

10 A preliminary injunction is an extraordinary
11 remedy never awarded as of right; that's quoting *Winter v*
12 *Natural Resources Defense Council*, 555 U.S. 7, page 24, from
13 2008.

14 The Supreme Court has described it as a drastic
15 remedy that should not be granted unless the movant, by a
16 clear showing, carries the burden of persuasion. That's
17 from *Mazurek versus Armstrong*, 520 U.S. 968, page 972, from
18 1997.

19 A plaintiff seeking this remedy bears the burden
20 of showing four factors. First, he must show that he is
21 likely to succeed on the merits. Second, that he will
22 likely suffer irreparable harm in the absence of preliminary
23 relief. Third, that the balance of equities tips in his
24 favor. And, fourth, that an injunction is in the public
25 interest. Although those last two considerations merge when

1 you are looking at the Government as the defendant.

2 A movant's failure to show any irreparable harm is
3 grounds for refusing to issue a preliminary injunction, even
4 if the other three factors entering the calculus merit such
5 relief. That's from *Chaplaincy of Full Gospel Churches*
6 *versus England*, 454 F.3d 290, page 297, out of the D.C.
7 Circuit from 2006.

8 First, I want to say: For purposes of this motion
9 only, I find that the plaintiffs have met their burden of
10 showing the commission is established within the executive
11 branch and, therefore, is subject to FOIA under 5 U.S.C.
12 Section 552(f) for the reasons plaintiffs state in their
13 reply brief.

14 However, I find the plaintiff has not shown that
15 it will likely suffer irreparable harm absent a preliminary
16 injunction. I express no view on the strength of the
17 plaintiff showing as to the other *Winter* factors.

18 To support a preliminary injunction, a claimant's
19 harm must be both certain and great, as well as actual and
20 not theoretical; that's from *Wisconsin Gas versus FERC*,
21 758 F.2d 669, page 674, out of the D.C. Circuit in 1985.
22 A plaintiff's injury must be of such imminence that there is
23 a clear and present need for equitable relief to prevent
24 irreparable harm. That's from the same case.

25 A key word here is "irreparable." The possibility

1 that corrective relief will be available at a later date, in
2 the ordinary course of litigation, weighs heavily against a
3 claim of irreparable harm, according to the *Wisconsin Gas*
4 case.

5 Plaintiff's primary argument is that it will
6 suffer irreparable harm if the Court does not order
7 expedited processing of the commission's record before the
8 commission finalizes its interim report to Congress a few
9 weeks from now.

10 First, however, I note the two FOIA requests here
11 are very broad, which calls into question the true urgency
12 of this request.

13 The plaintiff requested from the Department of
14 Defense, quote: All records arising from or related to the
15 commission; that's from the plaintiff's motion, Exhibit B,
16 at 1. Plaintiff requested from the commission, quote: All
17 records made available to or prepared for or by the
18 commission. Again, that's from the plaintiff's motion,
19 Exhibit I, at 1.

20 The Court agrees with the Government that these
21 FOIA requests appear to encompass essentially all records in
22 the commission's possession and all records in the DoD's
23 possession about the commission, including trivial records
24 like expense and travel reports. Indeed, at the hearing
25 here, counsel for plaintiffs conceded that he can't think of

1 anything that wouldn't be related to -- that wouldn't be
2 encompassed within this request relating to the commission.

3 EPIC blames the Government for the broadness of
4 its requests, noting the lack of information it has received
5 from the Government to date. I recognize that they're in a
6 difficult position; but, in the preliminary injunction
7 context, the burden is squarely on the plaintiff to show
8 each necessary element, including that such an extraordinary
9 relief is warranted. This broad request does not justify
10 the relief sought.

11 And I think even with the lack of information the
12 plaintiff currently has, it still could have, for purposes
13 of an expedited PI, sought a much narrower subset of
14 documents, for instance, that would not have included
15 anything relating to how the commission was set up or that
16 would not include administrative documents like expense and
17 travel reports. I think there would have been a number of
18 relatively simple ways to cabin the request that might have
19 gone more to irreparable harm, but that's not what they have
20 asked for here. They have asked for everything.

21 Second, the Court has doubts about the extent to
22 which any documents produced would be immediately useful to
23 the plaintiff. The record shows that many of the
24 commission's briefings have been classified. I'm looking to
25 the plaintiff's motion, Exhibit G for that.

