**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

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS**

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## INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully opposes the Partial Motion to Dismiss by Defendants National Security Commission on Artificial Intelligence ("AI Commission") and United States Department of Defense ("DOD"). According to the NDAA, the FOIA definition, and the relevant case law, the AI Commission is definitively an "agency" subject to the Freedom of Information Act ("FOIA"). The Government's remaining arguments for dismissal are both baseless and beyond the scope of this briefing.

In 2018, Congress created the AI Commission as an "establishment . . . in the executive branch[.]" John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("NDAA"), Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962 (2018). This language closely tracks the "agency" definition of the FOIA, which applies to any "establishment in the executive branch[.]" 5 U.S.C. § 552(f)(1). And as D.C. Circuit has explained, "[i]t would be a tall piece of statutory construction" to conclude that the phrase "establishment in the executive branch" carries different meanings in these two contexts. *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582 (D.C. Cir. 1990). Yet in arguing for dismissal of EPIC's FOIA claims against the AI Commission, that is precisely the absurd construction that the Government urges the Court to adopt. The Court should decline that invitation.

The Government's arguments for dismissal fail completely. First, the plain text of the NDAA leaves no doubt that the AI Commission is subject to the FOIA. Every other federal entity defined as an "establishment" in "the executive branch" concedes—correctly—that it an agency under the FOIA. Second, the so-called "*Soucie* test" is irrelevant to this case. The Court need not examine whether the AI Commission bears the hallmarks of an "agency" when Congress has made an explicit determination in the text of NDAA. Third, the Government's constitutional arguments are groundless. The structure of the AI Commission poses no separation-of-powers

problem, and even if it did, the remedy is not to simply give the Commission a pass on its FOIA obligations.

The Government's remaining arguments are not relevant to the purpose of this briefing, which is to address "whether the National Security Commission on Artificial Intelligence is an 'agency' subject to FOIA[.]" Order, ECF No. 18. However, even if the Court were to consider these arguments, they are without merit. EPIC's well-pled allegations are sufficient to survive a motion to dismiss, and EPIC has established that it is entitled to expedited processing and that the agencies have not met their statutory deadlines.

The Court should therefore deny the Government's Motion to Dismiss and order the Defendants to immediately process EPIC's FOIA Requests.

## BACKGROUND

### I. The Formation and Structure of the AI Commission

Congress created the National Security Commission on Artificial Intelligence through section 1051 of the NDAA, signed into law on August 13, 2018. The NDAA directs the AI Commission "to review advances in artificial intelligence, related machine learning developments, and associated technologies." *Id.* § 1051(a)(1). The AI Commission is "an independent establishment of the Federal Government" that is "in the executive branch." *Id.* § 1051(a); *see also* 5 U.S.C. § 104(1). The AI Commission "shall be composed of 15 members" appointed "for the life of the Commission" by the Secretary of Defense, the Secretary of Commerce, and the chairs and ranking members of six congressional committees. *Id.* § 1051(a)(4). The Commission "shall terminate on October 1, 2020." *Id.* § 1051(e).

The Chairman of the Commission is Defendant Eric Schmidt, the former executive chairman of Alphabet Inc. and the former chairman and chief executive officer of Google Inc. Compl. ¶¶ 19, 44, ECF No. 1. The Vice Chairman of the Commission is Robert O. Work, former

Deputy Secretary of Defense. Compl. ¶ 44. The Commission consists of thirteen other members, including representatives of Google, Microsoft, Amazon, and Oracle. *Id.*

Under the NDAA, the AI Commission is to "consider the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies by the United States to comprehensively address the national security and defense needs of the United States." NDAA § 1051(b)(1). Congress has designated nine AI-related subjects for the Commission to review, including "ethical considerations related to artificial intelligence and machine learning as it will be used for future applications related to national security and defense." NDAA § 1051(b)(2). Since it launched, the Commission has organized itself into four specialized working groups and has "decided to pursue Special Projects on three cross-cutting issues[.]" Compl. Ex. H at 2, ECF No. 1-1. One of the Commission's special projects concerns "the responsible and ethical use of AI for national security[.]" *Id.*

## II. The Secrecy of the AI Commission's Proceedings

Since March 2019, the AI Commission has held at least twenty-one plenary and working group meetings and has received more than 200 briefings. Press Release, Nat'l Sec. Comm'n on Artificial Intelligence, NSCAI Releases Interim Report to Congress (Nov. 4, 2019).[1] None of these meetings have been noticed in the Federal Register or open to the public, nor has the Commission published any agendas, minutes, or materials from these meetings. Compl. ¶ 59.

On February 7, 2019—a month before the Commission's work began "in earnest," *id.* at 1—EPIC sent a letter to members of the AI Commission urging the Commission "to provide opportunities for public input, including public hearings" and to "issue no reports until there has been a meaningful opportunity for public participation." Compl. Ex. A at 1, ECF No. 1-1.

