IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER	)	
	)	Case No. 19-cv-02906-TNM
Plaintiff,	)	
	)	Judge Trevor N. McFadden
v.	)	
NATIONAL SECURITY COMMISSION ON ARTIFICIAL INTELLIGENCE, *et al.*	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") has moved for a preliminary injunction requiring Defendants National Security Commission on Artificial Intelligence ("AI Commission" or "Commission") and U.S. Department of Defense ("DoD") (collectively, "Defendants") to grant expedited processing on EPIC's Freedom of Information Act ("FOIA") requests. EPIC is not entitled to this extraordinary relief because it cannot make the requisite showing as to any of the four factors for awarding a preliminary injunction. The Court should therefore deny the Motion.

STATUTORY BACKGROUND

Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis. *See, e.g.*, 32 C.F.R. § 286.8(a) (DoD regulation making first-in, first-out the default rule). *See also Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976). In 1996, Congress amended FOIA to provide for "expedited processing" of certain categories of requests. *See* Electronic Freedom of Information Amendments of 1996 ("EFOIA"), Pub. L. 104-231, § 8, 110 Stat. 3048 (*codified as amended at* 5 U.S.C. § 552(a)(6)(E)). Expedition, when granted, entitles requestors to move immediately to the front of an agency processing queue, ahead of requests filed previously by other persons (but still behind any already expedited requests).

As part of EFOIA, Congress directed agencies to promulgate regulations providing for expedited processing of requests for records in the following circumstances: (i) "in cases in which the person requesting the records demonstrates a compelling need," 5 U.S.C. § 552(a)(6)(E)(i)(I); and (ii) "in other cases determined by the agency," *id*. § 552(a)(6)(E)(i)(II). The "other cases determined by the agency" provision (subsection (E)(i)(II)) gives agencies "'latitude to expand the criteria for expedited access' beyond cases of 'compelling need.'" *Al-*

Fayed v. CIA, 254 F.3d 300, 307 n.7 (D.C. Cir. 2001) (quoting Electronic Freedom of Information Amendments of 1996, H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N 3448, 3469, 1996 WL 532690).

In enacting EFOIA, Congress specified that the expedited processing categories should be "'narrowly applied.'" *Al-Fayed*, 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26). As the D.C. Circuit explained in *Al-Fayed*, "Congress' rationale for a narrow application is clear: 'Given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for its treatment.' . . . Indeed, an unduly generous approach would also disadvantage those requestors who do qualify for expedition, because prioritizing all requests would effectively prioritize none." 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26).

When a request for expedited processing is filed, the agency must determine whether to grant the request, and give notice of the determination, within ten days of the request. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I). An agency's failure to respond will constitute constructive exhaustion of the requestor's administrative remedies as to that request. *See Judicial Watch, Inc. v. U.S. Naval Observatory*, 160 F. Supp. 2d 111, 113 (D.D.C. 2001).

FACTUAL BACKGROUND

The mission of the AI Commission is "to review advances in artificial intelligence, related machine learning developments, and associated technologies." Fiscal Year 2019 John S. McCain National Defense Authorization Act ("McCain Act"), Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962-65 (2018). The Commission is comprised of fifteen members appointed by various officials within the Executive Branch and Congress. *Id.* § 1051(a)(4)(A). The Commission's only responsibilities are to conduct its statutorily-defined review and submit

reports to the President and Congress.[1] *Id.* § 1051(c). The Commission is "a temporary organization under" 5 U.S.C. § 3161 with a scheduled termination date of October 1, 2020. McCain Act §§ 1051(a)(2), (e). Although the Commission's funds were authorized from a DoD appropriation, it is "an independent Commission" within the Executive Branch. *Id.* §§ 1051(a)(2), (d).

On February 22, 2019, EPIC submitted a FOIA request to DoD requesting documents about the creation of the AI Commission and its work. Complaint for Injunctive, Mandamus, and Declaratory Relief ("Complaint"), ECF No. 1, ¶¶ 99-100. Specifically, EPIC requested "[a]ll records concerning the creation of the . . . Commission" or "arising from or related to the" Commission as well as "the 'initial report on the findings and recommendations' of the . . . Commission." Mot., Ex. B at 1. EPIC also asked for expedited processing of its request, asserting in relevant part that:

> It is "urgen[t] to inform the public" about the activities of the AI Commission because the AI Commission's initial report on its findings and recommendations was due on February 9, 2019. The report must be made publicly available, yet there is no indication that the report has been published or even submitted to the President and the Congress. Moreover, the AI Commission is led by technologists, executives of major technology firms, and former federal officials, and the Commission is operating at a time when the White House has launched the "American AI Initiative." The AI Commission's findings, recommendations, and proceedings will therefore have significant influence on AI policymaking by both Congress and the executive branch. The public urgently needs to be informed of the activities of the AI Commission.

