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.	)	

REPLY IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS FOIA CLAIMS

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INTRODUCTION

For the reasons set forth in the Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss FOIA Claims, ECF No. 23-1, ("Motion"), the Court should dismiss Plaintiff Electronic Privacy Information Center's ("Plaintiff") claims under the Freedom of Information Act ("FOIA") against Defendant National Security Commission on Artificial Intelligence ("AI Commission" or "Commission") in their entirety and dismiss Plaintiff's claims against Defendant United States Department of Defense ("DoD") challenging DoD's alleged failure to respond to Plaintiff's FOIA requests within statutory deadlines and denial of Plaintiff's request for expedited processing.

In Plaintiff's Opposition to Defendants' Partial Motion to Dismiss ("Opposition"), ECF No. 24, Plaintiff makes a series of arguments to the contrary, none of which have merit. The Opposition fundamentally misunderstands the nature of the constitutional avoidance doctrine Congress built into the definition of "agency" when it enacted 5 U.S.C. § 552(f) to expand the scope of that term. Moreover, Plaintiff's attempts to avoid the Court's consideration of the defects in their expedition and statutory deadline claims or, in the alternative, to resuscitate those claims are futile. Defendants properly moved to dismiss those claims, and the claims lack merit.

ARGUMENT

I. The Court Should Dismiss All FOIA Claims Against the AI Commission Because It Is Not an Agency Subject to FOIA.

As explained in the Motion, when Congress expanded FOIA's scope in 1974 by enacting 5 U.S.C. § 552(f), it intended courts to apply the functional analysis set forth in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), when the definition of "agency" would otherwise implicate separation of powers issues. Here, Congress purporting to establish the AI Commission in the executive branch raises such issues because it possesses no executive powers and is comprised

almost exclusively of members appointed by the legislative branch who cannot be removed by the President. And, applying the *Soucie* analysis confirms that the Commission is not an "agency" within the meaning of FOIA. Plaintiff's attacks on this analysis are unpersuasive.

A. The McCain Act's Language Does Not Trump the Doctrine of Constitutional Avoidance Incorporated into FOIA's Definition of "Agency."

Plaintiff contends that the Court should begin and end its analysis of whether the AI Commission is an agency under FOIA by looking to the McCain Act that created the Commission. *See* Opp. at 11-17. Plaintiff specifically relies on language in the McCain Act that purports to establish the AI Commission in the executive branch and argues based on *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (D.C. Cir. 1990), that this language is dispositive of the Commission's status as an agency subject to FOIA. Opp. at 13. *See also id.* at 17-18.

Although it is true that the court in *Energy Research Foundation* relied heavily on Congress's language creating the Defense Nuclear Facilities Board as an "establishment in the executive branch" to hold that the Board was an agency for purposes of FOIA, the Board undisputedly did not raise any separation of powers issues. *See generally Energy Research Found.*, 917 F.2d 581. The Board was not within the Executive Office of the President, and its members were not appointed by Congress. *Id.* at 582. D.C. Circuit precedent is clear that, when deeming an entity to be an agency does raise separation of powers concerns—as is the case with the AI Commission—*Soucie*'s functional analysis applies, regardless of the language of the entity's enabling statute. *See* Mot. at 9-12. *See also Rushforth v. Council of Economic Advisors*, 762 F.2d 1038, 1042-44 (D.C. Cir. 1985) (applying *Soucie* to conclude that an entity was not an agency under FOIA despite having a functionally identical enabling statute to an agency under FOIA). Congress literally included the entire Executive Office of the President within the 1974

expansion of FOIA's definition of "agency," but numerous cases since 1974 have held that entities within that Office are not agencies subject to FOIA because of separation of powers concerns. *See, e.g.*, *Armstrong v. Exec. Office of the President*, 90 F.3d 552, 555-56 (D.C. Cir. 1996). Further, as the D.C. Circuit noted in *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997), *Soucie* applies even in "cases not involving presidential power at all." *Id.* at 881. Rather, Congress intended the *Soucie* test to control whenever a literal application of FOIA's definition of "agency" would raise separation of powers issues. The D.C. Circuit has also explicitly stated that Congress intended FOIA's definition of "agency" to be read to avoid separation of powers issues and that those issues are a "more fundamental" basis than FOIA's statutory language when deciding which government entities are "agencies." *Judicial Watch, Inc.*, 726 F.3d at 224, 227.

For this reason, Plaintiff's citation to a laundry list of government entities that were created under statutory language similar to the McCain Act's language creating the AI Commission is unavailing. *See* Opp. at 13-17. Plaintiff does not suggest that subjecting any of those entities to FOIA would implicate separation of powers concerns. In the absence of those concerns, the language of the statutes would be the dispositive consideration for determining whether they are subject to FOIA, as was the case for the Defense Nuclear Facilities Board in *Energy Research Foundation* and as is the case for any number of other federal agencies.

Plaintiff relies on the language of the McCain Act in an effort to distinguish *Dong* from this case, Opp. at 18-20, but this argument misapprehends *Dong*'s relevance. *Dong* establishes that *Soucie* applies outside the context of entities in the Executive Office of the President and states that an entity within the executive branch and subject to FOIA but controlled by

individuals appointed primarily by the legislative branch would create separation of powers issues. *Dong*, 125 F.3d at 881, 887.

