

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-1446 (RMU)
	)	
U.S. DEPARTMENT OF COMMERCE, et al.	)	
	)	
Defendants.	)	
	)	

---

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ RENEWED  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiff Judicial Watch, Inc. (“Judicial Watch”), by counsel, submits this opposition to Defendants’ motion to dismiss this action for failure to state a claim (Fed. R. Civ. P. 12(b)(6)). As grounds therefor, Plaintiff states as follows:

**MEMORANDUM OF LAW**

**I. Introduction.**

This case concerns an attempt by a federal agency to establish advisory committees comprised of business representatives from the United States, Canada, and Mexico, and yet evade the public disclosure requirements of the Federal Advisory Committee Act (“FACA”). 5 § U.S.C. App. 2. This case is important, not only because of the particular advisory committees at issue, but because the agency is seeking to create an exception under FACA which would substantially undermine the purposes of the statute.

Defendant previously argued that Plaintiff lacked standing to bring this action under FACA, and this Court subsequently dismissed the case on that basis. *Judicial Watch, Inc. v. U.S.*

*Dep't of Commerce*, 576 F. Supp. 2d 172 (D.D.C. 2008). The Court of Appeals reversed, finding that the injury requirement was met because “[i]n the context of a FACA claim, an agency's refusal to disclose information that the act requires be revealed constitutes a sufficient injury.” *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009). As for causation, the Court of Appeals found that, assuming the council was an “advisory committee” for purposes of FACA as alleged by Plaintiff, “Commerce is subject to an array of FACA obligations concerning the Council and its subgroups that are entirely within its power to discharge.” *Id.* (citing *Public Citizen*, 491 U.S. at 450-51). Finally, the Court of Appeals found that the injury was redressable because “the court could order that Commerce conduct any prospective encounters between itself and the Council . . . in compliance with FACA's requirements.” *Id.* at 873-74.

Defendants now have filed a renewed motion to dismiss, arguing that Plaintiff has failed to state a claim upon which relief can be granted. Once again, Defendants' position is without merit. Plaintiff has more than sufficiently pled allegations under which Defendants violated FACA by establishing and utilizing the North American Competitiveness Council (“NACC”) and its U.S. component subgroups without complying with the public disclosure provisions of that statute. Accordingly, the motion to dismiss should be denied.

## **BACKGROUND**

### **I. The Federal Advisory Committee Act**

FACA sets out a “comprehensive scheme” designed “to control the creation and operation of advisory committees” within the executive branch. *Center for Auto Safety v. Cox*, 580 F.2d 689, 692 (D.C. Cir. 1978). The central purpose of FACA is to “control the advisory

committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups.” *Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999) (citations omitted); *see* 5 U.S.C. App. 2 § 2. This is because advisory committees are too often “dominated by representatives of industry and other special interests seeking to advance their own agendas.” *Id.* at 284-85 (citing H.R. REP. NO. 92-1017 (1972)), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496 (“One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.”).

By its plain terms, FACA imposes a number of requirements on committees established or utilized by the President or federal agencies to obtain advice or recommendations (“advisory committees”). 5 U.S.C. App. 2 § 2 *et seq.* FACA defines “advisory committee,” in relevant part, to include any “committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.” 5 U.S.C. App. 2 § 3(2).

Advisory committees that meet this definition are subject to FACA’s requirements unless specifically exempted by statute. *Id.* at § 4. These requirements include, but are not limited to, the following: (i) that all meetings be open to the public; (ii) that notice of each meeting be published in the Federal Register; (iii) that interested persons be allowed to attend, appear before, or file statements with the advisory committee; and (iv) that records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agendas, and other documents made available to or

prepared for or by the advisory committees be made available through the provisions of FOIA. *See, e.g.*, 5 U.S.C. App. 2 §§ 10(a)(1-3) and (b).

## **II. Relevant Facts**

### **A. Establishment and Membership of the NACC.**

The Complaint alleges numerous detailed facts regarding Defendants' establishment and use of the NACC and its subcomponents. On March 23, 2005, U.S. President George W. Bush, Mexican President Vicente Fox, and Canadian Prime Minister Paul Martin reportedly met in Waco, Texas for a summit of North American leaders. Compl. ¶ 9. The principal outcome of this meeting was the creation of the Security and Prosperity Partnership of North America ("SPP"), which has been described as a cooperative effort of the governments of the United States, Mexico, and Canada to address numerous areas of mutual concern, including the movement of goods, traveler security, energy, environment, and health. *Id.*

Subsequently, on March 15, 2006, Defendant Gutierrez, Canadian Deputy Minister of Industry Suzanne Hurtubise, and Dr. Alberto Ortega, a representative of Mexican President Vicente Fox, met with senior business leaders in Washington, D.C. to solicit the views of the North American business community on priorities for the SPP, as well as recommendations from business leaders on how the SPP could help their companies become more competitive, reduce the cost of doing business, cut red tape, and eliminate unnecessary barriers to trade in North America. Compl. ¶ 10. Also discussed was the possible creation and institutionalization of a "North American Competitiveness Council." *Id.*

Following this March 15, 2006 meeting, a framework for the NACC was reached trilaterally. Compl. ¶ 11. It was agreed that the NACC would provide recommendations on issues concerning North American competitiveness that could be addressed through the SPP. *Id.*

On March 30-31, 2006, President Bush, President Fox, and Prime Minister Harper held a series of meetings in Cancun, Mexico to discuss various North American priorities, including the SPP and “North American Competitiveness.” Compl. ¶ 12. One meeting between President Bush, President Fox, Prime Minister Harper, and private sector representatives from each country addressed the proposed structure of the NACC. *Id.* Subsequent to these meetings, Defendant U.S. Department of Commerce reportedly worked with the Council of the Americas, the U.S. Chamber of Commerce, and other interested parties to formalize the NACC by facilitating interaction between representatives from the three governments and the private sector. *Id.* at 13.

On June 15, 2006, Defendant Gutierrez, Mexican Economy Minister Sergio Garciade Alba, Canadian Minister of Interior Maxime Bernier, and North American business leaders met in Washington, D.C. to officially launch the NACC. Compl. ¶ 14. According to a press release issued by Defendant U.S. Department of Commerce, on that same date, the NACC “is made up of high level business leaders from each country” who will meet annually with representatives of the United States, Mexican, and Canadian governments “to provide recommendations and priorities on promoting North American competitiveness globally.” *Id.* According to the U.S. Chamber of Commerce, Secretary Gutierrez expressed a desire to “institutionalize” the SPP and the NACC, so that its work will continue through changes in administrations. *Id.*

As officially launched by Defendant Gutierrez and his counterparts in Mexico and Canada on June 15, 2006, the NACC is comprised of thirty-five (35) members of the business

community. Compl. ¶ 15. Each country determines its own members and the membership selection process. *Id.* The U.S. component of the NACC is comprised of fifteen (15) members, all of which are large, for-profit corporations.<sup>1</sup> *Id.* The Mexican and Canadian components of the NACC are comprised of ten (10) members each, all of whom appear to be heads of major Mexican and Canadian business interests. *Id.* at 17. None of the NACC's members are full-time officers or employees of the U.S. government. *Id.* at 19. A complete list of members of the NACC is attached as Exhibit A to the Complaint.

Defendants, as well as the governments of Mexico and Canada, each designated organizations in their respective countries to serve as "Secretariats" and to help collect input from the business community. Compl. ¶ 20. Defendants selected two business groups, the Council of the Americas and the U.S. Chamber of Commerce, to serve jointly as the "Secretariat" for the United States. *Id.*

According to the U.S. Chamber of Commerce, Defendants, as well as the governments of Mexico and Canada, have committed to participate in "ministerial-level" meetings with the NACC annually. Compl. ¶ 21. The NACC also meets with "senior government officials" "two to three times per year" to "engage on an on-going basis to deliver concrete results." *Id.*

Also according to the U.S. Chamber of Commerce, the U.S. component of the NACC is composed of an Executive Committee and an Advisory Committee. Compl. ¶ 22. The Executive Committee is comprised of the fifteen (15) U.S. members of the NACC. *Id.* Each member is charged with representing the sector in which its business operates. *Id.* The Advisory

---

<sup>1</sup> Prior to the June 15, 2006 launch of the NACC, an organizational meeting of the U.S. section of the NACC had been held on May 26, 2006, attended by Defendant Gutierrez and more than one hundred business leaders and government officials and employees. Compl. ¶ 16.

Committee is comprised of more than 200 U.S. corporations, business associations, and local chambers of commerce. *Id.* The Advisory Committee provides advice and recommendations to the Executive Committee. *Id.* at 23. Also according to the U.S. Chamber of Commerce, the U.S. component of the NACC, which refers to the Executive Committee, meets twice a year with the Secretary of Commerce and “additional meetings at the working group level” are scheduled “as needed.” *Id.* at 24.

The NACC met on August 15, 2006 in Washington, D.C. Compl. ¶ 25. This apparently was the first formal meeting of the NACC. *Id.* Subsequently, Defendant Gutierrez and his counterparts from Mexico and Canada, met with the NACC on February 23, 2007 in Ottawa, Canada. *Id.* at 26. At this meeting, the NACC issued a report containing over fifty (50) recommendations regarding border-crossing facilitation, standards and regulatory cooperation, and energy integration. *Id.* That same day, Defendant Gutierrez and his counterparts in Mexico and Canada issued a press release acknowledging their receipt of the NACC’s report and recommendations. *Id.* The press release states that “[o]ur respective governments will review the report and consider carefully its recommendations in preparation for the next leaders’ meeting.” *Id.* The press release further states that “[w]e will continue to work with the NACC and other stakeholders as we strive to make North America the safest and best place to live, invest and prosper.” *Id.*

Finally, the Complaint also alleges that a “leaders” meeting was scheduled for August 20-21, 2007 in Montebello, Canada. Compl. ¶ 27. The Complaint further alleged, upon information and belief, that the NACC also was to be meeting on or about these same dates in Montebello, Canada, in conjunction with the “leaders” meeting. *Id.*

**B. Plaintiff's Investigation of the NACC.**

In furtherance of its public interest mission, Plaintiff began investigating the activities of the SPP and the NACC in approximately July 2006. Compl. ¶ 28. In August 2006, Plaintiff sent Freedom of Information Act ("FOIA") requests to various federal agencies, including Defendant U.S. Department of Commerce, seeking access to records regarding the creation, membership, operating guidelines, and meetings of the NACC, among other topics. *Id.* Plaintiff subsequently made further FOIA requests to various federal agencies, including again Defendant U.S. Department of Commerce, seeking access to additional records regarding the NACC. *Id.*

On March 23, 2007, Plaintiff submitted a request to the U.S. Chamber of Commerce, one of the organizations designated by Defendants to serve as Secretariat for the U.S. component of the NACC, asking that it be allowed to "participate in all future meetings of the NACC, to include Ministerial, Executive Committee and Advisory Committee meetings." Compl. ¶ 29. By letter dated April 19, 2007, the U.S. Chamber of Commerce informed Plaintiff that only invited officials and members of the Executive Committee of the NACC could participate in "Ministerial" meetings. *Id.* at ¶ 30. The U.S. Chamber of Commerce also informed Plaintiff that membership in the Executive Committee was "by definition only open to companies" and that the Advisory Committee is "only open to companies, sectoral associations, and local chambers of commerce." *Id.*

Subsequently, on July 26, 2007, Plaintiff submitted a request to Defendants asking that they acknowledge that the NACC and its U.S. component subcommittees are advisory committees under FACA. Comp. ¶ 31. Plaintiff's letter also requested Defendants bring the NACC and its U.S. component subcommittees into compliance with all appropriate laws and

regulations, including FACA's requirements that meetings be open to Plaintiff and members of the public and that all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, or other documents made available to or prepared by the NACC and its U.S. component subcommittees be made available to Plaintiff pursuant to the provisions of FOIA. *Id.* When Defendants failed to respond, Plaintiff filed this action of August 10, 2007. Plaintiff sought preliminary and/or injunctive relief to require Defendants to make the upcoming meetings in Montebello open to the public. The Court denied the motion. *Judicial Watch, Inc. v. Dep't of Commerce*, 501 F. Supp. 2d 83 (D.D.C. 2007).

As a not-for-profit, tax exempt, educational organization that seeks to promote integrity, transparency, and accountability in government, Plaintiff has been and continues to be damaged by Defendants' refusal to allow it access to the meetings and records of the NACC and its U.S. component subcommittees. Compl. ¶ 33. Not only has Defendants' refusal thus denied Plaintiff the ability to obtain information and records about the SPP and the NACC, but it also is restricting Plaintiff's ability to disseminate such information and records to the public and is limiting Plaintiff's ability to carry out its public interest mission in general. *Id.*

Moreover, public confidence in the integrity of the U.S. government as a whole has been and will be harmed by the appearance that Defendants are meeting with and obtaining recommendations and advice from a few, select representatives of major corporations, each with their own self interests, in order to formulate government policy. Compl. ¶ 34. Defendants' actions also create the appearance that members of the NACC and its U.S. component subcommittees may gain favor or influence with Defendants and/or the U.S. government by

participating in the NACC process, to the detriment of others who are not allowed to participate, thus further undermining public confidence in government. *Id.*

## ARGUMENT

### I. Plaintiff Has Stated Claims For Which Relief May Be Granted.

In assessing a Rule 12(b)(6) motion, a court must treat the complaint's factual allegations -- including mixed questions of law and fact -- as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Moreover, a complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). “Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues.” *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-14 (2002), or “plead law or match facts to every element of a legal theory,” *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted). Instead, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). A claim is facially plausible when the pleaded factual content “allows

the court to draw the reasonable inference that the defendant is liable for the misconduct.” *Iqbal*, 129 S. Ct. at 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

Applying these liberal standards here, it is evident that Defendants’ motion to dismiss must be denied.

**A. Plaintiff Has Adequately Alleged That The NACC Was “Established” And “Utilized” By Defendants As Those Terms Are Defined Under FACA.**

Plaintiff has more than sufficiently alleged that Defendants “established” and are “utilizing” the NACC and its U.S. component subcommittees as advisory committees. Compl. § 36. This “short and plain” factual statement alone satisfies the pleading requirement of Fed. R. Civ. P. 8(a). Moreover, assuming these allegations are true and drawing all reasonable inferences in Plaintiff’s favor, the Complaint sets forth a more than “plausible scenario” for relief under FACA.

Plaintiff has pled numerous additional and specific factual allegations describing Defendants’ establishment and utilization of the NACC and its U.S. component subgroups, as those terms are defined by FACA. 5. U.S.C. App. 2 § 3(2). These allegations set forth in detail the role of Defendants in establishing the NACC. First, Defendant Gutierrez met with “senior business leaders” in March 2006 to solicit their views regarding how government could “help their companies become more competitive, reduce the cost of doing business, cut red tape, and eliminate unnecessary barriers to trade in North America.” Compl. ¶ 10. A part of the same discussion was the possible creation and institutionalization of a “North American Competitiveness Council.” *Id.* Subsequent to this meeting, Defendants laid the groundwork by

creating the “framework” for the NACC. Compl. ¶ 11. Defendant Department of Commerce then “worked with private sector interest groups, the Council of the Americas and the U.S. Chamber of Commerce, and other interested parties to formalize the NACC . . . .” *Id.* at 13. The express purpose of the NACC was to “provide recommendations [to Defendants] on issues concerning North American competitiveness . . . .” *Id.*

As alleged in the Complaint, the NACC was, to use Defendants’ own word, “launched” by Defendant Gutierrez at a meeting on June 15, 2006. *Id.* at 14. The press release issued that day by Defendant Department of Commerce confirmed that the NACC “is made up of high level business leaders from each country” who will meet annually with Defendants “to provide recommendations and priorities on promoting North American competitiveness globally.” *Id.* At the same meeting, Defendant Gutierrez “expressed a desire to ‘institutionalize’ . . . . the NACC, so that work will continue through changes in administration.” *Id.* Hence, Plaintiff has more than sufficiently pled when, why, and how Defendants “established” the NACC.

Plaintiff have pled even more specific allegations regarding the establishment and utilization of the U.S. component of the NACC. Specifically, Defendants launched the U.S. section of the NACC at meeting on May 26, 2006, a meeting attended by more than 100 business leaders and government officials and employees. *Id.* at 16. The U.S. component of the NACC is comprised of 15 members, all of which are large, for-profit corporations. *Id.* As also alleged by Plaintiff, Defendants selected two business groups, the Council of the Americas and the U.S. Chamber of Commerce, to serve as a “Secretariat” for the U.S. component of the NACC. *Id.* at 20. Even more specifically, according to the U.S. Chamber of Commerce, the U.S. component of the NACC is composed of an Executive Committee and an Advisory Committee. *Id.* at 22.

The Executive Committee is comprised of the fifteen (15) U.S. members of the NACC. *Id.* Each member is charged with representing the sector in which its business operates. *Id.* The Advisory Committee is comprised of more than 200 U.S. corporations, business associations, and local chambers of commerce. *Id.* The Advisory Committee provides advice and recommendations to the Executive Committee. *Id.* at 23. Also according to the U.S. Chamber of Commerce, the U.S. component of the NACC, which refers to the Executive Committee, meets twice a year with the Secretary of Commerce and “additional meetings at the working group level” are scheduled “as needed.” *Id.* at 24.

These are highly detailed, specific factual allegations setting forth Defendants’ role in the “establishment” and “use” of advisory committees – the NACC, the Executive Committee, and the Advisory Committee. The alleged purpose of these committees is to provide policy recommendations to Defendants. Defendants are alleged to have planned and then “launched” the NACC and, just as significantly, the Executive Committee and the Advisory Committee.<sup>2</sup> Plaintiff provides specific factual allegations even to exact size and composition of NACC and each subgroup. Plaintiff avers additional allegations regarding specific meetings and policy recommendations to be provided to Defendants.

In short, the Complaint sets forth numerous detailed and specific allegations concerning how the NACC and its subgroups were established by Defendants and how they are being utilized by Defendants. Assuming these allegations are true and drawing all reasonable

---

<sup>2</sup> See 5 U.S.C. App. 2 § 3(2) (“advisory committee” includes “any subcommittee or other subgroup thereof . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”).

inferences in the plaintiff's favor, these specific factual allegations are more than sufficient to satisfy the pleading requirements necessary to survive any motion to dismiss. Taken together, these facts set forth at least a "plausible scenario" under which Plaintiff is entitled to relief under FACA.

**B. The Statutory Language and Existing Precedent Support Plaintiff's Allegations As To The "Establishment and Utilization" Of The NACC.**

The plain language of FACA defines an advisory committee as any committee that is "established or utilized" by an agency for the purpose of obtaining "advice or recommendations" for that agency. Plaintiff plainly has alleged that both NACC and its U.S. component subgroups were created by and are utilized by Defendants.

Despite these specific and detailed factual allegations, Defendants repeatedly claim that the "complaint does not allege that the Commerce Department was involved in the creation" of the NACC and "cannot support a conclusion" that the NACC was "established" by the Defendants. This assertion is simply incorrect, as the numerous detailed and specific factual allegations, assuming they are true and drawing all inferences in favor of Plaintiff, demonstrate the direct and indispensable role of Defendants in establishing the NACC and its U.S. component subgroups. As the Court of Appeals recognized in assessing standing, the allegations are more than sufficient, at the pleading stage, to show how Plaintiff can recover for an injury under FACA.

The limited case law supports Plaintiff's plain language interpretation of an "advisory committee" under FACA. Arguing that an agency does not "establish" a FACA advisory committee unless it is "actually formed" by the government (Defs.' Mem. at 21), Defendants rely

primarily on two decisions of the D.C. Circuit, *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999) and *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir. 1990). Both of these cases are inapposite.

First, both *Byrd* and *Food Chemical News* were decided on summary judgment. In this case, however, Plaintiff only is required to have alleged, as it has done, a plausible scenario under which relief may be granted. Plaintiff's allegations state a "facially plausible" claim that, if ultimately proven true, "allows the court to draw the reasonable inference that the defendant is liable for the misconduct." *Iqbal*, 129 S. Ct. at 1949. Again, the Court of Appeals recognized that Plaintiff has sufficiently alleged injuries under FACA at the pleading stage.

Second, both *Byrd* and *Food Chemical News* are distinguishable as they arose under a well-recognized exception to FACA under which a contractor retained by a federal agency forms an advisory committee. Both *Byrd* and *Food Chemical News* consider specifically whether a committee created by a contractor is subject to FACA. In both cases, the Court of Appeals concluded that FACA did not apply. This is because, as explained in *Food Chemical News*, it is well-established that the "[FACA] does not apply to persons or organizations which have contractual relationships with Federal agencies." 900 F.2d at 331 (citing H.R. CONF. REP. No. 1403, 92 Cong., 2d Sess. 2, reprinted in U.S.C.C.A.N. 3508-09 (also stating that FACA does not apply to "advisory committees not directly established by or for [Federal] agencies.")). As further explained by the Court,

contractors are unique under FACA as "Congress was no doubt mindful that government contractors, unlike the groups that prompted enactment of FACA . . . are subject to procurement regulations designed, or at least intended, to provide checks against waste and other misuses of government resources. *See, e.g.*, 48 CFR §§ 9.500-505 (providing for identification and resolution of organizational

conflicts of interest which may impair a contractor's objectivity in performing contract work).

900 F.2d at 331. While Defendants try to explain away this critical distinction (Defs.' Mem. at 22 n.8), their reliance on FACA's contractor exception is wholly misplaced and this Court should decline Defendants' invitation to expand this exception beyond its current scope.<sup>3</sup>

In this case, the NACC was, of course, not alleged to have been created by a government contractor. Instead, Defendants are alleged to have had a direct and indispensable role in the creation of the NACC. As the Court of Appeals stated, the allegation that "others" were involved "is of no consequence." 583 F.3d at 873. Similarly, that fact that Defendants are not alleged to have appointed individual members in no way diminishes Defendants' role in establishing the NACC and its subgroups. Plaintiff plainly has alleged that Defendants handpicked two private business entities – the Chamber and the Council of the Americas – to select certain other non-governmental entities to participate in the NACC and its subgroups. As will be proven in this case, this was done with the full expectation by Defendants that only certain large corporations would fill out the membership of the NACC and its U.S. component subgroups. In fact, the

---

<sup>3</sup> Defendants also cite a case which, while superficially similar, is distinctly different from this case. *People for the Ethical Treatment of Animals v. Barshefsky*, 925 F. Supp. 844 (D.D.C. 1996). In that case, the Court determined that an "international working group" did not fall under FACA. The Court concluded that the agency (the Office of the United States Trade Representative) had only "indirectly facilitated the formation" of the working group. *Id.* The Court further held that the working group was not "advisory in nature" as it did not formulate policy recommendations. According to the Court, there was not "any evidence which would lead to the conclusion that the working group advises or makes recommendations to any federal agency." *Id.* In contrast, the NACC and its U.S. component subgroups consist solely of "private individuals and groups" (*see Cummock v. Gore*, 180 F.3d at 285) organized for the sole purpose of developing policy recommendations for Defendants and to do so on a continuing basis. Accordingly, the working group in *Barshefsky* is far different than the policy-recommending NACC and its U.S. component subgroups. FACA is intended to apply to just such committees established and utilized by the federal government.

scenario presented in this case is precisely the situation to which FACA was intended to apply – to regulate interactions between an agency’s advisory committees and private interests and to “open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups.” *Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999) (citations omitted); *see* 5 U.S.C. App. 2 § 2.

Finally, and significantly, the U.S. General Service Administration (“GSA”), the federal agency charged with administering FACA (5 U.S.C. app. 2 § 7), has issued guidelines to assist agencies in determining when FACA applies. These guidelines, entitled “When FACA Is and Is Not Applicable to Interactions with The Private Sector,” are available on the agency’s website and a copy is attached hereto as Exhibit A.

To assist an agency, GSA describes various hypothetical scenarios under which an agency may establish a FACA advisory committee. In a strikingly similar fact pattern to the facts alleged in this case, the GSA considers a committee that is created by an agency head and is composed of “senior corporate officials which will meet, interact, deliberate, and advise him on a variety of issues . . . .” Exh. A. at 2. The committee structure also includes “a core membership with subgroups.”

According to the GSA, such a committee constitutes a FACA advisory committee. This is because “[t]he committee is established by an agency head (the Administrator) to obtain advice or recommendation for himself or other federal officials in the executive branch; and the committee is not composed wholly of full-time, or permanent part-time federal employees.” For these reasons, the agency must abide by all the requirements of FACA.

GSA's hypothetical example is this case. As alleged in the Complaint, Defendants wish to receive recommendations from various "corporate officials." Defendants established and are utilizing the NACC and its U.S. component subgroups for the sole purpose of developing and providing such recommendations. Based upon these alleged facts, assuming they are true and drawing all reasonable inferences in Plaintiff's favor, the NACC and its U.S. component subgroups are governed by FACA. Hence, even the federal agency with unique expertise in interpreting FACA rejects Defendants' arguments.

**C. In Addition to Plaintiff's Declaratory Judgment Act and APA Claims, Plaintiff May Also Pursue A Claim Under the Mandamus Act.**

Despite the Court of Appeals' clear finding that Plaintiff has alleged an injury redressable by the Court, Defendants' again challenge this Court's power to provide relief. Defs.' Mem. at 26-30. Significantly, a party does not need to assert any other cause of action other than to bring a FACA claim directly. According to the D.C. Circuit:

[T]he government's obligation to make documents available under FACA does not depend on whether someone has filed a FOIA request for those documents . . . the government's duty to disclose is otherwise independent of FOIA. We think it follows that a plaintiff does not have to file a formal FOIA request before bringing an action seeking a remedy for alleged FACA violations, including violations of the statute's disclosure requirements.

*NRDC v. Johnson*, 488 F.3d 1002, 1003 (D.C. Cir. 2007).

In addition to its claims under the Declaratory Judgment Act and the APA, Plaintiff has presented a claim under the Mandamus Act, 28 U.S.C. § 1361. Compl. ¶¶ 44-47. As the D.C. Circuit has explained, mandamus relief is available where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Northern States Power Co. v. Department of Energy*, 128 F.3d 754, 758

(D.C. Cir. 1997). In this case, Plaintiff alleges that Defendants are failing to carry out a “clear duty” owed to Plaintiff by failing to disclose records and open the meetings of the NACC and its U.S. component subgroups as required under FACA. Accordingly, Plaintiff has adequately alleged facts that may entitle Plaintiff to relief through mandamus.

**Conclusion**

For these reasons, Plaintiff respectfully requests that the Court deny Defendants’ motion to dismiss.

Dated: March 15, 2010

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Paul J. Orfanedes  
D.C. Bar No. 429716

/s James F. Peterson  
D.C. Bar No. 450171

501 School Street, S.W., Suite 700  
Washington, D.C. 20024  
(202) 646-5172

*Attorneys for Plaintiff*

# EXHIBIT A



U.S. General Services Administration

---

**Committee Management Secretariat**  
(202) 273-3556  
Fax (202) 273-3559  
[cms@gsa.gov](mailto:cms@gsa.gov)

---

## When FACA Is and Is Not Applicable To Interactions with The Private Sector

### INTRODUCTION

FACA was enacted in 1972 to control the growth and operation of the "numerous committees, board, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C. App. 1, § 2(a).

When initially enacted FACA assigned to the Office of Management and Budget (OMB) responsibility for government oversight of advisory committees. In 1977 President Carter, acting pursuant to a congressionally approved reorganization plan, transferred the advisory committee functions from OMB to the General Services Administration (GSA). (See Executive Order 12024.) The statutorily mandated Committee Management Secretariat (CMS) therefore, also was transferred to GSA to carry out this responsibility.

As part of its responsibility under FACA, GSA issues governmentwide guidelines and regulations for Federal Advisory Committee Management.

### ILLUSTRATIVE SCENARIOS

The attachments contain scenarios which illustrate when FACA does and does not apply to interactions between Executive branch officials and the private sector. An overview of the process when FACA applies is also included.

### SCENARIO ONE - FACA NOT APPLICABLE

**Factual assumptions:** As part of continuing National Performance Review (NPR) initiatives, the Administrator wishes a series of meetings with senior corporate executives from companies which have faced or are facing challenges similar to those facing government today, e.g., downsizing, restructuring, reduced resources, creative financing needs, labor and human resources concerns, increased customer relations demands, etc.

The Administrator's intent is to obtain experiential and anecdotal information from each executive on challenges faced by his/her company, how the company met the challenges, approaches which were productive or successful, and those which were not. The attendees may or may not change from session to session. The specific agenda subjects will likely change and may be set in advance or be free form. No consensus advice or recommendations resulting from group deliberation or interaction is expected or will be solicited.

### FACA does not apply because:

- The intent is to obtain information or viewpoints from individual attendees as opposed to

advice, opinions or recommendations from the group acting in a collective mode.

### **FACA coverage could become an issue if:**

- The function/mission of the group changes over time and the Administrator begins to use the group as a source of consensus advice or recommendations. The more static the group composition, i.e., the same attendees at each meeting, the more likely an issue of FACA's applicability will arise.

### **SCENARIO TWO - FACA APPLICABLE**

**Factual assumptions:** Same fact pattern as described in paragraph 1 of Scenario One except rather than seeking information on individual corporate experiences the Administrator prefers to establish a committee composed of senior corporate officials which will meet, interact, deliberate, and advise him on a variety of issues arising out of the NPR. The committee structure could include a core membership with subgroups.

### **FACA applies because:**

- The committee is established by an agency head (the Administrator) to obtain advice or recommendations for himself or other federal officers in the executive branch; and
- The committee is not composed wholly of full-time, or permanent part-time federal employees.

### **REQUIREMENTS/PROCESS WHEN FACA APPLIES**

#### **Establishment:**

- The Administrator is authorized to establish advisory committees to advise him/her on functions vested in the Administrator by the Federal Property and Administrative Services Act, or other GSA authorizing legislation.
- Committees which advise the Administrator also may be established by specific statutory language.
- No advisory committee can meet or take action prior to submitting a charter with the Administrator.
- The charter must contain the committee's designation, its objectives, its duration, the official to whom it reports, the agency or organization providing support, the duties of the committee, estimated operating costs, estimated number of meetings, and its termination date.

#### **Members:**

- The membership must be balanced in terms of points of view represented and the functions to be performed by the committee.
- Members are subject to ethics laws if they are appointed because of their personal knowledge, background or expertise. They are not subject to ethics laws if they are appointed to represent the point(s) of view of a particular group or segment of the public.
- Members usually are entitled to reimbursement for travel and per diem expenses. FACA also

provides for direct compensation, but many members serve gratuitously.

### **Meetings:**

- Must have 15 days advance notice in the Federal Register.
- Must be open to the public unless limited statutory bases for closure apply.
- Must have a Designated Federal Officer in attendance.
- Must have minutes which are available for public inspection (except for portions of a meeting which was closed).

### **FACA ADVISORY COMMITTEE MEMBERS APPLICABLE ETHICS STATUTES AND REGULATIONS**

**SGE - Special Government Employee** (a person who serves not more than 130 days out of a 365 day period)

**FTE - Full-time regular government employees**

**REP - Representative of particular interest group**

I. Executive Orders apply to SGEs and FTEs but not to REPs

II. Standards of Conduct apply to SGEs and FTEs but not to REPs except as noted below.\*

III. Conflicts of Interest apply to SGEs except as noted below\*\* and FTEs but not to REPs.

IV. Ethics in Government Act including both the A. Public Financial Form and B. Confidential apply to SGEs and FTEs but not to REPs.

\* Representative commission members would only be bound by the standards of conduct if the commission as a body made it applicable to all members. Representative members are reminded that nonpublic information should not be released to the public without permission.

\*\* SGE's are treated less restrictively on a number of conflicts of interest laws.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-1446 (RMU)
	)	
U.S. DEPARTMENT OF COMMERCE, et al.	)	
	)	
Defendants.	)	
_____	)	

**[PROPOSED] ORDER**

The Motion to Dismiss for Failure to State a Claim filed by Defendants U.S. Department of Commerce and Carlos Gutierrez, Secretary of Commerce, U.S. Department of Commerce, is hereby DENIED.

Dated:

\_\_\_\_\_  
The Hon. Ricardo M. Urbina  
United States District Judge