Id. at 4.

DoD sent EPIC a letter six days later acknowledging receipt of the request. *Id.* ¶ 104. In that letter, DoD denied EPIC's request for expedited processing, explaining that EPIC had not

[1] The AI Commission was also responsible for submitting an initial report to the President and Congress, but that responsibility has now been fulfilled. McCain Act § 1051(c); Complaint for Injunctive, Mandamus, and Declaratory Relief, ECF No. 1, ¶ 75.

demonstrated in its request that the information sought "has a particular value that will be lost if not disseminated quickly." Mot., Ex. C at 1. EPIC administratively appealed the denial, and DoD affirmed its initial decision on May 29, 2019. Defs.' Ex. A (Appeal Letter). DoD is currently processing Plaintiff's request on a non-expedited basis.

EPIC emailed a FOIA request to the AI Commission on September 11, 2019. *Id.* ¶ 88. The request sought all "documents which were made available to or prepared for or by the National Security Commission on Artificial Intelligence or any subcomponent thereof." Mot., Ex. I at 1. EPIC requested expedited processing for this request, justifying its claim of urgent need by asserting:

> [T]he Commission has disclosed extremely scant information about its proceedings—even as the Commission continues to issue reports, formulate recommendations, hold meetings, and receive briefings. Indeed, although the Commission claims that it will issue its first comprehensive report in just over two months, it has failed to release a single page of meeting minutes, agendas, or materials to date. It is urgent that the requested information be released to the public before the Commission's next scheduled meeting and the issuance of its first comprehensive report. Moreover, the AI Commission—comprised of prominent technologists, executives of major technology firms, and former federal officials—is operating during the "American AI Initiative," the White House's artificial intelligence policy project. The Commission's findings and recommendations, which must by law be delivered to the President and Congress, will have significant influence on the White House's initiative and on AI policy generally. Thus, the public urgently needs to be informed of the activities of the AI Commission.

Id. at 8-9. The Commission acknowledged receipt of the request the following day but had not yet made a determination about the request for expedited review when EPIC filed its Complaint. *Id.* ¶¶ 94, 96.

On September 27, 2019, EPIC sued the AI Commission, its Chairman and Executive Director (in their official capacities only), and DoD. *Id.* at 1, ¶¶ 18-21. EPIC filed the instant motion for preliminary injunction at the same time. Mot. at 1. Although the Complaint alleges

claims under multiple statutes, EPIC bases its motion solely on Defendants' failure to grant EPIC expedited review.[2] *Compare* Compl. ¶¶ 112-163 *with* Mot. at 2.

STANDARD OF REVIEW

Preliminary injunctive relief "is 'an extraordinary remedy never awarded as of right.'" *Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 17-0136, 2017 WL 499882, *3 (D.D.C. Feb. 7, 2017) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, (2008)); *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) ("A preliminary injunction is an extraordinary and drastic remedy") (citation omitted)). It "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). That burden is even higher when the moving party asks for affirmative, rather than prohibitory, relief because such a request alters the status quo. *See Singh v. Carter*, 185 F. Supp. 3d 11, 17 (D.D.C. 2016) (collecting cases).

ARGUMENT

EPIC has not met its burden to show that it is entitled to a preliminary injunction. Before a court will award a preliminary injunction, the moving party must establish (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving)

[2] The Motion could be read to imply that DoD's failure to make a timely determination regarding on EPIC's administrative is a separate, freestanding claim. *See* Mot. at 20. However, an agency's failure to respond to an administrative appeal under FOIA within the time provided by the statute is not a freestanding claim to relief. *Long v. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) ("Defendant's failure to comply with the relevant statutory deadlines does not establish plaintiffs' right to expedited processing."). Rather, it functions as constructive exhaustion of administrative remedies, permitting the FOIA requestor to seek judicial review. *See Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 189 (D.C. Cir. 2013). Defendants do not contest EPIC's right to bring the instant lawsuit or Motion, only their merits.

parties; and (4) that the public interest would be furthered by the injunction.[3] *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). The final two "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

EPIC's burden of persuasion is even higher here because it is asking the Court for mandatory preliminary relief that is identical to the final remedy EPIC seeks. The traditional purpose of a preliminary injunction is to "preserve the status quo" so that the court can issue a meaningful decision on the merits. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (citation omitted). Therefore, when, as here, a movant seeks mandatory injunctive relief, *i.e.*, an injunction that "would alter, rather than preserve, the status quo by commanding some positive act—the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014) (citations omitted).

