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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Court should reject the Government's arguments for dismissal and enter partial summary judgment in favor of the Electronic Privacy Information Center ("EPIC"). First, the Government's Exemption 5 arguments are contrary to the plain text of the FACA. Second, the Government's Congressional intent arguments directly contradict the best evidence of Congressional intent: the FACA itself. Third, the National Security Commission on Artificial Intelligence ("AI Commission"), comprised of temporary, intermittent employees, does not meet the exemption for a committee of permanent part-time employees. Fourth, Congress has exempted other commissions from the FACA but chose not to exempt the AI Commission from the FACA in both the 2019 and 2020 National Defense Authorization Acts. Finally, the Government's arguments concerning the Mandamus Act and the Declaratory Judgment Act are based on a misreading of EPIC's Complaint.

Because there "is no genuine dispute of material fact" as to EPIC's FACA claims, EPIC "is entitled to judgment as a matter of law." *Manua's, Inc. v. Scalia*, 948 F.3d 401, 406 (D.C. Cir. 2020).

ARGUMENT

I. THE AI COMMISSION IS BOTH AN AGENCY AND AN ADVISORY COMMITTEE.

A. The Court should not, and need not, rewrite the text of the FACA on account of FOIA Exemption 5.

The Government urges the Court to rewrite the definitions of "advisory committee" and "agency" to make the terms mutually exclusive, reasoning that this result is required by Freedom of Information Act ("FOIA") Exemption 5. Defs.' Reply 6. This argument fails for multiple reasons.

First, the plain text of the FACA is not susceptible to such a reading. Section 3(2) of the FACA defines an advisory committee as any "commission . . . 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). The AI Commission meets this definition. Pl.'s Mem. 10, ECF No. 30-1. Section 3(3) of the FACA states that "agency" has the same meaning as in 5 U.S.C. § 551(1), which in turn defines "agency" as "each authority of the Government of the United States[.]" 5 U.S.C. § 551.[1] The AI Commission meets this definition as well. Mem. Op. & Order, ECF No. 26, at 5. Moreover, the "plain text" of the FACA "does not reveal any affirmative language precluding" dual status—language that Congress could have included if it intended the terms "advisory committee" and "agency" to be mutually exclusive. *Stand Up for California! v. Dep't of Interior*, 298 F. Supp. 3d 136, 143 (D.D.C. 2018). But the text of the statute makes clear that Congress did not preclude dual status: an entity such as the AI Commission can be both an "advisory committee" and "agency."

Second, Congress specifically anticipated that an advisory committee could be subject to the disclosure requirements of a federal agency. Section 10(b) of the FACA states: "*Subject to section 552 of Title 5, United States Code,* the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection[.]" FACA § 10(b) (emphasis added). Section 552 of Title 5 sets out provisions for "Public information; *agency* rules, opinions, orders, records, and proceedings." 5 U.S.C. § 552 (emphasis added). Indeed, the entire section concerns the responsibilities of a federal agency. The section begins: "[e]ach *agency*

[1] The definition of "agency" in 5 U.S.C. § 551 is essentially identical to the definition of "agency" in 5 U.S.C. § 701(b), which applies to the judicial review chapter of the APA.

shall make available to the public information as follows: . . . .” 5 U.S.C. 552(a) (emphasis added).

The Government’s reading of the FACA would thus render the words “Subject to section 552 of Title 5” extraneous: no advisory committee could *ever* avail itself of 5 U.S.C. § 552, because no advisory committee could ever be an agency subject to the FOIA. The Government’s construction would violate the canon against surplusage, which “counsels courts ‘to give effect, if possible, to every clause and word of a statute,’ so that, ‘if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *Ibrahim v. Dep’t of State*, 311 F. Supp. 3d 134, 140 (D.D.C. 2018) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). The more sensible, plain-text reading of the statute is that Congress understood an advisory committee could be an agency itself.

