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.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOIA CLAIMS

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("Plaintiff" or "EPIC") has filed a Complaint for Injunctive, Mandamus, and Declaratory Relief ("Complaint"), ECF No. 1, asserting, *inter alia*, claims under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against Defendants National Security Commission on Artificial Intelligence ("AI Commission" or "Commission") and the United States Department of Defense ("DoD") (collectively, "Defendants"). In relevant part, Plaintiff alleges that (1) the AI Commission wrongfully failed to issue a determination on Plaintiff's FOIA request or its request for expedited processing within the statutorily prescribed period, Compl. ¶¶ 147-48, 154, and (2) DoD should have granted its request for expedited review on the FOIA requests Plaintiff sent to that agency, *id.* ¶ 155. However, Plaintiff's claims fail because the Commission is not an agency subject to FOIA and Plaintiff has not established its right to expedited processing for either its request to the Commission or its requests to DoD.

BACKGROUND ON THE AI COMMISSION

Congress created the AI Commission as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("McCain Act"), Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962-65 (2018), "to review advances in artificial intelligence, related machine learning developments, and associated technologies." *Id.* § 1051(a)(1). The Commission's only responsibilities are to review statutorily assigned topics relating to the intersection of artificial intelligence and national security, to make an initial report of its findings, and thereafter to make annual interim reports for the life of the Commission. *Id.* §§ 1051(b), (c). Although the Commission submits its reports directly to Congress and the President, the reports must be made publicly available (other than any annexes containing classified information). *Id.* § 1051(c)(1)(3). By statute, the Commission will terminate on October 1, 2020. *Id.* § 1051(e).

The AI Commission is comprised of fifteen members, who serve for the life of the commission. *Id.* §§ 1051(a)(4)(A), (6). Twelve of Commission's members were appointed by members of Congress. *Id.* §§ 1051(a)(4)(A)(iii) – (A)(xiv). The Secretary of Defense appointed two members, and the Secretary of Commerce appointed one. *Id.* §§ 1051(a)(4)(A)(i), (A)(ii). The members of the Commission then selected a Chair and Vice Chair. *Id.* § 1051(A)(5). In the event there are any vacancies, the individual that appointed the original member of the Commission appoints his or her replacement. *Id.* § 1051(a)(6).

When he signed the McCain Act, President Trump issued a signing statement noting "several provisions that raise constitutional concerns." Statement by President Donald J. Trump on H.R. 5515 (Aug. 13, 2018) (attached as Exhibit 1). In particular, the statement explained that, although "section 1051 [of the Act] purports to establish . . . [the AI C]ommission 'in the executive branch'" the fact that twelve of the fifteen members of the Commission are appointed by Congress "preclude[s] it, under the separation of powers, from being located in the executive branch." *Id.* at 2-3. Thus, the White House "treat[s] the [C]ommission as an independent entity, separate from the executive branch." *Id.* at 3.

In March 2019, the AI Commission entered into a Memorandum of Agreement with DoD whereby DoD would provide administrative support services to the Commission. Exhibit 2 (Memorandum of Agreement), *available at* https://www.nscai.gov/about/about/memorandum-of-agreement (last visited Oct. 30, 2019).[1] The Commission reimburses DoD for certain of these

[1] The Court may consider facts outside the complaint on a motion to dismiss without converting the motion into a motion for summary judgment when the facts are subject to judicial notice. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). Judicial notice of the Memorandum of Agreement is appropriate because it is a publicly available official document. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). *See also Pharm. Research & Mfgs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014).

services (*e.g.*, human resources support) using the $10 million of DoD's annual appropriation that Congress made available to the Commission. *Id.* at ¶¶ 4-6. *See also* McCain Act § 1051(d). DoD is not, however, involved in the Commission's substantive work. *See generally* Ex. 2.