An order compelling accelerated processing of a FOIA request would not merely preserve the status quo but would force specific action by Defendants. Moreover, "a preliminary injunction should not work to give a party essentially the full relief he seeks on the merits." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (per curiam). *See also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the

[3] Although the D.C. Circuit has not yet definitively decided whether *Winter* abrogates the "sliding scale" approach for assessing these four factors previously applied in this Circuit, "[s]everal judges" on the Circuit have "read *Winter* at least to suggest, if not to hold, 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *See Allied Progress v. Consumer Fin. Prot. Bureau*, No. CV 17-686 (CKK), 2017 WL 1750263, at *2 (D.D.C. May 4, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011)). This Circuit has also emphasized that a showing of irreparable harm is an "independent prerequisite" for a preliminary injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

preliminary injunction stage to give a final judgment on the merits."). EPIC has requested as preliminary relief, however, precisely what it seeks as its ultimate remedy—an injunction requiring Defendants to "immediately process and issue a determination on EPIC's FOIA Requests." Mot. at 2. EPIC has therefore taken on an even greater burden than a movant seeking a preliminary injunction that preserves the status quo pending the litigation's final outcome.

EPIC has failed to establish as of the four factors. Indeed, each one weighs heavily in Defendants' favor.

I. Plaintiff Has Not Shown that It Would Suffer Irreparable Harm Without a Preliminary Injunction.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp.*, 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974), internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (internal quotation marks and citation omitted). The party seeking injunctive relief must show that its injury is "both certain and great," and that it is "actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). "The key word in this consideration is *irreparable*. . . . The possibility that adequate . . . corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* (quoting *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925).

Initially, as discussed in the likelihood of success section below, EPIC cannot meet its burden to establish an urgent need for the requested records. *See* § II, *infra.* As this Court held in *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006) (Friedman, J.), "[i]t is hard to see how plaintiffs would be irreparably harmed once it has been found that their request fails the 'compelling need'-'urgency' test of the statute." *Id.* at 44. *See also Sai v.*

Transp. Sec. Admin., 54 F. Supp. 3d 5, 11 n.6 (D.D.C. 2014). Thus, if the Court finds that EPIC cannot meet the likelihood of success prong, it should also find that EPIC has failed to demonstrate irreparable harm.

Regardless, of the likelihood of success prong, EPIC has failed to demonstrate irreparable harm, which is an independent basis for denying its Motion. There are two reasons that EPIC will not suffer irreparable harm from the denial of the requested records.

First, even if there were some prejudice to EPIC from a delay in processing, it would not be sufficient to constitute irreparable harm. *Landmark Legal Foundation v. EPA*, 910 F. Supp. 2d 270 (D.D.C. 2012), is very instructive on this point. There, the plaintiff sought a preliminary injunction for expedited review of its request for records related to a possible forthcoming regulation. *Id.* at 272-274. The court in *Landmark* found no irreparable harm because, *inter alia*, the records were not necessary for the plaintiff to comment on or challenge that rule even if "its comments [would] not include information it might receive from the FOIA request." *Id.* at 278. Similarly, if the President or Congress chooses to enact new measures in the area of artificial intelligence based on the AI Commission's reports, EPIC would not need the requested documents to lobby for or against those measures, enter comments into the record under consideration, or bring legal actions challenging any measures they believe to be unlawful.

Second, EPIC will not benefit substantially from expedited processing because its requests are poorly designed to yield responsive, relevant documents. Initially, only a small proportion of the records requested would bear a modicum of relevance to the merits of the AI Commission's work because the FOIA requests are hugely overbroad. EPIC's requests to Defendants include all DoD "records . . . arising from or related to the" AI Commission, Mot., Ex. B at 1, and all AI Commission "records . . . which were made available to or prepared for or

by the" Commission, *id.*, Ex. I at 1. There are literally no records relating to, or possessed by, the Commission that would not be covered by these requests. The lack of irrelevant records does not harm EPIC, and that is most of what their requests seek. In addition, because the Commission is still reviewing information and formulating its report, responsive documents that are relevant are likely to be protected pursuant to FOIA Exemption 5 under the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-50 (1975); *Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 802 F. Supp. 2d 185, 198 (D.D.C. 2011). Thus, a preliminary injunction requiring expedited review would be unlikely to result in disclosure of the records EPIC seeks, further undercutting its argument that an injunction is needed to avoid irreparable harm. *See Landmark Legal Found.*, 910 F. Supp. 2d at 278 (finding that the likely application of FOIA exemptions supported a finding of no irreparable harm).

II. EPIC Is Unlikely to Prevail on the Merits of Its Claims.

EPIC also cannot show that it has a likelihood of success on the merits. As a threshold matter, it cannot succeed on its FOIA claim against the AI Commission because the Commission is not subject to FOIA. Moreover, EPIC cannot succeed against either Defendant because it has not established unusual urgency to its FOIA requests that would justify expediting them.

A. The AI Commission is Not an Agency Subject to FOIA.

FOIA by its terms applies only to "agenc[ies]." 5 U.S.C. § 552(a). Accordingly, any claim arising from an alleged failure to comply with FOIA brought against a government entity that is not an "agency" should be dismissed. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222, 225 (D.C. Cir. 2009); *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995) (per curiam). "[T]he touchstone of agency status is the exercise of 'substantial independent authority.'" *Flaherty v. Ross*, 373 F. Supp. 3d 97, 106 (D.D.C. 2019) (reviewing and discussing D.C. Circuit precedent). *See also Wash. Research Project, Inc. v.*

Dep't of Health, Ed. & Welfare, 504 F.2d 238, 248 (D.C. Cir. 1974).

Here, the AI Commission does not wield the kind of independent authority needed to be an agency under FOIA. A government entity can exercise some powers short of "substantial authority" and not qualify as an agency. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 882 (D.C. Cir. 1997). The Commission, however, is paradigmatically a non-agency because it "issues no orders and performs no regulatory functions" and "does not make binding rules of general application or determine rights and duties through adjudication." *Id.* Again, the Commission is empowered only to issue reports on a statutorily defined topic. McCain Act § 1051(b). As such, it cannot be an agency and is not subject to FOIA.

Indeed, advisory entities like the Commission are regularly held not to be agencies under FOIA.[4] For example, when EPIC sought a preliminary injunction to enforce FOIA requests it submitted to the Presidential Advisory Commission on Electronic Integrity, Judge Kollar-Kotelly of this Court found that EPIC was unlikely to succeed because it could not show that the commission was an agency subject to FOIA. *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019). In reaching this holding, she emphasized that the commission was "purely advisory in nature," lacked any "independent authority," and would "disband shortly after it deliver[ed] a report to the President." *Id.* at 315. The AI Commission is likewise only advisory in nature, possesses no authority to act on its own, and will disband after it issues its reports. *See* McCain Act § 1051. *Presidential Advisory Commission on Election*

[4] *See, e.g., Armstrong v. Nat'l Sec. Council*, 90 F.3d 552 (D.C. Cir. 1996); Meyer *v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) (Task Force on Regulatory Relief); Rushforth *v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985) (Council of Economic Advisors); *Wash. Research Project*, 504 F.2d 238 (initial health review groups); *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.D.C. 1975) (Over-the-Counter Antacid Panel).

Integrity is therefore on all fours with the instant case and supports holding that the Commission is not subject to FOIA.

Because EPIC cannot show that the AI Commission is an agency subject to FOIA, it cannot demonstrate that it is likely to succeed on the merits of its FOIA claims against the Commission. *See Citizens for Responsibility & Ethics in Wash.*, 566 F.3d at 222, 225; *Sweetland*, 60 F.3d at 855. This alone requires denying EPIC's Motion as to the Commission.

B. There is No Urgent Public Need for AI Commission Records.

Additionally, Plaintiff has no likelihood of succeeding in showing that it has met the "compelling need" standard for expedition of FOIA requests. 5 U.S.C. § 552(a)(6)(E)(i)(I). *See also* 32 C.F.R. § 286.8(e) (DoD regulation incorporating statutory standard for expedited processing). To show a compelling need, a requestor must demonstrate that it is "primarily engaged in disseminating information" and that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(v)(ii). Here, EPIC cannot meet its burden to show an urgent need to inform the public about the information it has requested from the AI Commission and DoD.

Review of an agency's decision that a request poses no "urgency to inform" is *de novo*, but the factors are to be narrowly applied. *Al–Fayed v. CIA*, 254 F.3d 300, 310-11 (D.C. Cir. 2001). "In determining whether requesters have demonstrated 'urgency to inform,' and hence 'compelling need,' courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Id.* at 310. "The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard." *Id.* (quoting H.R. Rep. No. 104-795, at 26 (1996)).

1. *The Overbreadth of EPIC's FOIA Requests Precludes a Finding of Urgency.*

As discussed above, the FOIA requests are so broad that records relevant to EPIC's stated interests in this case would likely be substantially outnumbered by the minutiae captured by EPIC's requests as-written. *See* § I, *supra*. *See also* Mot., Ex. B at 4; *Id.*, Ex. I at 8-9. "The case law makes it clear that only public interest in the specific subject of a FOIA request is sufficient to weigh in favor of expedited treatment." *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) (emphasis added). EPIC's requests would encompass everything from information about the AI Commission's formation—which by definition occurred before it began reviewing information or preparing reports—to expense and travel reports that bear no discernable relation to the Commission's statutory responsibilities. EPIC's requests also undercut its purported interests in the Commission's work because their breadth only creates delays in processing the small percentage of relevant documents captured by their requests. Thus, EPIC has not met its burden to demonstrate an urgent need for the requests it made and is unlikely to succeed on the merits of its FOIA claim.

2. *There Is No Urgent Need for Records Relating to the Commission's Reports Because the Timing of Any Release of the Records Will Not Affect Any Forthcoming Government Action.*

Even if EPIC requested only records reasonably related to the AI Commission's review and reports, its stated rationale for being entitled to expedited review would not establish an urgent need for disclosure of those records. EPIC claims that there is an urgent need because "the AI Commission's findings, recommendations, and proceedings will . . . have significant influence on AI policymaking by both Congress and the executive branch." Mot., Ex. B at 1, 4. *See also id.*, Ex. I at 8-9. This claim is insufficient to establish urgency for two reasons.

Initially, there is no urgent need to release records concerning the AI Commission because Congress did not include a right for the public to participate in the Commission's work.[5] *See generally* McCain Act § 1051 (providing no role for the public). Instead, Congress created a temporary entity with the limited functions of conducting a review and submitting reports to Congress and the President. *Id.* §§ 1051(a)(2), (c). To establish urgency, a plaintiff must show the requested records could affect a specific, time-sensitive government action. *See Landmark Legal Found.*, 910 F. Supp. 2d at 277; *Long*, 436 F. Supp. 2d at 43. The public does not have a role to play in the Commission's reporting, so the Commission's report will be unaffected by the timing of Defendants' release of any responsive records. As a result, EPIC's requests do not "concern[] a matter of current exigency to the American public" and "delaying a response would [not] compromise a significant recognized interest." *Al–Fayed*, 254 F.3d at 310. Rather, EPIC is just asserting a generalized right to know about government action, which has been held to be insufficient to meet its burden. *See id.*

Further, the absence of any direct impact from the AI Commission's reports contradicts EPIC's claim that there is an urgent need for records about the Commission's work to date. The Commission's only statutory duty is to submit reports of findings and recommendations to the President and Congress. *See* McCain Act §§ 1051(c)(1), (c)(2). Although EPIC makes the vague claim that an upcoming Commission report "will have significant influence on the White House's [American AI] [I]nitiative and on AI policy generally," it cannot point to any specific future government action that creates urgency. Mot., Ex. I at 9. In fact, the absence of such an action weighs heavily against a finding of urgency. *See Leadership Conf. on Civil Rights v.*

[5] The AI Commission is soliciting outside input, including from EPIC, but that invitation does not create an entitlement for the public to review other outside entities' input or the Commission's evaluations of them. *See e.g.*, Compl. ¶¶ 38, 86.

Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005). Neither the President nor Congress has an obligation to take any action upon receiving the reports, and EPIC has not identified a timeline for potential action by either. *See* Mot., Ex. B at 4; *id.*, Ex. I at 8-10. Indeed, EPIC's "fail[ure] to identify an imminent action indicating that the requested information will 'not retain its value if procured through the normal FOIA channels'" is a clear indication that it cannot meet the urgent need standard. *Long*, 436 F. Supp. 2d at 43 (citation omitted). EPIC's urgency claim fails for this reason as well.

3. *EPIC's Delays in Pursuing the Requested Records Belie Its Claims of Urgency.*

Despite EPIC's rhetoric, its actions reveal that there is no urgent need to release the records it seeks. "Courts have found that '[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm." *Open Top Sightseeing USA v. Mr. Sightseeing, LLP*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (citation omitted) (alteration in original) (discussing preliminary injunctions outside the FOIA context). *See also Sai*, 54 F. Supp. 3d at 11 n.6 (discussing the relationship between the urgent need standard in FOIA expedition cases and the irreparable harm standard for preliminary injunctions); *Long*, 436 F. Supp. 2d at 44 (same).

Here, EPIC has repeatedly and unnecessarily delayed in seeking information, refuting its current assertion that its FOIA requests should be given priority over those filed beforehand. The AI Commission "was formally established in August 2018," "[t]he Commission's members were appointed in October and November 2018." *FAQ*, Nat'l Sec. Comm'n on Artificial Intelligence, https://www.nscai.gov/about/faq (last visited Oct. 7, 2019). EPIC waited until February 2019 to submit its FOIA request to DoD requesting documents about the Commission's formation, Mot., Ex. B at 1. When DoD denied EPIC's request for expedited processing and

appeal, EPIC waited more than four months to bring this lawsuit challenging that denial. *See* Compl. ¶¶ 108-109. By the time it did so, some of EPIC's requests were already moot.[6] Even more tellingly, Plaintiff waited roughly a year after the Commission's creation to request records concerning its work. Compl. ¶ 88. In light of its delays, EPIC's claims to urgency now ring hollow.

III. The Balance of Equities and the Public Interest Weigh Against Granting the Preliminary Injunction

In considering a motion for a preliminary injunction, the Court must consider whether the injunction would be in the public interest or harm nonlitigants. *See Al-Fayed*, 254 F.3d at 303. To make the necessary showing on this prong of the preliminary injunction standard, a plaintiff seeking expedited review must show that there is a public interest giving the plaintiff's FOIA request priority over already-pending requests, not just that there is a public interest in disclosure generally. *See Wadelton v. Dep't of State*, 941 F. Supp. 2d 120, 124 (D.D.C. 2013). A request for preferential treatment, without more, is contrary to the public interest because it disrupts the ordinary operation of government. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d at 47; *The Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992).

EPIC once again fails to make the requisite showing. EPIC argues that expediting its requests would further the public interest because the information requested is needed to have a public debate about artificial intelligence policy and the AI Commission's work. Mot. at 28-29. However, as mentioned, EPIC does not require records from the Commission to engage in a public

[6] EPIC specifically requested the AI Commission's initial report in its FOIA request to DoD. Mot., Ex. B at 1. The Commission released the report on July 31, 2019, three months before EPIC filed this lawsuit. Compl. ¶ 75. EPIC's claim for expedited processing of this portion of its request should therefore be denied as moot in addition to the other reasons it fails. *See Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 5 n.2 (D.D.C. 2015).

debate on the topic. Indeed, the Commission's reports to the President and Congress are also made available to the public. McCain Act § 1051(c). Also, EPIC it provides no justification for why its requests are more time-sensitive or important than any other pending requests, which presumably also further public understanding of ongoing government actions. Such a justification would be hard, given the lack of any timeframe for a specific government action relating to EPIC's request. *See* § I.B.2, *supra.* Because EPIC has failed to distinguish its need for review from the countless others who filed first, the public interest and balance of the equities also weigh against a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should deny EPIC's Motion.

Dated: October 9, 2019

Respectfully submitted,

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DEFENDANTS' EXHIBIT A

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OVERSIGHT AND COMPLIANCE

MAY 29 2019

Ref: 19-A-0810-A1
FOID 19-F-0810

Mr. Enid Zhou
EPIC Open Government Counsel
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009

Dear Mr. Zhou:

This responds to your April 30, 2019 Freedom of Information Act (FOIA) appeal. You appealed the decision to deny EPIC.org's (EPIC) request for expedited processing of its February 22, 2019 FOIA request.

I reviewed the appeal at the appellate level and determined that the request for expedited processing should continue to be denied. EPIC sought expedited processing on the basis of compelling need. 32 Code of Federal Regulations §286.8(e)(i)(B), states that compelling need means that "the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity." In order to determine "compelling need," the DoD has a three-pronged test to decide whether or not the information is "urgently needed." The three prongs of the test which is as follows:

1. Whether the request concerns a matter of current exigency to the American public.
2. Whether the consequences of delaying a response would compromise a significant recognized interest.
3. Whether the request concerns actual or alleged federal government activity.

I have concluded that the initial request does not meet the first and second prongs of the test. Since EPIC has not demonstrated a compelling need for the information, FOID will continue to process the request in its standard queue.

You have the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Joo Y. Chung
Director

cc:
FOID