1 Most of the useful documents, such as drafts and
2 working papers, may well fall under Exemption 5 of FOIA.
3 I'm looking to 5 U.S.C. Section 552(b)(5), making it less
4 likely that the DoD and the commission would disclose these
5 records by November even if the Court were to issue a
6 preliminary injunction. Other judges of this District have
7 previously cited the potential applicability of FOIA
8 exemptions as a factor that cuts against a finding of
9 irreparable harm. I'm looking to *EPIC versus DOJ*, 15
10 F. Supp. 3d, 32, page 46, from 2014, and *Landmark Legal*
11 *Foundation versus EPA*, 910 F. Supp. 2d, 270, page 278, from
12 2012.

13 Without disclosure of classified material and
14 documents that could fall under Exemption 5, EPIC would
15 likely be left with few, if any, really useful records for
16 the purposes of the immediately upcoming interim report.
17 The Court is not inclined to grant extraordinary relief
18 where FOIA requests are so broad that many of the documents
19 that would be most relevant to the irreparable harm analysis
20 are subject to disclosure.

21 Third, without -- even without access to any of
22 the requested records, the plaintiff has still the means to
23 influence the work and recommendations of the commission.

24 The plaintiff has, in fact, already provided some
25 input to the commission, such as requesting that the

1 commission recommend adoption of the Universal Guidelines
2 for AI across the U.S. Federal Government. I am looking for
3 that to plaintiff's motion, Exhibit A, at 2.

4 The record also shows that, on September 12th, the
5 commission offered to host plaintiff for a meeting to
6 discuss the commission's work. I am looking to the
7 plaintiff's motion, Exhibit J, for that.

8 In argument, defense counsel admitted that they
9 met with the commission and discussed the commission's work.
10 If EPIC believes the commission's work is unduly shrouded in
11 secrecy, it can try to pressure the commission by bringing
12 that secrecy to the public's attention.

13 EPIC has failed to make a clear showing that the
14 lack of access to the commission's records greatly damages
15 its ability to critique the commission's work.

16 Indeed, it seems likely that the upcoming interim
17 report, which will provide the commission's early
18 substantive assessments, will give plaintiff some
19 understanding of the commission's views on AI policy. I am
20 looking for that to the plaintiff's motion, Exhibit H. EPIC
21 will be free to disseminate and critique that report.

22 Finally, the interim report marks an
23 intermediate -- not final -- phase in the commission's work.
24 The commission is obligated by statute to submit a final
25 report, by August of 2020, prior to the commission's

1 termination in October of next year. I am looking for that
2 to the McCain National Defense Authorization Act of fiscal
3 year 2019; Public Law No. 115-232, Section 1051(c)(2)(e);
4 132 Statute 1636, page 1965, from 2018.

5 The commission stated in its initial report that
6 the 2019 interim report will offer early substantive
7 assessments, and that the 2020 final report will lay out the
8 commission's full findings and recommendations. That's from
9 the plaintiff's motion, Exhibit H.

10 EPIC's demand for documents before this interim
11 report therefore seems a little arbitrary. It is not at all
12 clear to me that EPIC will face irreparable harms if it only
13 receives the requested information before the final report,
14 rather than just before the interim one.

15 There is no evidence in the record of any imminent
16 action that the Congress, the president, or any agencies
17 will take in conjunction with this year's interim report.

18 Assuming that there are any useful records the
19 commission can disclose, the Court believes it likely that
20 plaintiff can still timely acquire those records prior to
21 August 2020, even in the absence of preliminary relief, if
22 EPIC narrows its FOIA requests; that would give EPIC and the
23 public a chance to provide input on the commission's initial
24 assessments before it submits its full findings and
25 recommendations to the president and Congress.

1 I also think it unlikely that the president,
2 Congress, or any agency would take immediate action upon
3 submission of the report. Once the commission submits that
4 report, there will still be time for the plaintiff and the
5 public to weigh in on the commission's findings and
6 recommendations before the Government implements any
7 policies.

8 In short, similar to *EPIC versus Department of*
9 *Justice*, 15 F. Supp. 3d, 32, out of this District in 2014,
10 EPIC has not identified a relevant "looming deadline" by
11 which Congress, the president, or any agencies must act. I
12 am looking for that to page 45 and 46 of the EPIC opinion.