The AI Commission issued its Initial Report on July 31, 2019. Compl. ¶ 75. The Report describes the Commission's internal organization, initial activities, and planned next steps. *Id.*, Ex. H (Initial Report). The Commission intends to issue its first interim report on November 4, 2019, followed the next day by a conference on artificial intelligence and national security, for which the public may register. *Id.* § 86. *See also id.*, Ex. K (conference press release). The release of the interim report will mark a shift from the Commission's initial assessment phase—which is primarily comprised of the results of internal working group meetings—into its analysis phase "focused on consolidating the Commission's findings and refining its final recommendations." *Id.*, Ex. H at 2, 4.

PLAINTIFF'S FOIA REQUEST TO DOD

On February 22, 2019, Plaintiff sent a FOIA request by letter to DoD requesting records related to the AI Commission. Compl., Ex. B at 1. Specifically, Plaintiff sought:

> (1) All records concerning the creation of the National Security Commission on Artificial Intelligence;
>
> (2) All records—including but not limited to reports, agendas, meeting minutes, transcripts, working papers, drafts, studies, and notices of proposed meeting scheduled to be published in the Federal Register—arising from or related to the National Security Commission on Artificial Intelligence; and
>
> (3) The "initial report on the finding and . . . recommendations" of the National Security Commission on Artificial Intelligence, required by section 1051(c)(1) of the National Defense Authorization Act for FY 2019, due on February 9, 2019.

Id.

Plaintiff also requested expedited processing of its request pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II). Compl., Ex. B at 4-5. In justifying its purported need for expedited

processing, Plaintiff claimed that there was an "'urgent need 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" but the report had not yet "been published or even submitted to the President and the Congress." Id. at 4 (alterations omitted) (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). Plaintiff went on to assert that, because "the Commission is operating at a time when the White House has launched the 'American AI Initiative[,]' [t]he AI Commission's findings, recommendations, and proceedings [would] therefore have significant influence on AI policymaking by both Congress and the executive branch." *Id.*

Six days later, on February 28, 2019, DoD sent Plaintiff a letter providing an interim response to its FOIA request. Compl. ¶¶ 104-05. *See also* Ex. 3 (Interim Response).[2] In that letter, DoD informed Plaintiff that the agency had "already begun processing [its] request," but would "not be able to respond within the FOIA's 20-day statutory time period as there [were] unusual circumstances which impact[ed] [DoD's] ability to quickly process [the] request." Ex. 3 at 1. Specifically, the requested records were not held by the DoD division to which Plaintiff sent its request, meaning that DoD was "unable to estimate the volume of records or the number of consultations that [would] be required to make a release determination." *Id.* The DoD went on to deny Plaintiff's request for expedited processing because, based on Plaintiff's stated justification, the agency found that Plaintiff had "not clearly demonstrated how the information [sought would] lose its value if not processed on an expedited basis." *Id.*

[2] The Court may take judicial notice of documents relevant to a plaintiff's showing of exhaustion of administrative remedies, *see Vasser v. McDonald*, 228 F. Supp. 3d 1, 9–10 (D.D.C. 2016), so the Court may consider DoD's responses to plaintiffs' FOIA requests that are not attached to Plaintiff's Complaint.

Plaintiff filed an administrative appeal of DoD's denial of expedited processing on April 30, 2019, in which it "reiterated the grounds for expedition set forth in [its] February 22 FOIA Request." Compl. ¶ 108. DoD denied Plaintiff's administrative appeal on May 29, 2019, finding that its stated basis for urgently needing the records established neither "a matter of current exigency to the American public" nor that "the consequences of delaying a response would compromise a significant recognized interest." Ex. 4 (Final Appellate Response).[3]

Plaintiff filed the instant Complaint approximately four months later, on September 27, 2019. *See* Compl. ¶ 109. DoD had not made a final determination on Plaintiff's underlying request at that time. *Id.* ¶ 107.