[1] https://www.nscai.gov/press/press-releases/press-release-20191104.

On March 11, 2019, the AI Commission held its first plenary meeting in Arlington, Virginia. Ex. H at 1. The Commission did not publish notice in the Federal Register or otherwise provide the public with an opportunity to participate in the meeting. Compl. ¶ 63. Only after the fact—in a March 12, 2019 press release—did the Commission acknowledge that the March 11 meeting had occurred. Compl. Ex. D, ECF No. 1-1.

The AI Commission has not disclosed the details of its March 11 meeting to EPIC or the public. Compl. ¶ 64. The Commission has stated simply that it "received briefs from the Defense and Commerce departments, the intelligence community, and Members of Congress," Compl. Ex. D, including Sen. Martin Heinrich, Rep. Elise Stefanik, and Rep. Jerry McNerney. Compl. Ex. H at 1. Commissioners also established the AI Commission's four working groups. *Id.* at 2. Although the working groups have held at least nine meetings to date, *id.*, the Commission has not publicly disclosed the dates, locations, or contents of those meetings. Compl. ¶ 66.

On May 20, 2019, the AI Commission held its second plenary meeting in Cupertino, California. Ex. H at 1–2. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Compl. ¶ 67. Only nine days after the fact—in a May 29, 2019 press release—did the Commission acknowledge that the May 20 meeting had occurred. Compl. Ex. F, ECF No. 1-1.

The AI Commission has not disclosed the details of its May 20 meeting to EPIC or the public. Compl. ¶ 68. The Commission has stated simply that it "received classified briefs on the status of the U.S. government's artificial intelligence strategies and examined overseas trends," Compl. Ex. F, and that it was "briefed on U.S. Government policies and perspectives, including from the White House Office of Science and Technology Policy, the National Security Council, and the Defense Department's Office of Net Assessment." Compl. Ex. H at 2.

On July 11, 2019, the AI Commission held its third plenary meeting in Cupertino, California. *Id*. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Compl. ¶ 66. Only after the fact—in a July 12, 2019 press release—did the Commission acknowledge that the July 11 meeting had occurred. Compl. Ex. G, ECF No. 1-1.

The AI Commission has not disclosed the details of its July 11 meeting to EPIC or the public. Compl. ¶ 70. The Commission has stated simply that it "examined the AI landscape" and "received classified briefings on counterintelligence threats and challenges to the United States as well as opportunities to advance U.S. leadership in artificial intelligence." Compl. Ex. G. The meeting "featured briefings from the Intelligence Community, the Federal Bureau of Investigation, and the National Security Council." Ex. H at 2.

On July 31, 2019, the AI Commission submitted its Initial Report to Congress—more than five months after the February 9 statutory deadline. The four-page document summarized the "[i]nitial [a]ctivities" of the AI Commission; broadly described the relationship of the Commission to industry, academia, and other federal AI efforts; and included two bullet points on the Commission's "[n]ext [s]teps." Ex. H at 1–4.

On October 24, 2019, the AI Commission held its fourth plenary meeting. The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. Press Release, Nat'l Sec. Comm'n on Artificial Intelligence, NSCAI Holds Plenary Session (Oct. 24, 2019).[2] Only after the fact—in a press release published later that day—did the Commission acknowledge that the meeting had occurred. *Id.* The Commission disclosed only that

[2] https://www.nscai.gov/press/press-releases/press-release-20191024.

the "focus for this plenary was to review and finalize its interim report" and that "the commissioners voted unanimously to approve the report[.]" *Id.*

The Commission submitted its interim report to Congress on November 4, 2019. Nat'l Sec. Comm'n on Artificial Intelligence, *Interim Report* (Nov. 2019).[3] To date, the lone public event hosted by the AI Commission was a conference on November 5, 2019 "held in conjunction with the submission of NSCAI's interim report to Congress[.]" Compl. Ex. K, ECF. No. 1-1.

## III. EPIC's FOIA Request to the DOD

On February 22, 2019, EPIC submitted a FOIA Request via email to the Department of Defense. Compl. Ex. B, ECF No. 1-1. The DOD is responsible for funding the AI Commission. NDAA § 1051(d) (directing that the AI Commission be funded by "not more than $10,000,000" taken from "the amounts authorized to be appropriated by [the NDAA] . . . for the Department of Defense").

EPIC's DOD FOIA Request called for:

(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 meetings 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 findings 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.

[3] *Available at* https://epic.org/foia/epic-v-ai-commission/AI-Commission-Interim-Report-Nov-2019.pdf.

Compl. Ex. B at 1. EPIC also requested access to the records and meetings of the Commission pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 § 10. Compl. Ex. B at 6–7.