13 There, the plaintiff had requested records
14 relating to a program under section 214 of the Patriot Act.
15 Despite a looming deadline for authorization of section 215
16 of the Patriot Act and a quote-unquote ongoing debate about
17 Government surveillance, the Court found no irreparable
18 harm. I am looking to page 45 through 47 of that opinion.

19 In Judge Ketanji Jackson's words: A movant's
20 general interest in being able to engage in an ongoing
21 public debate using information that it has requested under
22 FOIA is not sufficient to establish that irreparable harm
23 will occur unless the movant receives immediate access to
24 that information. That's from pages 46 and 47. I believe
25 the same finding applies here.

1 I also look to the *Landmark Legal Foundation*
2 opinion, page 278, where Judge Royce Lamberth found that the
3 plaintiff may still submit public comments to the proposed
4 rule even after the proposed rule is published. While the
5 Court acknowledged that its comments will not include
6 information it might receive from the FOIA request, Judge
7 Lamberth was not convinced that this would result in
8 irreparable harm.

9 Judge Lamberth went on to say: This is especially
10 true, given that even if the Court were to order production
11 of records, many of these could fall under the exemptions to
12 the FOIA and thus be withheld or redacted. I think, again,
13 similar analysis applies.

14 Thus, contrary to the plaintiff's assertions, the
15 commission's records will not become stale in just one
16 month's time.

17 EPIC urges the Government's failure to disclose
18 the commission's record causes the same sort of irreparable
19 harm that other judges in this District have found
20 sufficient to support a preliminary injunction ordering
21 expedited processing; but I find the cases the plaintiff
22 cites are inapposite.

23 In *Protect Democracy Project versus DoD*,
24 263 F. Supp. 3d, 293, out of this District in 2017, the
25 plaintiff sought documents relating to the president's legal

1 authority to launch military strikes on Syria. The Court
2 concluded that there would be irreparable harm absent
3 expedited processing because the White House had suggested
4 that it might imminently launch another military strike.

5 Indeed, the Court there specifically contrasted
6 the true irreparable harm at issue there with the prospect
7 of administrative rulemaking or legislation which the Court
8 suggested would be unlikely to show irreparable harm. I am
9 looking to pages 300 and 301 for that. Here, there is not
10 even a prospect of imminent rulemaking or legislation.

11 I find that *Aguilera versus FBI*, 941 F. Supp. 144,
12 out of this District in 1996, is also distinguishable.
13 There, the plaintiff, who had been charged with murder,
14 sought records that would assist his defense at an upcoming
15 hearing on whether his confession should be suppressed. The
16 Court there noted simply that it would be difficult, if not
17 impossible, to remedy the harm that results from unwarranted
18 incarceration; and that's pages 151 to 152.

19 Obviously, we're in a very different situation
20 here. I find that those two cases are worlds apart from the
21 claimed irreparable harm facing EPIC here.

22 True, closer is *EPIC versus DOJ*, 416
23 F. Supp. 2d 30, also out of this District in 2006, in which
24 one of my colleagues found irreparable harm because
25 otherwise the plaintiff would not obtain, in a timely

1 fashion, records pertaining to the legality of the
2 administration's warrantless surveillance program. That's
3 from pages 40 and 41.

4 Similarly, in *Washington Post versus DHS*,
5 459 F. Supp. 2d 61, out of this District in 2006, records
6 that could reveal whether special interests had influenced
7 the administration were quote-unquote time sensitive due to
8 an impending congressional election. That's from pages 65
9 and 74 to 75.

10 For the reasons I have already discussed, however,
11 EPIC, here, has not clearly shown that it will be precluded
12 from receiving records in a timely fashion absent
13 preliminary relief.

14 EPIC insists that its FOIA requests encompass
15 records that the commission is already required to disclose
16 under FACA. I am looking for that to the plaintiff's reply,
17 at pages 7 and 8. But even if this is an accurate view of
18 FACA, i.e., that the commission should have already been
19 making the records public; here, the Court must assess
20 whether the plaintiff will suffer irreparable harm if the
21 Court does not immediately order the defendants to process
22 the FOIA requests in an expedited fashion.

23 In other words, I need not determine today whether
24 the commission is governed by FACA or if EPIC has certain
25 rights under FACA that had been violated. After all, FACA

1 is not the basis of this PI motion. The Court merely finds
2 that EPIC has not met its burden of showing irreparable harm
3 from the alleged FOIA violations at issue here.