PLAINTIFF'S FOIA REQUEST TO THE AI COMMISSION

On September 11, 2019, more than a year after the AI Commission's formal creation, Plaintiff emailed the Commission a FOIA request for "[a]ll records . . . or other documents which were made available to or prepared for or by the . . . Commission . . . or any subcomponent thereof." *Id.*, Ex. I at 1. Plaintiff also sought expedited processing, arguing that there was an urgent need for the requested records because "the Commission ha[d] disclosed extremely scant information about its proceedings" while preparing its first interim report and that the public needed the records "before the Commission's next scheduled meeting and the issuance of that report. *Id.* at 8-9. Plaintiff also went on to reiterate its justification for expedition from the DOD request, that the Commission "is operating during the 'American AI Initiative, . . . [so] [t]he Commission's findings and recommendations . . . will have a significant influence on the White House's initiative and on AI policy generally." *Id.* at 9.

[3] *See* note 2, *supra*.

Plaintiff filed the instant Complaint sixteen days after submitting its FOIA request to the AI Commission. *See* Compl. ¶ 95. At that time, the Commission had acknowledged Plaintiff's request but not otherwise responded. *Id.* ¶ 96-97.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action when a complaint fails "to state a claim upon which relief can be granted." Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, "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*, 556 U.S. 662, 678 (2009) (citation omitted). The Court need not accept as true, then, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the complaint. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal quotation marks omitted). For a plaintiff to survive a 12(b)(6) motion, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

ARGUMENT

Plaintiff's FOIA claims against the AI Commission should be dismissed because the Commission is not an agency subject to FOIA.[4] Further, even if the Commission were subject to FOIA, the Court should dismiss Plaintiff's expedition claims against both the Commission and DOD because Plaintiff has not established an entitlement to expedited processing. Finally, the

[4] In the alternative, the Court may dismiss Plaintiff's claim that the AI Commission did not respond timely to its FOIA request as premature. FOIA provides agencies twenty working days to respond to properly submitted requests for records. 5 U.S.C. § 552(a)(6)(A)(I). Plaintiff filed its Complaint only sixteen days after it submitted its request to the Commission. Compl. ¶ 95. Plaintiff's challenge was therefore premature and could be dismissed on that basis. *See Rosenberg v. U.S. Dep't of Immigration & Customs Enf't*, 956 F. Supp. 2d 32, 40 (D.D.C. 2013).

Court should dismiss Plaintiff's claim that Defendants violated FOIA's statutory deadlines because that is not an independent claim for relief.

I. The AI Commission Is Not Subject to FOIA.

Unless agency records have already been made publicly available, agencies subject to FOIA must make agency records available to any person who properly submits a request reasonably describing such records. 5 U.S.C. § 552(a)(3)(A). However, "[b]y its terms, FOIA applies only to an 'agency.'" *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009). Courts therefore dismiss FOIA claims brought against non-agencies for failure to state a claim. *See id.* at 226.

Here, the FOIA claims against the AI Commission should be dismissed because the Commission is not an agency subject to FOIA. As the D.C. Circuit has explained, "[t]he unavoidable fact is that each new arrangement must be examined anew and in its own context" to determine if an entity is within FOIA's ambit. *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974). FOIA's current statutory definition of "agency" has been interpreted since its enactment to exclude government entities when their inclusion would raise constitutional issues. Indeed, as evidenced by the relevant legislative history, Congress did not intend its definition of "agency" to be so expansive as to implicate separation of powers concerns. Because Congress's designation of the Commission as being within the executive branch—despite its members being almost exclusively legislative branch appointees—raises such constitutional concerns, the Court should follow the controlling precedent in this Circuit and find that the Commission is not an "agency" for purposes of the FOIA statute. This argument is set forth in detail below.

A. To Avoid Separation of Powers Issues, Courts Apply a Functional Analysis to Determine Whether Government Entities are "Agencies" Under FOIA.

Section 551(1) of FOIA defines an "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" other than Congress, the federal courts, and the governments of the District of Columbia or United States territories or possessions. 5 U.S.C. § 551(1). In 1974, Congress elaborated on this definition in Section 552(f)(1), providing that "'agency' . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, P.L. 93-502, § 3, 88 Stat. 1561, 1562 (1974). However, this expanded definition of "agency," if applied literally, would encompass government entities that Congress did not intend to make subject to FOIA and that the courts have held are not agencies for FOIA purposes. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), the D.C. Circuit considered whether the Office of Science and Technology was an "agency" under FOIA before the 1974 expansion of the definition of that term. *Id.* at 1073. Acknowledging that "[t]he statutory definition of 'agency' is not entirely clear," the court held that FOIA applied to "any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* As the D.C. Circuit later explained, the court took this functional approach when interpreting FOIA "to avoid the serious constitutional questions that would be presented if it were necessary for the court to consider whether the disclosure provisions of the Act exceeded the constitutional power of Congress to control the actions of the executive branch." *Judicial Watch, Inc. v. U.S. Secret*

Serv., 726 F.3d 208, 227 (D.C. Cir. 2013). *See also Ryan v. DOJ*, 617 F.2d 781, 788 n.19 (D.C. Cir. 1980); *Soucie*, 448 F.2d at 1080-81 (Wilkey, J., concurring).

When it enacted Section 552(f)(1) in 1974, Congress made clear that it intended the expanded definition of "agency" to be interpreted in a way that avoids separation of powers issues. Although Section 552(f)(1) provides that "establishment[s] in the executive branch of the Government (including the Executive Office of the President)" are "agencies" under FOIA, 5 U.S.C. § 552(f)(1), the Conference Report finalizing that language stated that "the conferees intend[ed] the result reached in *Soucie*" to dictate "the meaning of the term 'Executive Office of the President.'" H.R. Conf. Rep. No. 93-1380, at 14-15; S. Conf. Rep. No. 93-1200, at 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6285. As the D.C. Circuit later explained, "[i]n part, Congress exempted [documents from entities that are non-agencies under *Soucie*] from FOIA . . . in order to avoid serious separation-of-powers concerns that would be raised by a statute mandating disclosure of" those documents. *Judicial Watch, Inc.*, 726 F.3d at 216. *See also id.* at 227 (noting that "the [constitutional] avoidance canon . . . was relied on . . . by Congress in drafting the 1974 FOIA Amendments").

Since the 1974 FOIA amendments, courts have continued to apply *Soucie*'s functional approach to avoid separation of powers issues. *See, e.g.*, *Kissinger*, 445 U.S. at 156; *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996); *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993). The D.C. Circuit's decision in *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C. Cir. 1985), is particularly instructive. There, the D.C. Circuit applied the *Soucie* analysis to hold that the Council of Economic Advisors—an entity within the Executive Office of the President—was not an agency under FOIA. *Id.* at 1043. The court reached this holding despite (1) the House report on the 1974 FOIA amendments specifically

listing the Council as an agency and (2) an earlier case reaching the opposite conclusion as to another entity within the Executive Office of the President that had organizing statute that was, "for all practical purposes, identical" to the Council's. *Id.* at 1040-41. *Rushforth* therefore demonstrates that, when determining whether a government entity is an agency, the doctrine of constitutional avoidance at the heart of the *Soucie* analysis is even more important than the language of the statute that creates the entity. The D.C. Circuit reiterated this principle more recently in the closely related context of determining whether documents constitute "agency records," explaining that "separation-of-powers concerns provide . . . [a] more fundamental" basis for making that determination than an analysis of FOIA's statutory language. *Judicial Watch, Inc.*, 726 F.3d at 224.

Although *Soucie* itself concerned an entity within the Executive Office of the President, its functional approach to FOIA's definition of "agency" also applies to other entities when separation of powers issues exist. *See Dong v. Smithsonian Institution*, 125 F.3d 877, 881 (D.C. Cir. 1997) (applying *Soucie* to determine whether a government entity was an establishment within the executive branch subject to FOIA).[5] When determining whether an entity is within the legislative or judicial branches, and thus not an "agency" subject to FOIA, courts continue to apply a functional examination of the powers the entity exercises. *See Mayo v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993) (noting that "the entire judicial branch" and "the entire legislative branch" are excluded from FOIA's definition of "agency").

Courts' treatment of the United States Tax Court, which nominally "exercises Executive authority as part of the Executive Branch," is especially telling. *Kuretski v. Comm'r of IRS*, 755

[5] Although *Dong* was a case under the Privacy Act, that statue applies FOIA's definition of an "agency." *See In re Sealed Case*, 551 F.3d 1047, 1049 (D.C. Cir. 2009).

F.3d 929, 932 (D.C. Cir. 2014). Despite its location within the executive branch, both the Second Circuit and this Court applied a functional analysis to hold that it was not an agency subject to FOIA. In addressing this question, the Southern District of New York explained that "FOIA's application to a particular governmental entity depends not on the label attached to that entity but on an examination of its functions." *Megibow v. Clerk of the U.S. Tax Court*, No. 04 Civ. 3321(GEL), 2004 WL 1961591, at *5 (S.D.N.Y. Aug. 31, 2004). In a published decision, the Second Circuit affirmed the Southern District's dismissal "for the reasons given by the district court." *Megibow v. Clerk of the U.S. Tax Court*, 432 F.3d 387, 388-89 (2d Cir. 2005). In addressing the same issue, another judge of this Court was "persuaded by th[at] reasoning" and reached the same conclusion because "[t]he Tax Court's functions and procedures are purely adjudicative." *Byers v. U.S. Tax Court*, 211 F. Supp. 3d 240, 252 (D.D.C. 2016). The Court also independently looked to "the characteristics of the Tax Court" in holding that the Tax Court is "not an agency, for purposes of FOIA," despite being "a part of the Executive Branch for the purposes of a separation-of-powers analysis." *Id.* at 248.[6]

In sum, because "not only th[e D.C. Circuit], but Congress as well, wished to avoid the serious separation-of-powers questions that too expansive a reading of FOIA would engender[,] . . . it is doubly [the courts'] obligation to seek a construction that avoids constitutional conflict." *Judicial Watch, Inc.*, 726 F.3d at 227. Courts meet this obligation by taking a functional approach to the statute's definition of "agency" when separation of powers issues arise. *See,*

[6] As an example with regard to the legislative branch, another judge of this Court ordered discovery on "the organizational arrangements of the" Government Printing Office to help determine whether that entity is "a legislative branch agency . . . excluded from FOIA" or "a kind of chameleon, subject to FOIA for activities undertaken as a service to the Executive Branch." *Congressional Info. Serv. v. U.S. Gov't Printing Office*, Civ. A. No. 86-3408, 1987 WL 9509, at *1 (D.D.C. Apr. 7, 1987).

e.g., *Armstrong*, 90 F.3d at 558 (applying *Soucie* to entity within the Executive Office of the President); *Megibow*, 432 F.3d at 388-89 (adopting a functional analysis to an Article I court). As set forth below, placing the AI Commission in the executive branch would raise similar separation of powers issues, so this Court should apply a functional analysis to determine whether it is in fact an agency subject to FOIA.

B. Locating the AI Commission Within the Executive Branch Would Raise Serious Separation of Powers Concerns.

As a creation of Congress with legislatively assigned duties, the AI Commission triggers separation of powers scrutiny. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269 (1991). In particular, as noted in the President's signing statement, the Congressional appointment of twelve of the AI Commission's fifteen members would create separation of powers problems if the Commission were actually located within the executive branch. *See* Ex. 1 at 2-3.

This conclusion is necessitated by *Dong*, 125 F.3d 877, in which the D.C. Circuit considered whether the Smithsonian came within FOIA's definition of an agency. *Id.* at 878. In holding that it "was plain that the Smithsonian is not an establishment in the executive branch" under Section 552(f)(1), the D.C. Circuit explained:

> To begin with, nine of the seventeen members of its governing Board of Regents are appointed by joint resolution of Congress, and six of the remaining eight *are* members of Congress. (The other two are the Vice President and the Chief Justice of the United States.) Moreover, there is no evidence that the Secretary of the Smithsonian answers to the President, or that the institution administers federal statutes, prosecutes offenses, promulgates rules and regulations (other than with respect to its own buildings and grounds), or engages in any other typically executive activity.

Dong, 125 F.3d at 879 (internal citations omitted). The Court went on to state that, "[i]ndeed, if the Smithsonian were to wield executive powers, the method by which its Regents are appointed would appear to violate the Constitution's separation of powers principles." *Id.* (emphasis

added). *See also Statton v. Fla. Fed. Judicial Nominating Comm'n*, No. 8:19-CV-485-T-33CPT, 2019 WL 1763239, at *4-5 (M.D. Fla. Apr. 22, 2019) (holding that a commission comprised of Senators and senatorial appointees was not part of the executive branch, and therefore not subject to FOIA, and noting that an exercise of executive power by the commission "would appear to violate the Constitution's separation of powers principles").

The AI Commission shares precisely those characteristics with the Smithsonian that the D.C. Circuit found constitutionally problematic. Like the Smithsonian Board of Regents, none of the AI Commission's members is appointed by the President. McCain Act § 1051(a)(4)(A). Under the McCain Act Congress appoints twelve of the fifteen Commission members, and the Secretaries of Defense and Commerce appoint the remaining three. *Id.* Also like the Smithsonian, neither the Chairman of the Commission nor the Executive Director of the Commission answers to the President. *See* Ex. A at 3 (stating that the Trump Administration "treat[s] the [C]ommission as an independent entity, separate from the executive branch"). *See generally* McCain Act § 1051. Indeed, the President had no role in the Commission's creation (other than signing the McCain Act into law) and exerts no control over the Commission's functioning.

The Court need not—and indeed should not—resolve the question of whether locating the AI Commission within the executive branch would be unconstitutional in light of the almost complete control over the Commission exercised by the legislative branch. Instead, the Court should follow the well-established precedent of using a functional approach to interpret the definition of "agency" under FOIA to avoid serious constitutional separation of powers questions. *See Judicial Watch, Inc.*, 726 F.3d at 216, 224, 227.

C. Under the D.C. Circuit's Functional Approach, the AI Commission Is Not an Agency Subject to FOIA.

Looking beyond its label as an entity within the executive branch, the AI Commission is clearly not an "agency" within the scope of FOIA. As the D.C. Circuit explained, a government entity must "exercise substantial independent authority before it can be considered an agency for § 551(1) purposes." *Dong*, 125 F.3d at 881. Although that test originated in *Soucie*, where "much of the focus was on the independence aspect of the formula, . . . the requirement of authority" applies even in "cases not involving presidential power at all." *Id.* (emphasis omitted). Moreover, an agency must exercise substantial authority to qualify as an agency under FOIA; minor ancillary powers are insufficient. *Id.* at 882.

The AI Commission, however, possesses no independent authority. This is evident from the fact that the Commission is "purely advisory in nature" and will "disband shortly after it deliver[s its final] report to the President" and Congress. *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297 (D.D.C.) (holding that EPIC was unlikely to prevail on the merits of a FOIA action because its request was directed to a non-agency), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019). *See also* McCain Act §§ 1051(b), (c), (e). Further, the Commission does not "administer[] federal statutes, prosecute[] offenses, promulgate[] rules and regulations[,] . . . or engage[] in any other typically executive activity." *Dong*, 125 F.3d at 879 (holding that the Smithsonian was not an "agency" under FOIA). Thus, the Commission is not an "agency" for purposes of FOIA within the functional test established by the D.C. Circuit. *See Dong*, 125 F.3d at 881.

* * *

Because the AI Commission is not an agency subject to FOIA, the Court should dismiss Plaintiff's FOIA claims against it.

II. Plaintiff Has Not Demonstrated an Urgent Need for the Requested Records.

Without expedited processing, agencies 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). Expedited processing gives a FOIA request priority over non-expedited requests (but still behind any already-filed expedited requests).

To be entitled to expedited processing, "the person requesting the records [must] demonstrate[] a compelling need" or meet other criteria set by agency regulations. 5 U.S.C. §§ 552(a)(6)(E)(i)(I), (i)(II). *See also Al-Fayed v. CIA*, 254 F.3d 300, 307 n.7 (D.C. Cir. 2001). 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). Review of an agency's decision that a request poses no "urgency to inform" is *de novo* based on "based on the record before the agency at the time of the determination" but the factors are to be narrowly applied. *Al–Fayed v. CIA*, 254 F.3d 300, 304, 310-11 (D.C. Cir. 2001) (quoting 5 U.S.C. § 552(a)(6)(E)(iii)).

"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)).

Here, Plaintiff fails to state a claim with regard to either the denial of Plaintiff's request to DoD for expedited processing or the AI Commission's constructive denial of Plaintiff's FOIA request to the Commission (even presuming that the Commission is subject to FOIA).

A. Plaintiff Has Not Shown Any Urgency with Regard to Its FOIA Request to the AI Commission.

Even if the AI Commission were subject to FOIA—and it is not—Plaintiff's challenge to the AI Commission's constructive denial of its FOIA request would lack merit for two reasons.[7]

1. *The Overbreadth of Plaintiff's Request Prevents It from Meeting Its Burden on Urgency.*

"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). Here, Plaintiff cannot meet that burden because it seeks documents bearing no relevance to its stated justifications.

Plaintiff requested that the AI Commission produce "[a]ll records . . . or other documents which were made available to or prepared for or by the . . . Commission . . . or any subcomponent thereof." Compl., Ex. I at 1. Plaintiff attempted to justify an urgent need for those records by arguing that (1) the public needed the records before the Commission held its next scheduled meeting and issued its first interim report on November 4, 2019, and (2) the Commission operating during the White House's American AI Initiative meant that its findings and recommendations would have a significant influence on AI policy. *Id.* at 1, 8-9. *See also*

[7] The failure to respond to a request for expedited processing within ten days constitutes a constructive denial and permits the requester to seek judicial review. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); *Judicial Watch, Inc. v. U.S. Naval Observatory*, 160 F. Supp. 2d 111, 113 (D.D.C. 2001).

Compl. ¶ 80 & Ex. K. However, Plaintiff's request is so broad that it 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.

The overbreadth of its request means that Plaintiff has not justified the full scope of its specific request, as it is must to prevail on its claim. *See Elec. Privacy Info. Ctr.*, 355 F. Supp. 2d at 102. The scope of Plaintiff's claim also means that the AI Commission would have to expend its limited resources to process records irrelevant to the Commission's substantive work, delaying the processing of records that might provide the public with the information Plaintiff claims it urgently needs. This belies Plaintiff claim to urgency and is ground for dismissing Plaintiff's expedition claim against the Commission.

2. *The Requested Records are Not Necessary for the Public to Affect Any Imminent Government Action.*

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). To establish urgency, a plaintiff must show the requested records could affect a specific, time-sensitive event. *See Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 277 (D.D.C. 2012); *Long v. DHS*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006). Without such an event, "delaying a response would [not] compromise a significant recognized interest." *Al-Fayed*, 254 F.3d at 310. 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.

The only imminent government action that Plaintiff can identify is the issuance of the AI Commission's first interim report. However, Plaintiff is not entitled to participate in the Commission's drafting of that report, so the release of the requested records would not enable Plaintiff to affect the contents of the report. *See generally* McCain Act § 1051. Even if Plaintiff had such a right, there would not be time before the report's release on November 5, 2019, for the Commission to produce the requested records, Plaintiff to formulate input based on those records, and the Commission to re-write its interim report based on that input. Finally, because the report has no legal effect or other direct impact on Plaintiff or the public, it is unclear that it is even the type of government action upon which a finding of urgency could be based. EPIC's urgency claim fails for this reason as well.

B. Plaintiff has Not Shown Any Urgency with Regard to Its FOIA Request to DoD.

Plaintiff's challenge to DoD's denial of its request for expedited processing is also without merit. Indeed, Plaintiff's requests to DoD suffer from the same problems as its request to the AI Commission—they also seek every record related to the Commission without regard to its relevance to Plaintiff's claim to urgency and also fail to identify an impending government action that could be affected if the records were released. However, there are also three additional problems unique to Plaintiff's requests to DoD.

First, Plaintiff's stated rationale for an urgent need for the requested records is now partially moot. In its requests to DoD, Plaintiff specifically sought the AI Commission's initial report, and Plaintiff's primary justification for needing the records was that the report had not yet been released. *See* Compl., Ex. B at 1, 4. That report has long since been released, mooting both that portion of the request and the stated rationale for it. *See* 5 U.S.C. § 552(a)(6)(E)(iii) (providing that judicial review is "based on the record before the agency at the time of the determination"). *See also Harvey v. Lynch*, 123 F. Supp. 3d 3, 7 (D.D.C. 2015) (holding that the

release of document moots FOIA claims seeking those documents). That leaves only the possible influence of the Commission on AI policymaking because it is "operating at a time when the White House has launched the 'American AI Initiative,'" which does not identify any specific impending action. Compl., Ex. B at 4.

Second, DoD is unlikely to have the types of records that Plaintiff claims the public urgently needs. The McCain Act provides that DoD make $10 million available to the AI Commission, and DoD provides administrative services to the Commission under the Memorandum of Agreement between the two. McCain Act § 1051(d); Ex. 2. Neither relationship with the Commission would give DoD the type of substantive policy documents that would inform the public about either the Commission's work or AI policy generally. Plaintiff's rationale for urgency is therefore a poor fit with the records Plaintiff has requested from DoD.

Third, Plaintiff's delay in bringing this action belies the urgency it alleges. "Courts have found that '[a]n unexcused delay . . . implies a lack of urgency . . . .'" *Open Top Sightseeing USA v. Mr. Sightseeing, LLP*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (citation omitted) (discussing the irreparable harm analysis for preliminary injunctive relief). *See also Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 11 n.6 (D.D.C. 2014) (noting "the relationship between the irreparable harm analysis and the FOIA inquiry into whether plaintiff has an 'urgency to inform' and thus a 'compelling need' for expedition."). Although DoD "made the required funds transfer of appropriations to fund the AI Commission" in December 2018, EPIC waited until February 2019 to submit its FOIA request to DoD requesting documents about the Commission's formation. Compl., Ex. B at 1-2. Then, after 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. With seven months of accumulated delay, Plaintiff's claim to urgently need DoD's records concerning the Commission rings hollow.

III. Failure to Comply with FOIA's Statutory Deadlines is Not a Basis for Relief.

Plaintiff's Count VI alleges that Defendants failed to comply with their statutory deadlines for responding to Plaintiff's FOIA requests. Compl. ¶¶ 146-152. However, "an agency's failure to comply with [FOIA's] statutory deadlines is not an independent basis for a claim." *Roseberry-Andrews v. Dep't of Homeland Sec.*, 299 F. Supp. 3d 9, 20 (D.D.C. 2018). *See also Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 41 (D.D.C. 2014). The Court should therefore dismiss Count VI for failure to state a claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's FOIA claims against the AI Commission and Plaintiff's claim challenging DoD's denial of Plaintiff's request for expedited processing of its request.

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Respectfully submitted,

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