EPIC sought expedited processing of its DOD FOIA Request. *Id.* at 4. EPIC explained that there was an "urgency to inform the public about an actual or alleged Federal Government activity'" and that the request was "made by a person who is primarily engaged in disseminating information." *Id.* (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). As stated in EPIC's DOD FOIA Request:

> 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.* EPIC also stated that it is "an organization 'primarily engaged in disseminating information,'"—and thereby entitled to expedited processing of its DOD FOIA Request—because EPIC qualifies as "a representative of the news media." *Id.* at 5 (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). Finally, EPIC explained that it is entitled to "news media" fee status and a waiver of all duplication fees. *Id.* at 5–6.

The DOD acknowledged receipt of EPIC's FOIA Request by letter dated February 28, 2019. Compl. Ex. C, ECF No. 1-1. In the letter, that DOD stated that it would deny EPIC's request for expedited processing. *Id.* at 1. Today—November 7, 2019—is the 181st working day since the DOD received EPIC's FOIA Request. The DOD has not made a determination on EPIC's FOIA Request. Compl. ¶ 107.

On April 30, 2019, EPIC filed an administrative appeal of the DOD's denial of expedited processing. Compl. Ex. E, ECF No. 1-1. EPIC reiterated the grounds for expedition set forth in EPIC's DOD FOIA Request. *Id.* at 2–5. Today—November 7, 2019—is approximately the 134th working day since the DOD received EPIC's FOIA Appeal concerning the agency's denial of expedited processing. Prior to the filing of this suit, EPIC had not received a determination from the DOD regarding EPIC's FOIA Appeal. Compl. ¶ 110.

## IV. EPIC's FOIA Request to the AI Commission

On September 11, 2019, EPIC submitted a FOIA Request via email to the AI Commission ("EPIC's AI Commission FOIA Request"). Compl. Ex. I, ECF No. 1-1. EPIC requested "[a]ll records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the National Security Commission on Artificial Intelligence or any subcomponent thereof." *Id.* at 1. EPIC also requested access to the records and meetings of the Commission pursuant to the FACA, 5 U.S.C. app. 2 § 10. Compl. Ex. I at 11.

EPIC sought expedited processing of its AI Commission FOIA Request. EPIC explained that there was an "urgency to inform the public about an actual or alleged Federal Government activity'" and that the request was "made by a person who is primarily engaged in disseminating information." *Id.* at 8 (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). As EPIC stated in its FOIA Request:

> It is 'urgen[t] to inform the public' about the activities of the AI Commission because the 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.

*Id.* at 8–9. EPIC further explained that "[t]he 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." *Id.* at 9. EPIC also stated that it is "an organization 'primarily engaged in disseminating information,'" *id.* (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II))—and is thereby entitled to expedited processing of its FOIA Request—because EPIC qualifies as "'a representative of the news media.'" *Id.* (quoting *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003)). Finally, EPIC explained that it is entitled to "news media" fee status and a waiver of all duplication fees. *Id.* at 9–10.

The AI Commission acknowledged receipt of EPIC's AI Commission FOIA Request by email dated September 12, 2019. Compl. Ex. J, ECF No. 1. Today—November 7, 2019—is the 57th calendar day since the Commission received EPIC's request. The Commission has not made a determination on EPIC's request, nor has the Commission made a determination on EPIC's request for expedited processing. Compl. ¶¶ 96–97.

**V. EPIC's FOIA Lawsuit**

On September 27, 2019, EPIC filed the instant lawsuit against the AI Commission, AI Commission Chairman Eric Schmidt, AI Commission Executive Director Ylli Bajraktari, and the DOD. As relevant to this briefing, EPIC stated three claims for relief.

First, EPIC charged that the AI Commission and DOD had unlawfully failed to make a determination on EPIC's FOIA Request and FOIA Appeal within the timeframes set forth in 5 U.S.C. § 552(a)(6). Compl. ¶¶ 146–52 (Count VI).

Second, EPIC charged that the AI Commission and DOD had unlawfully denied expedited processing of EPIC's FOIA Request in violation of 5 U.S.C. § 552(a)(6)(E). Compl. ¶¶ 153–58 (Count VII).

Finally, EPIC charged that the AI Commission and DOD had unlawfully withheld records responsive to EPIC's FOIA Request. Compl. ¶¶ 159–63 (Count VIII).

EPIC also stated claims for relief under the FACA; the Administrative Procedure Act, 5 U.S.C. §§ 551–706; and the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e).

On October 16, 2019, the Court denied EPIC's Motion for a Preliminary Injunction, ECF No. 4, but ordered the parties to brief a "Partial Motion to Dismiss on the question whether the National Security Commission on Artificial Intelligence is an "agency" subject to FOIA[.]" Order, ECF No. 18.