4 Similarly, I need not definitively resolve today
5 whether EPIC is entitled to expedited processing. Even if
6 EPIC meets the standard for expedited processing, the relief
7 would not be immediate production of records; rather,
8 plaintiff's FOIA requests would simply jump ahead of all of
9 the nonexpedited requests and would be processed along with
10 all of the expedited requests already pending before, at
11 least, the Department of Defense. In the absence of such
12 relief, harm would be neither certain nor great since
13 plaintiff, that is EPIC, would be unlikely to receive many
14 useful records by November; and it already has the means to
15 influence AI policy in any event. Nor is any harm
16 irreparable given that the requested records will retain
17 value beyond this November.

18 Thus, I find that plaintiff has failed to make a
19 clear showing that it will likely suffer irreparable harm in
20 the absence of preliminary relief. For these reasons, the
21 Court will deny the plaintiff's motion, and a separate order
22 will be issued shortly.

23 I would like to chat with you-all a bit, though,
24 about this issue as to whether the commission is subject to
25 FOIA. I think that seems like a purely legal one and

1 probably where you-all are most interested in getting the
2 records; and I would like to try to figure that out pretty
3 expeditiously so that, if it is in fact subject to FOIA, we
4 can get things up and running there.

5 I guess I have in mind some sort of briefing
6 schedule on that issue, and we can allow the other things to
7 continue in due course. But maybe we can at least try to
8 get -- come to grounding on that.

9 Mr. Davisson, does that make sense to you?

10 MR. DAVISSON: Yes, Your Honor. We think it does.
11 Possibly partial motions for summary judgment on that
12 particular issue as soon as the Court finds practicable.

13 THE COURT: Do you have a thought about how we do
14 that? Do we need to do dual motions for summary judgment
15 there or --

16 MR. DAVISSON: Can I confer with counsel?

17 THE COURT: Sure.

18 (Whereupon, the proceeding pauses.)

19 MR. DAVISSON: Your Honor, it's the commission's
20 burden in this case to demonstrate that it's not an agency;
21 it's a legal question. And we think that maybe an expedited
22 motion to dismiss would be the appropriate vehicle more than
23 a summary judgment motion.

24 THE COURT: Okay. Mr. Feldon, what's your view on
25 that?

1 MR. FELDON: Your Honor, the commission is willing
2 to move forward with a motion to dismiss based on the
3 failure to be subject to FOIA. We would ask that we receive
4 a minimum of two weeks to draft the motion in light of how
5 concentrated the briefing has been thus far.

6 THE COURT: Sure. I think that's very
7 appropriate.

8 Okay. So I will ask for -- again, to be clear, I
9 think there are other things out there, including the FACA
10 claim, that we should just proceed in the normal course.
11 But I would like to try to, I think, figure out what to do
12 there. And that seems -- I am sympathetic to the
13 plaintiff's concerns about getting any useful documents. It
14 seems like that will be -- we can figure that out one way or
15 the other on this. So just be looking for a motion to
16 dismiss from the commission.

17 You have asked for two weeks. So we're looking
18 at -- how about Halloween. October 31st?

19 MR. FELDON: Excuse me one second. Let me just
20 check my calendar.

21 THE COURT: Okay.

22 MR. FELDON: Thursday, the 31st, works for
23 defendant, Your Honor.

24 THE COURT: Okay. How long do you need to propose
25 that, Mr. Davisson?

1 MR. DAVISSON: I think one week would be enough
2 for us, Your Honor.

3 THE COURT: Okay. And I will ask for any reply to
4 be by the 14th of November.

5 So any -- I will ask for a partial motion to
6 dismiss -- or, I guess, it would be a motion to dismiss from
7 the commission to be filed on or before October 31st; the
8 opposition to be filed on or before November 7th; and the
9 reply, if any, to be on or before November 14th.

10 Anything else we should discuss today,
11 Mr. Davisson?

12 MR. DAVISSON: One minute, Your Honor.

13 (Whereupon, the proceeding pauses.)

14 MR. DAVISSON: That's all for us, Your Honor.

15 THE COURT: Mr. Feldon?

16 MR. FELDON: Nothing further, Your Honor.

17 THE COURT: Thanks, folks.

18 THE DEPUTY: All rise.

19 (Whereupon, the proceeding concludes, 12:49 p.m.)
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CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 18th day of October, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter