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 A PRELIMINARY INJUNCTION

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INTRODUCTION

The Government's arguments against the issuance of a preliminary injunction fail in their entirety. EPIC is likely to succeed on the merits. In the authorizing language, Congress made clear that the AI Commission is an agency subject to the FOIA. The scope of EPIC's FOIA Requests is almost identical to the records that the Commission must already disclose under the Federal Advisory Committee Act. Moreover, EPIC's FOIA Requests readily satisfy the statutory standard for expedited processing. And the Government's accusations of undue delay on EPIC's part are groundless.

EPIC has also established that it will suffer irreparable harm absent an injunction. The AI Commission has announced that on Tuesday, November 5, 2019, it will present preliminary recommendations on the nation's policy for artificial intelligence to the President and the Congress. Pl.'s Mem. Ex. K. Without speedy disclosure of the requested records, EPIC will be denied its right to learn the basis of the Commission's findings, to assess the Commission's recommendations, and to meaningfully respond to the report that the Commission will release in a little over three weeks.

EPIC has shown that the balance of the equities and the public interest favor an injunction. Expedited processing of EPIC's FOIA Requests will advance Congress's objectives under the statute and poses little risk of prejudicing other FOIA requesters. Accordingly, the Court should order the AI Commission and the DOD to process EPIC's FOIA Requests on an expedited basis and order the agencies to make an immediate determination on each of EPIC's requests.

ARGUMENT

I. EPIC IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

A. The AI Commission is subject to the FOIA.

The Government's attempts to excuse the AI Commission from the obligations of the FOIA are meritless. Congress determined that the AI Commission is subject to the FOIA when it stated that the Commission is an "establishment . . . in the executive branch." NDAA § 1051(a). The FOIA applies to "agenc[ies]." 5 U.S.C § 552. The term "agency" under the FOIA "includes any . . . establishment in the executive branch of the Government[.]" 5 U.S.C. § 552(f). Congress repeatedly used the key phrase from the FOIA in the NDAA:

> (1) IN GENERAL.—There is *established in the executive branch an independent Commission* to review advances in artificial intelligence, related machine learning developments, and associated technologies.
>
> (2) TREATMENT.—The Commission shall be considered an *independent establishment of the Federal Government* as defined by section 104 of title 5, United States Code, and a temporary organization under section 3161 of such title.

NDAA § 1051(a) (emphases added). The text of the two statutes leaves no doubt: the AI Commission—an "establishment . . . in the executive branch" under section 1051(a) the NDAA—is also an "establishment in the executive branch" under § 552(f) of the FOIA. The Commission is thus an "agency" subject to the FOIA.

This result is compelled by the *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (D.C. Cir. 1990). In *Energy Research Foundation*, the D.C. Circuit held that a board defined by Congress as "establishment in the executive branch"—like the AI Commission—is necessarily subject to the FOIA:

> In creating the Board, Congress used the same terms contained in § 552(f)'s description of "agency." The Board's statute reads: "There is hereby established an independent establishment in the executive branch, to be known as the 'Defense Nuclear Facilities Safety Board'...." 42 U.S.C. § 2286(a) (emphasis added). It would be a tall piece of statutory construction for a court to say that an

> "establishment in the executive branch" as used in § 2286(a) is not an "establishment in the executive branch" within the meaning of [the FOIA].

Energy Research Found., 917 F.2d at 582–83. So too here: it would be a "tall piece of statutory construction" to conclude that an "establishment . . . in the executive branch" under section 1051(a) the NDAA is not an "establishment in the executive branch" within the meaning of the FOIA.

Other provisions of the NDAA make clear that Congress knew how to exempt the AI Commission from the FOIA if it wished to, but Congress chose not to. In section 1652 of the NDAA, Congress "established a commission to develop a consensus on a strategic approach to defending the United States in cyberspace against cyber attacks of significant consequences" (known as the "Cyberspace Solarium Commission"). NDAA § 1652(a). Like the AI Commission, the Cyberspace Solarium Commission is charged with making findings and submitting a report to Congress and senior executive branch officials. § 1652(k)(1). But unlike the AI Commission, Congress determined that the Cyberspace Solarium Commission would be exempt from the Freedom of Information Act. NDAA § 1652(m)(2). In that provision, Congress stated, "The provisions of section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), shall not apply to the activities, records, and proceedings of the Commission under this section." *Id.*

If Congress had meant to exempt the AI Commission from the FOIA, it could easily have included language in section 1051. But Congress did not. And the fact that Congress found it necessary to enact section 1652(m)(2) to exempt the Solarium Commission from the FOIA makes clear that entities such as the Cyberspace Solarium Commission and AI Commission are presumptively subject to the FOIA absent an express statutory exemption.

Nevertheless, the Government insists that the Commission is exempt from the FOIA under the "substantial independent authority" test (also known as the "*Soucie* test" after *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)). But the *Soucie* test is irrelevant where Congress has already dictated, using plain statutory language, that a federal entity is subject to the FOIA. That was the conclusion of the D.C. Circuit in *Energy Research Foundation*. Having found that the Defense Nuclear Facilities Safety Board qualified as an agency under the plain text of the FOIA (and the Board's organic statute), the court declined to rely on the *Soucie* test to evaluate the "agency" status of the Board. *Energy Research Found.*, 917 F.2d at 584. The *Soucie* test is likewise irrelevant to the "agency" status of the AI Commission: Congress has already determined that the Commission is an entity to which the FOIA applies. *Compare* NDAA § 1051(a), *with* 5 U.S.C. § 552(f). A contrary holding would arbitrarily limit Congress's power to subject new federal entities to the statutory framework of the FOIA—even where Congress closely tracks the "agency" definition that it previously enacted under § 552(f).

Dong v. Smithsonian, on which the Government erroneously relies, only reinforces the rule of *Energy Research Foundation*. In *Dong*, the D.C. Circuit considered whether the Smithsonian Institution qualified as an "agency" under the Privacy Act, 5 U.S.C. § 552a, which "borrows the definition of 'agency' found in FOIA, 5 U.S.C. § 552(f)." *Dong v. Smithsonian Inst.*, 125 F.3d 877, 878 (D.C. Cir. 1997). The court explained that "to be an agency under the Privacy Act"—and by extension, the FOIA—an entity need only "fit into one of the categories set forth either in § 552(f) or § 551(1)." *Dong*, 125 F.3d at 879. Accordingly, the court independently evaluated three "agency" categories that "might be thought to cover the Smithsonian": (1) an "establishment in the executive branch," § 552(f); (2) a "Government controlled corporation," *id.*;

and (3) an "authority of the Government of the United States," 5 U.S.C. § 551(1), which exercises "substantial independent authority," *Soucie*, 448 F.2d at 1073. *Dong*, 125 F.3d at 878–82.

Step one of the court's three-part analysis in *Dong* is dispositive in this case. Unlike the AI Commission, the Smithsonian is not defined by law as an "establishment . . . in the executive branch[.]" NDAA § 1051(a). The court in *Dong* thus concluded, based on the specific facts of the case, that the Smithsonian was not an "establishment" under 5 U.S.C. § 552(f). *See Dong*, 125 F.3d at 879. But crucially, the *Soucie* test played no role in the court's "establishment" analysis. *See id*. Only seven paragraphs later—when the court separately evaluated the Smithsonian's status as an "authority of the Government of the United States" under 5 U.S.C. § 551(1)—did the court even mention *Soucie*. *Dong*, 125 F.3d at 881–82. Had the Smithsonian qualified as an "establishment in the executive branch," the Smithsonian would have "fit into one of the of categories set forth . . . in § 552(f)," *Dong*, 125 F.3d at 879, and the D.C. Circuit's analysis would have ended at step one without reference to *Soucie*. That is precisely the scenario here: because the AI Commission is defined by Congress as an "establishment . . . in the executive branch," NDAA § 1051(a), the *Soucie* test is simply irrelevant.

The Government cites a laundry list of cases in which federal entities were found not to qualify as "agencies," but none are apposite here. Two are not even FOIA cases; rather, they address the narrower definition of "agency" under the Administrative Procedure Act ("APA"). *See Flaherty v. Ross*, 373 F. Supp. 3d 97, 104 (D.D.C. 2019); *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 315–18 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019). Congress has deliberately broadened the FOIA's definition of "agency" beyond that of the APA, including—importantly—

the addition of the phrase "establishment in the executive branch." 5 U.S.C. § 552(f). As the D.C. Circuit has explained:

> Congress added the "establishment" language to § 552(f) in 1974 for the purpose of expanding FOIA's coverage. H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974); *see* H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974); S. Rep. No. 854, 93d Cong., 2d Sess. 33 (1974), 1974 U.S. Code Cong. & Admin. News 6267. Through these words, Congress sought to encompass entities that might have eluded the APA's definition in § 551(1), which FOIA had incorporated by reference.

Energy Research Found., 917 F.2d at 583. "Congress thus incorporated in FOIA the APA definition, . . . and added the FOIA definition of agency to expand, rather than limit, its coverage." *Cotton v. Heyman,* 63 F.3d 1115, 1121 (D.C. Cir. 1995)**;** *see also Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (describing the 1974 FOIA amendments as an "expanded definition"). Thus, cases interpreting the APA's definition of "agency" do not control here.

Of the FOIA cases cited by the Government, none concern entities that—like the AI Commission—were established by Congress using the language of 5 U.S.C. § 552(f). Thus, the courts in those cases had no clear indication that Congress intended the FOIA to apply. Instead, each court had to rely on non-textual factors to determine if the entity at issue was covered by § 552(f). *See CREW v. Office of Admin.*, 566 F.3d 219, 221, 221–26 (D.C. Cir. 2009) (White House Office of Administration); *Armstrong*, 90 F.3d at 557–65 (National Security Commission); *Sweetland v. Walters*, 60 F.3d 852, 853–55 (D.C. Cir. 1995) (Executive Residence of the President); *Meyer v. Bush*, 981 F.2d 1288, 1291–98 (D.C. Cir. 1993) (President's Task Force on Regulatory Relief); *Wolfe v. Weinberger*, 403 F. Supp. 238, 240–41 (D.D.C. 1975) (FDA Over-the-Counter Antacid Drugs Advisory Review Panel).

Here, by contrast, Congress has made things simple. The FOIA applies to any "establishment in the executive branch," 5 U.S.C. § 552(f), and the AI Commission is an

"establishment . . . in the executive branch," NDAA § 1051(a). When Congress has spoken so clearly about the "agency" status of a federal entity, courts have respected that legislative determination. *See, e.g.*, *Energy Research Found.*, 917 F.2d at 582–83. The court should do the same here and conclude that the AI Commission is an "agency" subject to the FOIA.

B. EPIC's FOIA Requests describe records that the AI Commission is already required to disclose.

The Government next attempts to cast EPIC's FOIA Requests as "[o]verbroad," but this argument also fails. Defs.' Opp'n 12. First, EPIC's FOIA Requests track the categories of records that *Congress itself* requires federal entities such as the AI Commission to publish. In addition to being subject to the FOIA, the AI Commission is an "advisory committee" under the Federal Advisory Committee Act, 5 U.S.C. app. 2.[1] As such, it is subject to the FACA's records disclosure requirement:

> 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 and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. app. 2 § 10(b) (emphasis added). Notably, the FACA requires the proactive and "*contemporaneous* availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee." 41 C.F.R. § 102-3.170 (emphasis added). An advisory committee "may not require members of the public or other interested parties to file

[1] The term "advisory committee" under the FACA includes any "commission" which is "established by statute . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government[.]" 5 U.S.C. app. 2 § 3(2). The AI Commission was established by statute, NDAA § 1051(a), and is required to submit "recommendations" to the President and Congress, NDAA § 1051(c). The Commission is thus subject to the FACA.

requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA." 41 C.F.R. § 102-3.170.

Nevertheless, EPIC was forced to seek these records through two FOIA Requests: one request filed at the outset of the Commission's work, and one request filed after the Commission failed to open its meetings and publish its records for six months. *See* Pl.'s Mem. Ex. B; Pl.'s Mem. Ex. I. Other than the records described in section 10(b) of the FACA, the only documents EPIC sought were (1) the Commission's initial report, which by law must be published, NDAA § 1051(c)(3); and (2) records in the possession of the DOD "concerning the creation of" or "related to" the AI Commission. Pl.'s Mem. Ex. B at 1.

In arguing that EPIC's FOIA Requests are overbroad, the Government puts itself squarely at odds with Congress's decision to require the publication of nearly all advisory committee records. 5 U.S.C. app. 2 § 10(b). The AI Commission may have created extra work for itself by failing to process and publish the requested records on an ongoing basis, as the FACA requires. 41 C.F.R. § 102-3.170. But this self-imposed hardship does not relieve the Government of its obligation to immediately process EPIC's FOIA Requests for those same records or undercut EPIC's entitlement to expedition.

Second, the FOIA requires only that the requester "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records which (i) reasonably describes such records . . . shall make the records promptly available to any person."). Yet the Government does not even dispute that EPIC's FOIA Requests reasonably describe the records sought.

Finally, the overwhelming secrecy of the AI Commission makes it impossible to know which of the records requested by EPIC will be most relevant to the Commission's November 5

report to Congress and the President. EPIC welcome proposals from the Commission and the DOD as to which records the agencies will expeditiously process first, in order to ensure that the most pertinent material is immediately released to the public. But again, the Government may not rely on the Commission's lack of transparency to further delay the release of records critical to informing the public—particularly with a major report due to Congress in less than a month.

C. EPIC's FOIA Requests readily satisfy the standard for expedited processing.

The Government fundamentally misconstrues the relevant standard for expedited processing. EPIC is entitled to expedition of both FOIA Requests.

First, the Government simply misstates the FOIA's standard for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II). That provision requires an "urgency to inform the public concerning *actual or alleged Federal Government activity*," *id.* (emphasis added)—not a "government action." Defs. Opp'n 13–14.[2]

Second, the Government erroneously claims that EPIC has no right "to participate in the Commission's work." Defs.' Opp'n 13. As noted, the AI Commission is an "advisory committee" under the FACA. Accordingly, EPIC and the public are entitled to attend Commission meetings, 5 U.S.C. app. 2 § 10(a)(1); to receive timely notice of Commission meetings, 5 U.S.C. app. 2 § 10(a)(2); to "attend, appear before, or file statements" with the Commission, 5 U.S.C. app. 2 § 10(a)(3); and to review the records and minutes of the Commission, 5 U.S.C. app. 2 §§ 10(b)–(c). Each of these "significant recognized interest[s]" is "compromise[d]" by the Government's failure to expeditiously process EPIC's FOIA Requests. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). Absent the records EPIC has requested, EPIC and the public will not know when and

[2] The Government does not dispute that EPIC satisfies the first prong of 5 U.S.C § 552(a)(6)(E)(v)(II) ("primarily engaged in disseminating information"), nor could it. *See EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

where the Commission is meeting; will not be able to attend or participate in the Commission's proceedings; and will not know what information the Commission considered or how it arrived at its recommendations.

Finally, the Government fundamentally misapplies the § 552(a)(6)(E)(v)(II) expedited processing standard. As EPIC has explained, the "Federal Government activit[ies]" to which the requested records pertain are (1) the ongoing proceedings of the AI Commission, (2) the Commission's November 5, 2019 report to Congress and the President, and (3) the Commission's future meetings. Pl.'s Mem. 21–22. Absent prompt disclosure of the requested records, EPIC will be denied the ability to follow and participate in the Commission's proceedings, which are of "vital national importance" and "cannot be restarted or wound back." *Protect Democracy Project v. DOD*, 263 F. Supp. 3d 293, 300 (D.D.C. 2017) (quoting *Elec. Frontier Found. v. Office of Dir. of Nat'l Intelligence*, 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007)).

Nonetheless, the Government insists that EPIC must identify some other, *secondary* "government action"—perhaps by the President or Congress—that "the requested records could affect[.]" Defs. Opp'n 13–14. But the Government cites no authority for this reading of § 552(a)(6)(E)(v)(II). It is true that the AI Commission's recommendations will be highly influential, possibly spurring Congress to enact further legislation or the President to issue another Executive Order concerning AI. *See* Exec. Order No. 13,859, 84 Fed. Reg. 3,967, 3,967 (Feb. 11, 2019). But the Commission is itself part of the federal government, NDAA § 1051(a), and its activities—particularly the Commission's November 5 report to Congress and the President—are of urgent interest to the public. Thus, EPIC is entitled to expedited processing of its FOIA Requests.

D. EPIC has diligently pursued disclosure of the requested records, which the Government has unlawfully delayed.

The Government's claim that EPIC "repeatedly and unnecessarily delayed in seeking information" is absurd and false. Defs.' Opp'n 14. The record establishes that EPIC has diligently pursued information about the Commission, beginning in February 2019—just two weeks after the full membership of the Commission was known[3] and more than a month before the Commission held its inaugural meeting. The record also establishes that EPIC resorted the instant motion only after it had exhausted every other avenue of relief.

On February 7, 2019, EPIC sent a petition to Commission Chairman Eric Schmidt, Vice Chairman Robert O. Work, and every member of the Commission for whom EPIC could identify a current email address (there being no published contact information for the AI Commission at the time). Pl.'s Mem. Ex. A. EPIC urged the Commission to conduct an "open and inclusive process" and to "ensure a public and transparent process for policy." *Id.* at 1. EPIC received no substantive response from the Commission or its members.

On February 22, 2019—still two weeks out from the AI Commission's first meeting—EPIC sent a FOIA Request to the DOD seeking the expedited release of records concerning the Commission. Pl.'s Mem. Ex. B. At that point, the DOD was the only federal agency to even acknowledge the Commission's existence. *See* Memorandum from Michele Bail, Dir., Program & Fin. Control, Dep't of Def., to Asst. Sec. of the Army, Fin. Mgmt. & Comptroller, et al. (Dec. 26,

[3] To EPIC's knowledge, the first public report of the Commission's full membership was a January 22, 2019 *Nextgov* article. Jack Corrigan, *Former Google Chief to Chair Government Artificial Intelligence Advisory Group*, Nextgov (Jan. 22, 2019), https://www.nextgov.com/emerging-tech/2019/01/former-google-chief-chair-government-artificial-intelligence-advisory-group/154333/. Neither the AI Commission nor the DOD officially disclosed Commission's roster until the Commission launched a website in late July 2019.

2018).[4] The DOD refused to process EPIC's FOIA Request on an expedited basis, Pl.'s Mem. Ex. C, a determination which EPIC timely appealed, Pl.'s Mem. Ex. E. The DOD also failed to render a determination on EPIC's appeal. Compl. ¶ 107.[5]

Throughout the spring and summer of 2019, EPIC continued to monitor the work of the AI Commission as best as it could, given the Commission's refusal to open its meetings to the public and the DOD's failure to process EPIC's original FOIA Request. EPIC repeatedly called the public's attention to the Commission's closed-door proceedings and urged the Commission to operate transparently. *See* EPIC, *US AI Commission Holds Secret Meeting on National AI Policy* (Mar. 15, 2019);[6] *US AI Commission Continues Secret Meetings* (July 15, 2019);[7] EPIC, *Secret AI Policy Meetings Continue* (Sep. 19, 2019).[8] Yet the Commission did not even launch a public website until late July—*after* the Commission had finalized its initial report. *See* Pl.'s Mem. Ex. H.

On September 11, 2019—within a few weeks of the AI Commission first publishing official contact information, and despite the Commission's complete lack of FOIA regulations—EPIC sent a FOIA Request to the Commission seeking the expedited release of records. Ex. I. To date, the Commission has failed to release any records responsive to EPIC's FOIA Request.

On September 24, 2019, EPIC learned that the AI Commission plans to submit its interim report to Congress and the President on November 5, 2019, less than a month from today. *See* Ex.

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[4] https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/letter/19-05_LTR_DoD_Directed_Transfer_Commission_Artificial_Intelligence.pdf.
[5] The Government has filed as an exhibit a letter which allegedly reflects the DOD's determination on EPIC's expedited processing appeal. Defs.' Opp'n Ex. A. EPIC did not receive such a letter from the DOD.
[6] https://epic.org/2019/03/us-ai-commission-holds-secret-.html.
[7] http://epic.org/2019/07/us-ai-commission-continues-sec.html.
[8] https://epic.org/2019/09/secret-ai-policy-meetings-cont.html.

K. Having exhausted every available means of obtaining information about the Commission, EPIC filed the instant suit and Motion on September 27, 2019. *See* Compl.; Pl's Mot. for Prelim. Inj.

In sum, the record demonstrates that EPIC has made repeated efforts to obtain access to Commission meetings and documents for eight months—longer than the Commission has been fully operational. *See* Ex. H at 1 ("The Commissioners met and began to work in earnest in March 2019."). EPIC sought the extraordinary remedy of a preliminary injunction only when it became clear that the Government would not voluntarily disclose records in a timely fashion, thereby preventing EPIC from following and participating in the Commission's proceedings (including the drafting of the November 5 report). The Government's suggestion that EPIC unduly delayed its Motion is thus baseless.

II. EPIC WILL SUFFER IRREPARABLE HARM IF RELIEF IS NOT GRANTED.

The Government's unlawful refusal to timely disclose records about the AI Commission's ongoing activities and forthcoming report works precisely the type of irreparable harm that—time and again—courts have found sufficient for an injunction requiring expedited processing. *E.g.*, *EPIC v. DOJ*, 416 F. Supp. 2d 30, 40–41 (D.D.C. 2006); *Protect Democracy Project*, 263 F. Supp. 3d at 300–01; *Wash. Post v. DHS*, 459 F. Supp. 2d 61 (D.D.C. 2006); *Aguilera v. FBI*, 941 F. Supp. 144, 151 (D.D.C. 1996). The Government's arguments to the contrary all fail.

First, as noted above, EPIC does indeed satisfy the "compelling need"/"urgency" standard for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II). The Government's irreparable harm arguments on this point are thus irrelevant. *See* Defs.' Opp'n 7–8.

Second, EPIC will suffer irreparable harm absent expedited processing of its FOIA Requests. Without prompt disclosure of the requested records, EPIC will be unable to attend or participate in the ongoing proceedings of the AI Commission; unable to provide expert input on

proposals before the Commission; and unable to fully understand how the Commission arrived at its recommendations—interests that are all protected by section 10 of the FACA. Moreover, this harm will become more acute as the date moves closer to November 5, when it will be too late to give useful input on the Commission's interim report to Congress.

The Government attempts to shift focus away from the work of the AI Commission, suggesting that EPIC must demonstrate some irreparable harm pertaining to future decisions of the President or Congress. Defs. Opp'n 8. But EPIC's harm arises from being denied information about *the Commission's proceedings*, not the actions of subsequent decisionmakers. And unlike *Landmark Legal Foundation v. EPA*, 910 F. Supp. 2d 270 (D.D.C. 2012), a delay in the production of the requested records will not simply deprive EPIC of a small increment of useful information. Here, delay will completely prevent meaningful participation in the Commission's proceedings. EPIC cannot turn back time to attend meetings for which no notice was published; EPIC cannot participate in a debate about which it has no information; and EPIC cannot give worthwhile feedback on a report that has already been finalized. Yet these are the near-certain consequences of failing to expeditiously process EPIC's FOIA Requests.

Third, the Government argues that EPIC's FOIA Requests are too broad to support the injunction EPIC seeks. Defs.' Opp'n 8–9. As noted, EPIC has requested little more than what the AI Commission was already obligated to disclose over the past six months. 5 U.S.C. app. 2 § 10(b). And again, EPIC welcomes suggestions from the Government as to which records are most relevant to the AI Commission's ongoing proceedings and imminent report (and should therefore be released first). But it will be impossible to know which records to prioritize until the AI Commission and DOD identify the records responsive to EPIC's FOIA Requests. The court should not allow the AI Commission and DOD to further delay processing of EPIC's FOIA

Requests based on an information asymmetry that the agencies themselves have unlawfully created.

Finally, the Government is mistaken in believing that FOIA Exemption 5 will cover most records related to the Commission's formulation of its report. The application of Exemption 5 to advisory committees is "narrowly limited," 41 C.F.R. § Pt. 102-3, Subpt. D, App. A, as the FACA expressly requires the disclosure of "drafts" and "working papers." 5 U.S.C. app. 2 § 10(b). Thus, EPIC will still suffer significant and irreparable harm absent a preliminary injunction.

III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR RELIEF.

Against the powerful equitable interests that EPIC has identified, Pl.'s Mem. 27–28, the Government makes only two arguments. Neither withstands scrutiny.

First, the Government claims that EPIC does "not require records from the Commission to engage in a public debate on the topic" of AI policy. Def.'s Opp'n 15. This is true as far as it goes—EPIC is a longtime leader in the public debate over AI policy—but it is beside the point. EPIC has a strong interest in records *specific to the AI Commission*. EPIC and the public have been kept almost entirely in the dark about the proceedings of a highly influential government committee, one that is just weeks away from issuing a major report to Congress and the President. Absent the records that EPIC has requested, the public will have little idea about the basis of the Commission's recommendations; who spoke with the Commission; what evidence was gathered; how the Commission arrived at its findings; which recommendations were proposed and rejected; how the Commission's November report relates to future work of the Commission; and whether there may be conflicts of interest between the Commission's activities and the business interests of individual Commissioners. *See, e.g.*, *Rebellion* (2019) (listing AI Commission Chairman Eric Schmidt as a "Board Member" of Rebellion Defense, Inc., a company which "builds products

using artificial intelligence and machine learning that serve the mission of national defense for the United States").[9]

It is impossible to have a fully informed public debate about the AI Commission without access to these details, even once the Commission's subsequent reports are made public. Moreover, the public cannot exercise its right to timely participate in the proceedings of the AI Commission if it is only brought into the loop when the Commission's reports are already finalized. 5 U.S.C. app. 2 § 10(a)(3); *see also* 5 U.S.C. app. 2 § 2(b)(5) (finding that "the Congress and the public should be kept informed with respect to the number, purpose, membership, *activities*, and cost of advisory committees" (emphasis added)). Thus, EPIC and the public both have a strong equitable interest in the prompt disclosure of the requested records.

Second, the Government surprisingly claims EPIC has not established that its FOIA Requests are more important than "other pending requests." Defs.' Mem. 16. This argument strains credulity as applied to the AI Commission, which lists no contact information for FOIA requesters; has promulgated no FOIA regulations; and now claims that it is not even subject to the FOIA. Defs.' Mem. 9–11. It is highly unlikely that expedited treatment of EPIC's request will materially disadvantage other FOIA requesters seeking records from the Commission, if indeed there are any. The Commission cannot claim it is overwhelmed by FOIA requests while simultaneously arguing it is exempt from the FOIA.

Regardless, as EPIC has noted, the expedited processing system envisions that some requests will be prioritized over others. EPIC has demonstrated a "compelling need" for the requested information by showing an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). Contra the Government, EPIC has

[9] https://rebelliondefense.com/.

identified multiple time-sensitive "Federal Government activit[ies]" to which the requested records pertain. *See* § I.C, *supra.* Ordering expedition of EPIC's FOIA Requests would simply advance the Congressional intent behind the FOIA's expedited processing provisions. *See EPIC v. DOJ*, 416 F. Supp. 2d at 39. Thus, the balance of the equities and the public interest favor the injunction EPIC seeks.

CONCLUSION

For the above reasons, and for the reasons set forth in EPIC's Motion and Memorandum, the Court should grant EPIC's Motion for a Preliminary Injunction; order the AI Commission and the DOD to process EPIC's FOIA Requests on an expedited basis; and order both agencies to make immediate determinations on each of EPIC's requests.

Respectfully Submitted,

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