Third, FACA § 10(b) and the deliberative process protections of FOIA Exemption 5 are far from “incompatib[le].” Defs.’ Reply 5. To be clear: the Court need not—indeed, cannot—determine at this point how Exemption 5 might apply to the AI Commission’s records because the Commission has not asserted any Exemption 5 claims. “[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.” *Qassim v. Trump*, 927 F.3d 522, 529 (D.C. Cir. 2019) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). In any event, there is nothing “irreconcilable” about the two provisions, Defs.’ Reply 6, just as there is nothing irreconcilable about the FOIA’s requirement to disclose agency records on the one hand, 5 U.S.C. § 552(a)(3)(A), and the statute’s allowance that certain agency records may be withheld on the other, 5 U.S.C. § 552(b). Congress has already done much of the work to reconcile FACA § 10(b) and the FOIA exemptions. *See* FACA § 10(b) (“Subject to section 552 of Title 5”). And if the AI Commission someday asserts the deliberative process privilege to

withhold records otherwise subject to disclosure under the FACA, it will be up to the Court—at that juncture—to decide precisely how Exemption 5 and FACA § 10(b) interact.[2] But the questions raised by this hypothetical scenario certainly do not justify disregarding the plain language of the FACA.

The sources relied on by the Government do not undercut the plain language of the FACA. As explained, *Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973), and its progeny fail to identify any direct conflict between the definitions of "advisory committee" and "agency." Pl.'s Mem. 14–17.[3] Instead, these decisions misread the FACA to conclude—erroneously—that "Congress meant something other than what it literally said" when it defined the phrase "advisory committee." *Texas v. EPA*, 726 F.3d 180, 189 (D.C. Cir. 2013) (quoting *New York v. EPA*, 413 F.3d 3, 41 (D.C. Cir. 2005)). The Court should not accede to the logical errors of these prior decisions, which are not binding on this Court. Nor does *Judicial Watch, Inc. v. Department of Commerce*, 583 F.3d 871 (D.C. Cir. 2009), resolve this case. The fact that the FOIA and the FACA generally treat deliberative records differently, *id.* at 874, does not make the statutes irreconcilable; it simply means that a court must reconcile the two statutes' disclosure provisions if and when that court confronts an assertion of Exemption 5 by a dual FOIA-FACA entity.

Nor should the Court give any weight to the Government's own interpretations of the FACA. *See* Defs.' Reply 4 (quoting 12 Op. O.L.C. 73, 75–76 (1988)). It is hardly surprising that

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[2] Even if the Court were to hold that the AI Commission may assert the deliberative process privilege through FOIA Exemption 5, the privilege only "protects agency documents that are *both* predecisional *and* deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (emphases added). That definition would cover only a subset of the "drafts," "working papers," and other records subject to disclosure under FACA § 10(b).

[3] The Government insists that EPIC "never explains why the court's analysis in [*Gates*] case was wrong." In fact, EPIC did so at length. Pl.'s Mem. 14–17; *see, e.g.*, *id.* at 15 ("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.'").

the Office of Legal Counsel ("OLC") would endorse an interpretation of the FACA that minimizes the disclosure obligations of executive branch advisory committees. After all, a statute that requires "disclosure of certain information held by the government . . . creates tension with the understandable reluctance of government agencies to part with that information[.]" *NRDC v. Def. Nuclear Facilities Safety Bd.*, 969 F.2d 1248, 1250 (D.C. Cir. 1992) (quoting *Reporters Comm. for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987)). And the validity of the OLC guidance cited by the Government has been called into doubt following the D.C. Circuit's decision in *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). *See Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F. Supp. 3d 96, 106–07 (D.D.C. 2017) (faulting the Government for "rely[ing] primarily on pre-*Cummock* interpretations of Section 10(b)," including "1980s Office of Legal Counsel guidance").

Finally, the Government resists EPIC's verbatim quotation of an argument previously made by the Government in this very case. Defs.' Reply 5–6; *see also* Pl.'s Mem. 18 (quoting Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. 16, at 11–12) ("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.'"). Having already conceded the breadth of this language, the Government cannot now argue that the exact same language excludes a vast array of records possessed by the Commission. Indeed, at the status conference held in this case on March 6, 2020, Government counsel indicated that the AI Commission would read the language of FACA § 10(b) and EPIC's FOIA Request as coextensive. *See* Minute Entry (Mar. 6, 2020) (transcript pending). The Court should hold the Government to that representation.

Even if the two statutes require disclosure of distinct sets of records,[4] the Government has not explained why this would warrant an atextual application of the FACA's "advisory committee" definition. FACA § 3(2). Congress established the AI Commission in terms that fit *both* the FACA's definition of an "advisory committee" *and* the FOIA and APA definitions of an "agency." McCain Act § 1051. It is not for the Government or the courts to second-guess that legislative choice simply because the AI Commission's transparency obligations flow from two statutes rather than one. The Government's various policy arguments, Defs.' Reply 6, simply have no bearing on the meaning of "advisory committee" under FACA § 3(2).

B. The text of the FACA proves that Congress intended the statute to apply to agencies like the AI Commission.

The Government makes numerous arguments about Congress's "[l]egislative [i]ntent" that ignore the plain text of the statute. Defs.' Reply 8. The Court should reject the Government's invitation, "like a stranger offering candy to a child," not to read the statute literally. Mem. Op. & Order 7.

First, the Government cites to *Gates* and its OLC opinion to contend that the mere existence of two definitions in the FACA—"agency" and "advisory committee"—makes the terms mutually exclusive. Defs.' Reply 7. This simply does not follow. The text of the two definitions gives no indication that the terms are incompatible. Congress could certainly have included a carveout from FACA § 3(2) for "agenc[ies]," as it did for "any committee that is

[4] Notably, the Government appears torn about whether the FACA is broader in scope that the FOIA, Defs.' Reply 8 (quoting *Judicial Watch*, 583 F.3d at 874) ("The scope of FOIA's document disclosure requirements is in a number of respects narrower than FACA's analogous requirements."); or narrower in scope than the FOIA, *id.* at 5 ("Courts have interpreted FACA to apply to only material used by the advisory committee, not all documents within the possession of the commissioners or commission staff."). The Court need not resolve this question now, however, as the Government has yet to disclose (or withhold as exempt) any records pursuant to the FACA.

composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government[.]" But Congress did not do so. Moreover, there is no reason to assume that a single entity cannot satisfy two adjacent statutory definitions. For example, 5 U.S.C. § 552a(a) provides separate definitions of the terms "individual," *id.* § 552a(a)(1), and "Federal personnel," *id.* § 552a(a)(13), yet no one would seriously suggest that "citizen[s] of the United States" under § 552a(a)(1) cannot also be "officers and employees of the Government of the United States" under § 552a(a)(13). That line of argument is no more convincing when applied to the FACA.

Second, the Government again cites its own OLC guidance to argue that an "advisory committee" cannot also be an "operating arm[] of government." Defs.' Reply 7. The Government does not bother to define the latter term, which appears nowhere in the FACA, the FOIA, or the APA. Nor does it explain why an "operating arm[] of government" could not also be charged with "giv[ing] advice and recommendations"—exactly the type of dual entity that Congress has created in the AI Commission. *See* McCain Act § 1051(c)(1) (requiring the AI Commission to deliver "recommendations" to Congress and the President); Mem. Op. & Order 5 ("The Court concludes that the Commission is indeed an 'agency' subject to FOIA."). And neither *Washington Research Project, Inc. v. Department of Health, Education & Welfare*, 504 F.2d 238 (D.C. Cir. 1974), nor *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), held that the terms "agency" and "advisory committee" were mutually exclusive. Those cases simply stand for the uncontroversial proposition that an entity which is not an "agency" is not subject to the FOIA. But that, of course, is irrelevant since the AI Commission *is* an agency subject to the FOIA.

Third, the Government suggests that the Court should read the phrase "any committee which is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" in FACA § 3(2) as a synonym for the word "agency," and therefore hold

agencies exempt from "advisory committee" status. Defs.' Reply 7–8. This is a remarkable contortion of statutory text. Had Congress meant to exempt agencies from FACA § 3(2), it could have used the far simpler term "agency," a word which appears in the very next provision, FACA § 3(3). Instead, Congress used precise language to describe the particular types of committees that are excused from the FACA. The Court should enforce the statute that Congress actually enacted, notwithstanding the district court's erroneous holding in *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.D.C. 1975).

Finally, the Government protests that "complying with both FACA and FOIA would impose greater burdens on a government entity than is contemplated by either statute alone[.]" Defs.' Reply 8. True, but hardly relevant to the task of statutory interpretation. "[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018). It does not matter whether the Government believes it "wast[eful]" or "impractical" or "absurd" for Congress to require a federal entity to conduct open meetings and regularly publish its records. Defs.' Reply 8. That is for Congress to decide—which it did when it established the AI Commission as an advisory committee. FACA § 3(2); McCain Act § 1051.

C. The Commission members are temporary, intermittent employees, not 'permanent part-time' ones.

Despite the AI Commission's status as a temporary organization whose members are employed on an intermittent basis, the Government attempts to squeeze the Commission into the FACA's exemption for "any committee which is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" in FACA § 3(2). This attempt fails outright.

First, the Government recycles its earlier argument that Congress's use of "permanent . . . employee[]" in the FACA must conform to the definition of a *different* phrase borrowed from a regulation that implements a *different* set of statutes. This argument fares no better the second time around. The regulation in question, 5 C.F.R. § 531.403, was issued by the Office of Personnel Management ("OPM")—not the General Services Administration, the agency charged with issuing "administrative guidelines and management controls applicable to advisory committees." FACA § 7(c). As previously noted, 5 C.F.R. § 531.403 implements a series of pay-grade statutes not relevant to the FACA. *See* 5 U.S.C. § 2301(b)(3); 5 U.S.C. § 5301(a)(2); 5 U.S.C. § 5338. And 5 C.F.R. § 531.403 does not even define the phrase "permanent employee," it defines a different term: "permanent position." Defs. Reply 9–10.[5] As the OPM concedes, "position" and "employee" are not synonymous. *See* 5 C.F.R. § 531.402(a) (noting that some "employees" may "[o]ccupy permanent positions"). Thus, 5 C.F.R. § 531.403 is of little help to the Government. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

As a fallback, the Government presents what it claims is an "ordinary understanding" of the phrase "permanent employee": "a person filling a permanent employment position." Defs.' Reply 10. This definition is circular, and the Government cites no authority for it. A more plausible and useful definition is the one already provided by EPIC. *See Employment,* Black's Law Dictionary

[5] The Government claims there is "some irony" in this point because of EPIC's prior arguments concerning the "agency" status of the AI Commission. Defs.' Reply 10 n.4. But the Government forgets that the Commission is also as an "independent establishment of the Federal Government as defined by section 104 of title 5, United States Code[.]" McCain Act § 1051(a)(2). That provision, in turn, defines an "independent establishment" as an "establishment in the executive branch"—the exact language used in 5 U.S.C. § 552(f)(1).

(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"). Because their employment will end with the scheduled termination of the AI Commission, the Commission members are not permanent employees, and the Commission is not exempt from FACA § 3(2).

The Government also attempts to find support for its atextual definition in common law, Defs.' Reply 11. But even if the Government's suggested common law definition of "permanent employee" applies, the Commission would still not be exempt from FACA § 3(2). Because the employer in this case—the AI Commission—is itself a "temporary organization," McCain Act § 1051(a)(2), the period when the agency will "continue[] to engage in work that requires the employee's job functions, " Defs.' Reply 11, is inherently temporary, which in turn makes its employees temporary as well.

