

**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 STATUS REPORT

Plaintiff Electronic Privacy Information Center (“EPIC”) respectfully submits this Status Report to notify the Court of material developments in this case in advance of the December 20, 2019 status conference. Specifically: (1) Defendants National Security Commission on Artificial Intelligence (“AI Commission” or “NSCAI”), et al., have failed to file a timely answer or other pleading responsive to EPIC’s Complaint; and (2) EPIC has proposed, and Defendants have declined, a schedule for the production of records by the AI Commission and United States Department of Defense (“DOD”) pursuant to the Freedom of Information Act (“FOIA”).

Defendants Have Failed to Timely Answer EPIC’s Complaint

1. Defendants have failed to file an answer or other pleading responsive to EPIC’s Complaint by the deadline(s) set by this Court and the Federal Rules of Civil Procedure. As a result, Defendants have failed to deny—and have therefore admitted to—all of the factual allegations set forth in EPIC’s Complaint.

2. EPIC filed a Complaint in this case on September 27, 2019, stating claims under the FOIA, the Federal Advisory Committee Act (“FACA”), the Administrative Procedure Act (“APA”), and the Mandamus and Venue Act of 1962. Compl., ECF No. 1.

3. On the same day, EPIC filed a Motion for a Preliminary Injunction to obtain expedited processing of EPIC’s FOIA Requests. Mot. for Prelim. Inj., ECF No. 4.

4. On October 2, 2019, Government counsel entered an appearance on behalf of all Defendants. Notice of Appearance, ECF No. 9.

5. On October 2, 2019, EPIC served the Complaint on the United States Attorney for the District of Columbia. Aff. of Service, ECF No. 11.

6. As a result of EPIC’s service on the U.S. Attorney, Defendants had thirty days—until November 1, 2019—to “serve an answer or otherwise plead to [EPIC’s] complaint[.]” 5 U.S.C. § 552(a)(4)(C); *see also* Docket Entry No. 11 (“Answer due for ALL FEDERAL DEFENDANTS by 11/1/2019.”).

7. EPIC subsequently served the Complaint on Defendant United States Department of Defense on October 3, 2019, Aff. of Mailing, ECF No. 12; the United States Attorney General on October 4, 2019, Aff. of Mailing, ECF No. 11; Defendant Eric Schmidt, in his official capacity as Chairman of the National Security Commission on Artificial Intelligence, on October 11, 2019, Aff. of Mailing, ECF No. 20; Defendant Ylli Bajraktari, in his official capacity as Executive Director of the National Security Commission on Artificial Intelligence, on October 11, 2019, Aff. of Mailing, ECF No. 21; and Defendant National Security Commission on Artificial Intelligence on October 15, 2019, Aff. of Mailing, ECF No. 19.

8. On October 18, 2019, the Court denied EPIC’s Motion for a Preliminary Injunction but set a “briefing schedule for 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. The Court ordered the Defendants to file their Motion by October 31, 2019. *Id.*

9. On October 31, 2019, Defendants filed a Motion to Dismiss FOIA Claims, which asked the Court to dismiss Counts VI and VII of EPIC’s Complaint. Defs.’ Mot. to Dismiss FOIA Claims, ECF No. 23.

10. Defendants did not move to dismiss, or otherwise file a pleading responsive to, Counts I–V and Count VIII of EPIC’s Complaint. *See id.*

11. Defendants stated that they would “separately answer[] Plaintiff’s Count VIII alleging unlawful withholding of agency records.” *Id.* at 1 n.1; *see also* Mem. Op. & Order at 20 n.7, ECF No. 26. Defendants did not explain when or how Count VIII would be answered.

12. Defendants also stated that their “responses to Plaintiffs’ remaining claims” (Counts I–V) were “not yet due,” and that “Defendants [would] address them separately when responses are required.” *Id.* at 1 n.1.

13. On November 14, 2019, Defendants filed a Reply in Further Support of Defendants’ Motion to Dismiss FOIA Claims, ECF No. 25.

14. Defendants again claimed in their Reply that “Defendants’ time to respond to Plaintiffs’ claims under the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16, ha[d] not yet run.” *Id.* at 11 n.4 (citing Fed. R. Civ. P. 12(a)(3)). Defendants stated that they would “timely respond to those claims in a separate filing” by an unspecified date. *Id.*

15. Defendants did not explain why the 60-day deadline of Fed. R. Civ. P. 12(a)(3) would supersede this Court’s instruction to “ALL FEDERAL DEFENDANTS” to file an answer by November 1, 2019. Docket Entry No. 11.

16. However, even if Fed. R. Civ. P. 12(a)(3) were to control the answer deadline for Counts I–V of EPIC’s Complaint, an answer or responsive pleading would have been due—at the outermost—by Monday, December 16, 2019, 62 days after service was effected on the final Defendant. *Id.*; *see also* Fed. R. Civ. P. 6(a)(1)(C) (extending deadlines that fall on a weekend to the next weekday).

17. On December 3, 2019, the Court denied Defendants’ Motion to Dismiss FOIA Claims. Mem. Op. & Order, ECF No. 26.

18. By rule, Defendants had “14 days after notice of the court’s action”—i.e., until Tuesday, December 17, 2019—to file a pleading responsive to the counts that Defendants unsuccessfully moved to dismiss (Counts VI and VII). Fed. R. Civ. P. 12(a)(4)(A).

19. Today is Thursday, December 19, 2019.

20. Defendants have failed to serve an answer or other pleading responsive to Counts I–V of EPIC’s Complaint by the deadline of November 1, 2019 (or, at the outermost, by December 16, 2019). *See* Docket Entry No. 11; Fed. R. Civ. P. 12(a)(3).

21. Defendants have failed to serve an answer or other pleading responsive to Counts VI and VII of EPIC’s Complaint within the period allowed by Fed. R. Civ. P. 12(a)(4)(A).

22. Defendants have failed to serve an answer or other pleading responsive to Count VIII of EPIC’s Complaint by the deadline of November 1, 2019. *See* 5 U.S.C. § 552(a)(4)(C); Docket Entry No. 11.

23. The Federal Rules of Civil Procedure are clear about the consequence of Defendants’ failure to timely serve an answer or responsive pleading: “An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6); *see also* *Reyes v. Kimuell*, 270 F. Supp. 3d 30,

32 n.1 (D.D.C. 2017) (citing Fed. R. Civ. P. 8(b)(6)) (“Because Mr. Kimuell has not responded, the Court treats the allegations of the complaint as admitted, except as to the amount of damages.”); *Casanova v. Marathon Corp.*, 256 F.R.D. 11, 16 (D.D.C. 2009) (“If a timely answer to a complaint is not filed, it has to follow from Rule 8 that all the allegations in the complaint are deemed admitted.”); *Seifert v. Winter*, 555 F. Supp. 2d 3, 6 n.2 (D.D.C. 2008) (“Because the defendant did not file an answer to the plaintiff’s complaint, the Court will treat all of the facts alleged in the complaint as true pursuant to Federal Rule of Civil Procedure 8(b)(6).”).

24. Having failed to serve a timely answer or other pleading responsive to EPIC’s claims, Defendants have therefore admitted to all of the factual allegations set forth in EPIC’s Complaint. *See* Fed. R. Civ. P. 8(b)(6).

EPIC Has Proposed, and Defendants Have Declined, a FOIA Production Schedule

25. On December 3, 2019, this Court denied Defendants’ Motion to Dismiss FOIA Claims, ruling (1) that the AI Commission is an “agency” subject to the FOIA; and (2) that dismissal of Counts VI and VII of EPIC’s Complaint—the two Counts addressed in Defendants’ Motion—was not warranted. Mem. Op. & Order.

26. At the conclusion of the initial pleading process in FOIA cases, it is this Court’s ordinary practice to set a schedule for the production of records by agency defendants. *See, e.g.*, Minute Order, *EPIC v. DOJ*, No. 17-410-TNM (July 11, 2017) (“[T]his case will proceed according to the following schedule: (1) The DOJ shall produce all non-exempt records responsive to categories 4 and 5 of Plaintiff’s FOIA request, or otherwise respond to that portion of Plaintiff’s request, on or before August 16, 2017[.]”).

27. Accordingly, EPIC contacted opposing counsel on December 10, 2019 to discuss a FOIA production schedule that the parties could jointly propose to the Court ahead of the December 20, 2019 status conference.

28. EPIC proposed the following schedule with respect to EPIC's September 11, 2019 FOIA request to the AI Commission:

- By **Jan. 31, 2020**, the Commission will process 3,000 pages of responsive records and disclose to EPIC all non-exempt, reasonably segregable portions thereof.
- By **the last day of every month** thereafter (or the next working day, if the month ends on a weekend or holiday), the Commission will process 3,000 additional pages of responsive records and disclose to EPIC all non-exempt, reasonably segregable portions thereof.
- This production schedule will continue until the Commission has processed all records responsive to EPIC's FOIA request and has disclosed to EPIC all non-exempt, reasonably segregable portions thereof.
- In identifying and processing records, the Commission will prioritize the categories of records identified in EPIC's November 5, 2019 supplemental letter to the NSCAI, Ex. A:
 - All records, including emails, draft language, and communications, regarding footnote 179 of the November 2019 Commission Report, concerning privacy protection and the GDPR;
 - All records, including emails, draft language, and communications, regarding footnote 196 of the Report, concerning "government access to data on Americans;" and

- The names of all the “Commission’s staff engagements,” as that term is used on pg. 66 of the Report, between March 2019 and October 2019.

29. EPIC noted that this schedule is consistent with FOIA production schedules ordered by courts in the D.D.C. and is reasonable under the circumstances, given that the AI Commission has no other FOIA requests to process. Hr’g Tr. 31:15–24, ECF No. 22; *see also Seavey v. DOJ*, 266 F. Supp. 3d 241, 247–48 (D.D.C. 2017) (2,850 pages per month); *EPIC v. DHS*, 218 F. Supp. 3d 27, 37 (D.D.C. 2016) (2,000 pages per month); *Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (5,000 pages per month); Joint Status Rep., *Lardner v. FBI*, No. 03–cv–874 (D.D.C. Aug. 1, 2012) (5,000 pages per month).

30. EPIC proposed the following schedule with respect to EPIC’s February 22, 2019 FOIA request to the DOD:

- By **Jan. 31, 2020**, the DOD will process 1,000 pages of responsive records and disclose to EPIC all non-exempt, reasonably segregable portions thereof.
- By **the last day of every month** thereafter (or the next working day, if the month ends on a weekend or holiday), the DOD will process 1,000 additional pages of responsive records and disclose to EPIC all non-exempt, reasonably segregable portions thereof.
- This production schedule will continue until the DOD has processed all records responsive to EPIC’s FOIA request and has disclosed to EPIC all non-exempt, reasonably segregable portions thereof.

31. On December 13, 2019, opposing counsel informed EPIC that the AI Commission “is still arranging the infrastructure needed to conduct FOIA review, so it is not in a position to agree on a processing schedule at this time.”

Next Steps in This Case

32. In view of the Court's December 3, 2019 ruling and Defendants' admission of all facts set forth in EPIC's Complaint, EPIC believes it would be appropriate for the Court to (1) set a schedule for the production of records pursuant to the FOIA by Defendants AI Commission and DOD, consistent with the above-described proposal; and (2) set a schedule for the briefing of cross-motions for summary judgment on EPIC's FACA, APA, and Mandamus claims.

33. Given that the meetings of the AI Commission are ongoing, and that EPIC seeks access to those meetings pursuant to the FACA, EPIC believes the following accelerated schedule for summary judgment briefing would be appropriate:

- 1/14/20 – Defendants' Motion for Summary Judgment
- 1/28/20 – Plaintiff's Opposition and Cross-Motion for Summary Judgment
- 2/7/20 – Defendants' Reply and Opposition
- 2/14/20 – Plaintiff's Reply

34. The adoption of the above production and briefing schedules would facilitate the efficient resolution of this lawsuit and conserve the Court's resources.

35. EPIC contacted opposing counsel concerning this Status Report, who stated that Defendants will set forth and explain their positions on these matters at tomorrow's hearing.

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

ENID ZHOU, D.C. Bar #1632392
EPIC Open Government Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Dated: December 19, 2019

Attorneys for Plaintiff EPIC