**STANDARD OF REVIEW**

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Bowser v. Smith*, 314 F. Supp. 3d 30, 33 (D.D.C. 2018) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012)). The Federal Rules of Civil Procedure "do not require 'detailed factual allegations' for a claim to survive a motion to dismiss," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Though plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," it is not a "probability requirement." *Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint should be allowed to proceed 'even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

In order to state a claim under the FOIA, a requester need only "establish (or, at this stage, plausibly allege) that the agency has (1) improperly (2) withheld (3) agency records." *EPIC v. IRS*, 910 F.3d 1232, 1240 (D.C. Cir. 2018). "At all times, courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure[.]" *CREW v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011)).

## ARGUMENT

The Government's Motion to Dismiss should be denied. Under the plain text of the NDAA, the AI Commission is an agency subject to the FOIA. The so-called "*Soucie* test" is not relevant to this case, as Congress has already determined that the FOIA applies to the Commission. The Government's constitutional arguments are wrong in their entirety and reflect a basic misunderstanding of the FOIA, the NDAA, and the separation of powers. And the Government's remaining arguments—though beyond the scope of this briefing—also fail. EPIC has firmly established that it is entitled to expedited processing and that the agencies have not met their statutory deadlines.

### I. THE AI COMMISSION IS AN AGENCY SUBJECT TO THE FOIA.

#### A. Congress has dictated in plain terms that AI Commission is an agency subject to the FOIA.

The Government's attempts to excuse the AI Commission from the obligations of the FOIA cannot be squared with the plain text of the NDAA. Congress determined that the AI

Commission is an agency subject to the FOIA by stating that the Commission is an "establishment . . . in the executive branch." NDAA § 1051(a).

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). The court must therefore "start[] with [the] text" of the relevant statutes: the FOIA and the NDAA. *Id.*

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)(1). This key phrase from the FOIA is precisely the language that Congress used to define the AI Commission 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)(1) of the FOIA. The Commission is thus an "agency" subject to the FOIA.

Even if the Commission's agency status were not clear from the face of the NDAA, Congress also took pains to define the AI Commission as an "independent establishment of the Federal Government as defined by section 104 of title 5, United States Code[.]" NDAA § 1051(a)(2). Section 104, in turn, defines an "independent establishment" as "*an establishment in the executive branch*" "[f]or the purpose of [Title 5]." 5 U.S.C. § 104(1) (emphasis added). Title 5

includes the FOIA, which (as noted) applies to "any . . . establishment in the executive branch[.]" 5 U.S.C. § 552(f)(1). Congress thus expressly defined the AI Commission—not once, but twice—as an agency subject to the FOIA.

This conclusion 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 and 5 U.S.C. § 104(1) is not an "establishment in the executive branch" within the meaning of the FOIA. "[W]hen Congress uses the same language in two statutes having similar purposes"—for example, statutes defining the legal status and obligations of federal entities—"it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

The rule of *Energy Research Foundation* is ironclad throughout the executive branch. Apart from the AI Commission, there are eleven federal entities defined by Congress as an "establishment" "in the executive branch"; "of the executive branch," or "within the executive

branch."[4] Each of these "establishment[s]" concedes—as it must—that it is an agency subject to the FOIA:

| **Agency** | **"Establishment" Provision** | **FOIA Webpage** |
|---|---|---|
| Armed Forces Retirement Home | 24 U.S.C. § 411(a) | *Freedom of Information Act (FOIA)*, Armed Forces Retirement Home (2018)[5] |
| Barry Goldwater Scholarship and Excellence in Education Foundation | 20 U.S.C. § 4703(a) | *Required Statements*, Barry Goldwater Scholarship & Excellence in Educ. Found. (2016) (navigate to "Freedom of Information Act (FOIA)" tab)[6] |
| Defense Nuclear Facilities Safety Board | 42 U.S.C. § 2286(a) | *FOIA Reading Room*, Def. Nuclear Facilities Safety Board (2019)[7] |
| Harry S. Truman Scholarship Foundation | 20 U.S.C. § 2004(a) | *FOIA*, Harry S. Truman Scholarship Found. (2017)[8] |
| James Madison Memorial Fellowship Foundation | 20 U.S.C. § 4502(a) | *Freedom of Information Act (FOIA)*, James Madison Memorial Fellowship Found. (2019)[9] |
| National Archives and Records Administration | 44 U.S.C. § 2102 | *Freedom of Information Act (FOIA)*, National Archives (2019)[10] |
| Nuclear Waste Technical Review Board | 42 U.S.C. § 10262(a) | *NWTRB FOIA/PA*, U.S. Nuclear Waste Technical Review Board (2017)[11] |

[4] The U.S. Code also identifies the National Center for Productivity and Quality of Working Life, the Office of the Nuclear Waste Negotiator, and the Office of the Federal Inspector for the Alaska Natural Gas Transportation System as "establishment[s] in" or "of" the executive branch. 42 U.S.C. § 10242(a); 15 U.S.C. § 2411; Reorganization Plan No. 1 of 1979, 44 Fed. Reg. 43,663 (1978), *reprinted in* 5 U.S.C. app. 1. However, all three agencies have been disbanded.
[5] https://www.afrh.gov/foia.
[6] https://goldwater.scholarsapply.org/required-statements/.
[7] https://www.dnfsb.gov/foia-reading-room.
[8] https://www.truman.gov/foia.
[9] https://www.jamesmadison.gov/foia.php.
[10] https://www.archives.gov/foia.
[11] https://www.nwtrb.gov/nwtrb-foia-pa.

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|---|---|---|
| Office of Personnel Management | 5 U.S.C. § 1101 | *Freedom of Information Act*, OPM.gov (2019)[12] |
| Postal Regulatory Commission | 39 U.S.C. § 501 | *Freedom of Information Act (FOIA) and Privacy Act*, Postal Reg. Commission (2019)[13] |
| United States Interagency Council on Homelessness | 42 U.S.C. § 11311 | *Freedom of Information Act (FOIA)*, U.S. Interagency Council on Homelessness (2017)[14] |
| United States Postal Service | 39 U.S.C. § 201 | *Freedom of Information Act (FOIA)*, U.S. Postal Serv. (2019)[15] |

Similarly, the Federal Emergency Management Agency ("FEMA") and the United States Agency for International Development ("USAID") are defined by Congressionally-authorized reorganization plans as "establishment[s]" in the executive branch. Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41,943 (1978), *reprinted in* 5 U.S.C. app. 1 ("There is hereby established as an independent establishment in the Executive Branch, the Federal Emergency Management Agency[.]"); Exec. Order No. 12,163, 3 C.F.R. § 435 (1979), *reprinted as amended in* 22 U.S.C. § 2381 note ("The United States Agency for International Development is an independent establishment within the Executive branch."). Accordingly, both FEMA and USAID concede that they are agencies subject to the FOIA. *Freedom of Information Act*, FEMA (2017);[16] *Freedom of Information Act (FOIA)*, USAID (2019).[17]

The FOIA even applies to "independent establishment[s]" that—unlike the AI Commission—are not expressly situated in the executive branch. The Federal Maritime

[12] https://www.opm.gov/information-management/freedom-of-information-act/.
[13] https://www.prc.gov/foia.
[14] https://www.usich.gov/foia/.
[15] https://about.usps.com/who/legal/foia/welcome.htm.
[16] https://www.usich.gov/foia/.
[17] https://www.usaid.gov/foia-requests.

Commission, 46 U.S.C. § 301(a); the National Transportation Safety Board, 49 U.S.C. § 1111(a); and the Surface Transportation Board, 49 U.S.C. § 1301(a), are all defined by statute as "independent establishment[s] of the United States Government." Again, all three entities concede that they are agencies subject to the FOIA. *Freedom of Information Act Requests & Reports*, Fed. Maritime Commission (2018);[18] *FOIA Requests*, Nat'l Transp. Safety Board (2019);[19] *FOIA*, Surface Transp. Board (2019).[20] The AI Commission is no different.

Other provisions of the NDAA make clear that Congress knew how to exempt the AI Commission from the FOIA if it wished to—which it did not. 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). ("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."). The fact that Congress found it necessary to enact section 1652(m)(2) makes clear that entities such as the Cyberspace Solarium Commission and AI Commission are presumptively subject to the FOIA absent an express statutory exemption. Yet the NDAA includes no such exemption for the AI Commission.

[18] https://www.fmc.gov/about-the-fmc/freedom-of-information-act-requests-reports/.
[19] https://www.ntsb.gov/about/foia/Pages/foia_requests.aspx.
[20] https://www.stb.gov/stb/docs/FOIA/foia.html.

If Congress had intended to exempt the AI Commission from the FOIA, it could easily have included equivalent language in section 1051. Congress did not. And if for some reason Congress had regretted its decision to subject the AI Commission to the FOIA, Congress could have inserted a FOIA exemption into the pending National Defense Authorization Act for Fiscal Year 2020. S. 1790, 116th Cong. § 1083 (2019); H.R. 2500, 116th Cong. § 1083 (2019).[21] Again, Congress did not. The plain text of the NDAA is conclusive: the AI Commission is an agency subject to the FOIA.

**B. The *Soucie* test has no bearing on the AI Commission's status as an agency.**

Despite the unambiguous statutory language of the NDAA and the FOIA, the Government insists that the AI 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)(1). A contrary holding would arbitrarily limit Congress's power to subject new federal entities to the statutory framework of the FOIA—even where Congress tracks the "agency" definition that it previously enacted under § 552(f)(1). A

[21] Section 1083 of both the Senate and House bills, if enacted, would extend the term of the AI Commission through March 2021. Yet neither bill includes a FOIA exemption.

court would not second-guess Congress's determination that "the members of the Commission shall be deemed to be Federal employees," NDAA § 1051(a)(7), by nevertheless applying the criteria of 5 U.S.C. § 2105 (defining an "employee" for the purposes of Title 5). By the same token, this Court should not second-guess Congress's determination that the Commission is an "establishment . . . in the executive branch"—and thus an agency subject to the FOIA, 5 U.S.C. § 552(f)(1)—by applying the *Soucie* test. It is Congress's prerogative to subject the AI Commission to the FOIA, which Congress has done here through plain statutory language.

*Dong v. Smithsonian Institution*, 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)(1); (2) a "Government controlled corporation," id.; 5 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 characteristics of the Smithsonian, that the museum was not an "establishment" under 5 U.S.C. §

552(f)(1). *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 Congress defined the Smithsonian 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 resort 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.

Although the Government cites to numerous cases in which the *Soucie* test was applied, none of those decisions concern entities that, like the AI Commission, were expressly defined by Congress using the language of 5 U.S.C. § 552(f)(1). Indeed, one of the cases on which the Government principally relies—*Rushforth v. Council of Economic Advisors*, 762 F.2d 1038 (D.C. Cir. 1985)—stands for precisely the opposite of what the Government claims. In an attempt to liken *Rushforth* to the instant case, the Government notes that the Council of Economic Advisers ("CEA") was subjected to—and failed—the *Soucie* test despite "the House report on the 1974 FOIA amendments specifically listing the Council as an agency[.]" Defs.' Mem. 9–10. But the Government omits a crucial fact: Congress deliberately dropped any reference to the CEA from the final Conference Report on the 1974 amendments. *Rushforth*, 762 F.2d at 1040. Thus, if anything, the relevant legislative history indicated that Congress did *not* consider the CEA to be an agency.

Here, Congress has made things simple. The FOIA applies to any "establishment in the executive branch," 5 U.S.C. § 552(f)(1), 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.

### C. The Government's separation-of-powers arguments are baseless and irrelevant.

Undeterred by the plain text of the NDAA and the FOIA, the Government makes the remarkable claim that the AI Commission cannot be deemed an "agency" under the FOIA because the Commission's composition appears to violate the separation of powers. These arguments fail in their entirety.

First, the Government's constitutional arguments rest on a fundamental misconception of the FOIA, the NDAA, and how the two statutes interact. The Government urges the Court to disregard the FOIA's plain-text definition of an "agency" because "placing the AI Commission in the executive branch" would supposedly "raise . . . separation of powers issues[.]" Defs.' Mem. 12. But there is no "placing" for the Court to do: *Congress already put the Commission "in the executive branch."* NDAA § 1051(a)(1). Moreover, it is section 1051 of the NDAA—not the FOIA—that establishes the Commission as part of the executive branch. Section 552(f)(1) simply dictates that the Commission, by virtue of being an "establishment," is *also* an agency subject to the FOIA. Thus even if the structure of the Commission posed a constitutional problem (which it does not), adopting an atextual interpretation of § 552(f)(1) would do nothing to remedy that problem.[22] The AI Commission would continue to exist, and the alleged separation-of-powers

[22] That said, if the Court were to find that the structure of the AI Commission violates the separation of powers, the Court could remedy such a violation by ordering the Commission dissolved or by enjoining the Commission's activities until the defect is cured.

violation would remain. The only difference is that the (supposedly unconstitutional) Commission would be operating without the public scrutiny that Congress plainly intended the FOIA to provide.

Second, the Government simply misunderstands the doctrine of constitutional avoidance. As the Supreme Court recently explained, "constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)); *see also Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)) ("Despite this constitutional problem, if 'Congress has made its intent' in the statute 'clear, we must give effect to that intent.'"). Here, "ordinary textual analysis" compels the conclusion that an "establishment . . . in the executive branch" under section 1051(a) of the NDAA (and 5 U.S.C. § 104(1)) is an "establishment in the executive branch" under section 552(f)(1) of the FOIA. *See Energy Research Found.*, 917 F.2d at 582–83. The doctrine of constitutional avoidance is thus irrelevant to this case, and it is certainly not a basis to rewrite the plain statutory text of the NDAA and the FOIA as the Government sees fit.

Third, the Government wildly overstates the legislative history associated with 5 U.S.C. § 552(f)(1). The key passage of the Conference Report from the 1974 FOIA amendments reads, in its entirety:

> With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

S. Conf. Rep. No. 93-1200, at 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6285; *accord* H.R. Conf. Rep. No. 93-1380, at 14–15. Notably, this passage refers solely to the phrase

"Executive Office of the President" in 5 U.S.C. § 552(f)(1)—not to the statutory language at issue in this case ("establishment in the executive branch"). Congress's narrow separation-of-powers concern was simply that "*the President or his advisors*" not be compelled to disclose their records. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013) (emphasis added). Congress certainly did not announce, through a lone conference report, that courts can simply ignore express statutory language whenever the FOIA's definition of "agency" is implicated. Yet by asking the Court to disregard the AI Commission's status as an "establishment . . . in the executive branch," NDAA § 1051(a), that is exactly the absurd result that the Government urges.

Fourth, even if the Government could sidestep the plain text of the NDAA and the FOIA, the statutory structure of the Commission is entirely consistent with the separation of powers. Although the Government does not specify which constitutional provision it believes the Commission is violating, the Government's arguments appear to be based on the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. *See* Defs.' Mem. 12 ("[T]he 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."). But the Appointments Clause only limits the appointment of "principal" or "inferior" officers who "exercis[e] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). By contrast, the Appointments Clause does not restrict the appointment of mere "employees" like the members of the Commission. "Employees are lesser functionaries subordinate to officers of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976), and "such '[l]esser functionaries' need not be selected in compliance with the strict requirements of Article II." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991).

The members of the Commission are defined by statute as "employees," NDAA § 1051(a)(7), and as the Government notes, the Commission "possesses no independent authority" and is "purely advisory in nature[.]" Defs.' Mem. 12 (quoting *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)). Thus, the members of the Commission are quintessential "[l]esser functionaries" whose selection need not conform to the Appointments Clause. *Freytag*, 501 U.S. at 880. As a result, Congress's decision to place the AI Commission in the executive branch is perfectly consistent with the constitutional separation of powers.

Finally, even if the presence of legislatively-appointed members on the AI Commission meant that it could not exist within the executive branch, there is no constitutional prohibition on applying the FOIA to entities *outside* of the executive branch. Should the Court find that the Commission is not part of the executive branch, the Court should nevertheless respect Congress's decision to subject the Commission to the FOIA—as expressed through Congress's use of matching statutory language in section 1051(a) of the NDAA and 5 U.S.C. § 552(f)(1). But the Court need not go so far, as the Government's constitutional avoidance arguments fail across the board.

## II. EPIC HAS PLAUSIBLY ALLEGED THAT IT IS ENTITLED TO EXPEDITED PROCESSING AND THAT THE DEFENDANTS HAVE VIOLATED STATUTORY DEADLINES.

The Government, in its Partial Motion to Dismiss, also advances two arguments that are not within the scope of the Court's briefing order. Defs.' Mem. 15–20. These arguments should be rejected for at least three reasons: first, they are beyond the sweep of the Court's Order; second, EPIC's well-pled allegations are sufficient to survive a motion to dismiss; and third, EPIC

has established that it is entitled to expedited processing and that the agencies have not met their statutory deadlines.

On October 16, 2019, the Court ordered the parties to brief a partial motion to dismiss on the question of "whether the National Security Commission on Artificial Intelligence is an 'agency' subject to FOIA." Order, ECF No. 18. The Government addresses that issue on pages 7–15 of its Motion. But the remaining pages address issues not identified in the Court's Order: EPIC's claim for expedited processing (Count VII) and EPIC's claim that the agencies violated their statutory deadlines under 5 U.S.C. § 552(a)(6) (Count VI). There is no basis to dismiss either of these claims, and the Government's arguments should in any event be rejected as beyond the scope of this briefing.

If the Court decides to reach these additional arguments, the Government's motion should be denied because it has not carried its burden to dismiss EPIC's claims. As to the agency violations of the FOIA's statutory deadlines, the D.C. Circuit made clear in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), "if the agency does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Id.* at 189–90. The Circuit recently reiterated again in *Judicial Watch, Inc. v. DHS*, 895 F.3d 770 (D.C. Cir. 2018) that district courts have jurisdiction over claims involving FOIA processing delays and have authority to resolve those delays through injunctive relief or through "ordinary remedies, such as a production order." *Id.* at 783.

The cases that the Government cites in its motion are simply not relevant and do not support dismissal of EPIC's claims under Fed. R. Civ. P. 12(b)(6). In *Roseberry-Andrews v. DHS*, 299 F. Supp. 3d 9 (D.D.C. 2018), the court held that an initial delay was not a basis for granting the plaintiff's motion for summary judgment where the agency subsequently produced records

during the course of the litigation. *Id*. at 20. But this is not a motion for summary judgment, and the Government has produced no responsive records. In *EPIC v. DOJ*, 15 F. Supp. 3d 32 (D.D.C. 2014), the court denied EPIC's motion for a preliminary injunction and cited *CREW* to hold that the remedy for failure to meet statutory deadlines is not to "require an agency to immediately hand over all of the requested documents." *Id.* at 41. Yet the court did not dismiss any of EPIC's claims and did not make any ruling under Fed. R. Civ. P. 12(b)(6). There is simply no basis to dismiss EPIC's well-pled claim here.

There is also no basis to dismiss EPIC's expedition claims. EPIC explained the exigent need for the public to be informed about the AI Commission's activities—and the consequences that would flow from failure to obtain that relief—in both the detailed FOIA Requests that EPIC submitted to the agencies and the well-pled allegations in EPIC's Complaint. In the Complaint, EPIC described in detail the "Privacy and Human Rights Risks Posed by the Use of Artificial Intelligence," the need for "Public Participation in Artificial Intelligence Policymaking" and the Commission's role in directing U.S. policy on AI. Compl. ¶¶ 22–49. EPIC also reiterated the urgent need to "inform the public about the activities of the AI Commission" in order to meaningfully engage in advance of the release of the Commission's reports. Compl. ¶ 90. In the context of the Government's motion to dismiss, the Court must accept these allegations as true. *Am. Chemistry Council, Inc. v. HHS*, 922 F. Supp. 2d 56, 61 (D.D.C. 2013).

Thus, there is no basis to dismiss EPIC's expedition claim. The D.C. Circuit in *Al-Fayed v. CIA*, 254 F.3d 300 (D.C. Cir), articulated the standard of review and ultimately ruled on the *merits* of an expedited processing claim in the context of a plaintiff's motion for a preliminary injunction. *Id*. at 310–11. But this is not a preliminary injunction motion: it is the Government's motion to dismiss, and the applicable standard of review is whether EPIC has *stated a claim* for

expedited processing. That is not a *de novo* review "based on [sic] 'based on the record before the agency at the time of the determination.'" Defs.' Mot. 15 (quoting *Al-Fayed*, 254 F.3d at 310–11). In the context of the Government's 12(b)(6) motion, the Court's only role is to determine whether EPIC has stated "a claim for relief that is plausible on its face." Defs.' Mem. 6 (quoting *Iqbal*, 556 U.S. at 678).

The Government's reference to *EPIC v. DOD*, 355 F. Supp. 2d 98 (D.D.C. 2004), is similarly irrelevant because the court in that case was reviewing a motion for a preliminary injunction and assessing the expedition claim *de novo* based on the record before the agency. But even setting aside the standard of review, the Government's argument misunderstands the dispute in that case. The court in *EPIC v. DOD* rejected an expedition claim where the issue of urgent public interest—"data mining in general"—was *broader* than the specific subject matter of EPIC's request (the "Verify K2 Enterprise" program). *Id*. at 101–103. There is no similar mismatch here. EPIC has explained why there is an urgent public interest in understanding the work of the AI Commission, which is the subject of this request. *See* Compl. ¶¶ 22–49, 90.

The Government's argument concerning the "imminent government action" prong of EPIC's expedition claim is especially confounding given the extensive discussion at the October 16, 2019 hearing about the AI Commission's pending reports. *See* Tr. Mot. Hr'g 2–5, 10, 14–16, 19–21, 34–41, 48–53, ECF No. 22 (recording dozens of references to the Commission's reports). The Commission's issuance of these reports is most certainly an "imminent" action by the Government. The November 2019 report has now been released, and the next report will be filed in October 2020. As the Government concedes, the production of records to EPIC can only serve the urgent need that EPIC has articulated if there "would be [] time before the report's release" for the EPIC and other members of the public to "formulate input" based on the Commission's

records. Defs.' Mem. 18. Yet the agency has not even begun to process EPIC's request. There is no question that the Commission's 2020 report is "associated with a specific timeframe," and EPIC has properly alleged that it is the subject of an "ongoing public controversy." *Long v. DHS*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006).

The Government's further attempt to rely on cases addressing motions for preliminary injunctions—*Long*; *Landmark Legal Foundation v. EPA*, 910 F. Supp. 2d 270 (D.D.C. 2012); *Open Top Sightseeing USA v. Mr. Sightseeing, LLP*, 48 F. Supp. 3d 87 (D.D.C. 2014); and *Sai v. TSA*, 54 F. Supp. 3d 5 (D.D.C. 2014)—is again beside the point. This is a motion to dismiss, and there is no basis to dismiss EPIC's expedition claims. The Government's arguments as to Counts VI and VII of EPIC's Complaint thus fail.

## CONCLUSION

For the above reasons, the Court should deny the Government's Partial Motion to Dismiss EPIC's Complaint.

Respectfully Submitted,

MARC ROTENBERG, D.C. Bar #422825
EPIC President and Executive Director

ALAN BUTLER, D.C. Bar #1012128
EPIC Senior Counsel

/s/ John L. Davisson
JOHN L. DAVISSON, D.C. Bar #1531914
EPIC Counsel

ELENI KYRIAKIDES, D.C. Bar #155276
EPIC International Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1519 New Hampshire Ave, N.W.
Washington, D.C. 20036
(202) 483-1140 (telephone)

(202) 483-1248 (facsimile)

*Attorneys for Plaintiff EPIC*

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