Second, the Government resists EPIC's argument that the members of the Commission are intermittent, not part-time, employees—and thus doubly ineligible for the exemption of FACA § 3(2). Defs.' Reply 12–13 (citing Compl., ECF No. 1, ¶ 43). In response to the specific allegation in EPIC's Complaint, the Government erroneously asserts that the relevant paragraph "consist[ed] of characterizations of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, to which no response is required." Answer, ECF No. 29, ¶¶ 40–43. Although this is incorrect—the intermittent status of the AI Commission's employees is not dictated by the McCain Act, nor did EPIC suggest as much—the Government's response reflects its mistaken view that paragraph 43 of EPIC's Complaint contained no factual allegations. Thus, on the Government's understanding at the time, paragraph 13 of its Answer—which applies only to

"allegation[s]" in EPIC Complaint—was also not a denial of paragraph 43. Answer ¶ 13. The Government therefore admitted to the intermittent status of the AI Commission's members.

In any event, the Commission members' intermittent employment is not a matter of idle speculation: it was confirmed by AI Commission Chief of Staff Michael Gable in a September 24, 2019 meeting between EPIC staff and AI Commission staff. *See* Decl. of John L. Davisson ¶ 8 ("Michael Gable, Chief of Staff of the AI Commission, stated that the members of the Commission were employed in 'excepted service appointments on an intermittent basis.'"); *see also id.* ¶ 10 ("I memorialized Mr. Gable's statement in my contemporaneous notes of the meeting, which I have reviewed in composing this Declaration."). Because there is no genuine dispute as to the intermittent nature of the Commission members' employment, the Commission is covered by FACA § 3(2), and EPIC is entitled to summary judgment on its FACA claims.

D. Congress's repeated decision not to exempt the AI Commission from the FACA is powerful evidence that it meant for the statute to apply.

The Government objects that Congress's failure to explicitly exempt the AI Commission from the FACA—not once, but twice—should carry no "weight" in the Court's analysis. Defs.' Reply 12. But the Court has already foreclosed the Government's theory of statutory construction. As this Court recently ruled:

> Indeed, there is powerful circumstantial evidence that Congress intended to impose FOIA on the Commission. In a different section of the NDAA, Congress created the Cyberspace Solarium Commission. . . . A later subsection then declared that FOIA "shall not apply to the activities, records, and proceedings of the [Cyberspace Solarium] Commission." Id. § 1652(m)(2). So the Congress that created the AI Commission knew how to excuse it from FOIA, but did not do so.

Mem. Op. & Order 7. The same applies here: Congress explicitly excused the Cyberspace Solarium Commission from the FACA as well, McCain Act § 1652(m)(1), yet did not do so for

the AI Commission. Contra the Government, this is "powerful circumstantial evidence that Congress intended to impose [the FACA] on the Commission." Mem. Op. & Order 7.

II. EPIC IS ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF TO REMEDY THE AI COMMISSION'S VIOLATIONS OF THE FACA.

The AI Commission asserts incorrectly that EPIC has "abandoned" claims for relief "directly under FACA" and "under the Declaratory Judgment Act," Defs.' Reply 2, and that EPIC is not entitled to injunctive relief under the Mandamus Act, Defs.' Reply 13–15. This argument is based on a misreading of EPIC's Complaint and a misunderstanding of applicable law. EPIC established in its Complaint that the AI Commission is subject to FACA; that the agency has violated its FACA obligations; and that EPIC is entitled to both injunctive and declaratory relief. Compl. pp. 28–35. There is no need for the Court to issue relief under the Declaratory Judgment Act[6] or the Mandamus Act because the AI Commission is an agency subject to the APA, which authorizes both declaratory and injunctive relief. 5 U.S.C. § 706. The Court should accordingly grant partial summary judgment on Counts II, III, and V of EPIC's Complaint. If the AI Commission were not subject to the APA, then the Court could have issued injunctive relief under the Mandamus Act for the FACA violations laid out in Counts I and IV of EPIC's Complaint. Assuming the Court rules in favor of EPIC on its APA claims, the Court can dismiss these alternative Counts as moot.

CONCLUSION

For the above reasons, the Court should grant summary judgment in EPIC's favor with respect to EPIC's FACA claims and order the Government to open the AI Commission's

[6] As the court in *EPIC v. Drone Advisory Committee*, 369 F. Supp. 3d 27 (D.D.C. 2019), recently explained, the Declaratory Judgment Act can support the "prayer for relief" in a FACA case. *Id.* at 38.

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.

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