Congress itself incorporated the constitutional avoidance doctrine into 5 U.S.C. § 552(f). *See Judicial Watch, Inc.*, 726 F.3d at 227. Congress's later usage of language purporting to place the AI Commission in the executive branch for at least some purposes does not demonstrate a decision to override its earlier intent for FOIA's definition of "agency" to exclude entities that would implicate separation of powers issues. *See Byers v. U.S. Tax Court*, 211 F. Supp. 3d 240, 248 252 (D.D.C. 2016) (holding that the U.S. 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"). *See also 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) (holding that a functional analysis, not a statutory label, determine whether an entity is within the executive branch for FOIA purposes), *aff'd*, 432 F.3d 387 (2d Cir. 2005). Plaintiff's argument relying exclusively on the language of the McCain Act is therefore without merit.

B. If the AI Commission Were Considered an Agency Subject to FOIA, It Would Implicate Separation of Powers Issues.

A statute triggers separation of powers scrutiny when Congress creates entities with legislatively assigned duties but purporting to exercise the powers of other branches of government. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269, 274 (1991). Congress may overreach, for example, by constraining the appointment and removal of officers in the executive branch. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497-98 (2010) (removal); *Freytag v. Comm'r, Internal Revenue*, 501 U.S. 868, 882 (1991) (appointment). Here, if the language in the McCain Act were to be interpreted to place the AI Commission within the executive branch for purposes of FOIA,

it would raise serious separations of powers concerns because Congress appoints the overwhelming majority of the Commission's members and the Congressionally-controlled Commission would be exercising the powers of the executive branch. *See* Mot. at 12-13. The President does not directly appoint any members of the Commission, nor does the McCain Act authorize the President to remove members. McCain Act. §§ 1051(a)(4)(A) & (a)(6). These are precisely the kind of issues that the D.C. Circuit held would raise separation of powers concerns in *Dong*, if the government entity at issue in that case were considered an "agency" under FOIA. *See Dong*, 125 F.3d at 879.

In an effort to completely avoid the application of *Soucie* to determine whether the AI Commission is an agency under FOIA, Plaintiff contends that the Court should not apply the constitutional avoidance doctrine. Opp. at 20-23. The five arguments Plaintiff marshals in support of this contention are unpersuasive.

First, Plaintiff makes the confusing and confused argument that using *Soucie* to determine whether the AI Commission is an agency subject to FOIA would not resolve any separation of powers issues because the McCain Act would still purport to establish the Commission within the executive branch.[1] Opp. at 20-21. Critically, Plaintiff does not explain how that language in the McCain Act would raise separation of powers concerns outside the

[1] In a footnote to this argument, Plaintiff asserts that the proper resolution of any separation of powers issues would be to dissolve or enjoin the AI Commission. Opp. at 20 n.22. For such a remedy to be justified, the Court would need to hold conclusively that the Commission was unconstitutional in its entirety. Reaching that conclusive holding would require the Court to disregard the principle of constitutional avoidance incorporated into FOIA. Also, the proper remedy would actually be to invalidate the single, severable provision of the McCain Act purporting to place the Commission within the executive branch. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (reiterating the rule that invalidating a severable portion of a statute is normally the proper remedy for a constitutional problem). The primary effect of invalidating that provision would be to exempt the Commission from FOIA and, more importantly, would have no impact on the Commission's ability to do its work.

FOIA context. *See generally id.* A government entity can properly be "treated as an agency under other federal statutes," even if it is not an agency under FOIA and deeming it to be within the executive branch for purposes of FOIA "could appear to violate the Constitution's separation of powers principles." *See Dong*, 125 F.3d at 879, 882-83. Using *Soucie* to interpret 5 U.S.C. § 552(f) not to include the Commission would avoid the constitutional issue before the Court, as Congress intended. This is entirely consistent with the Commission being within the executive branch for other purposes. *See Dong*, 125 F. 3d at 882-83. *See also Byers*, 211 F. Supp. 3d at 248 252. Plaintiff's speculation that there might be other contexts where giving effect to Congress's language purporting to establish the Commission within the executive branch could give rise to separation of powers issues is therefore both unpersuasive and beside the point.

Second, Plaintiff argues that the doctrine of constitutional avoidance is inapplicable here because it requires that a statute be susceptible to more than one construction and Plaintiff asserts that the McCain Act can be interpreted only one way. This argument is doubly flawed. The focus of the constitutional avoidance doctrine here is on FOIA's definition of agency, not the McCain Act. *Rushforth*, 762 F.2d at 1041-42 (holding that the language of a government entity's originating statute is not determinative of its agency status under FOIA). Congress has incorporated the constitutional avoidance doctrine into 5 U.S.C. § 552(f) since its enactment, making that statutory provision susceptible to a non-literal interpretation. *See Armstrong*, 90 F.3d at 555-56 (excluding entities within the Executive Office of the President from the scope of 5 U.S.C. § 552(f)). Further, as discussed above, a government entity can be an agency for some purposes without being an agency under FOIA. *See Dong*, 125 F.3d at 882-83. Thus, even if the McCain Act were the proper focus of the statutory analysis, the Court could still give its language effect without holding that the AI Commission is an agency subject to FOIA. This

would be a perfectly plausible alternate interpretation of Congress's intent to which the McCain Act is susceptible.

Third, Plaintiff argues that Congress intended to incorporate the doctrine of constitutional avoidance into FOIA's definition of "agency" only when a government entity is within the Executive Office of the President. Opp. at 21-22. In doing so, Plaintiff accurately recites the relevant portion of the legislative history to the 1974 FOIA amendments that enacted 5 U.S.C. § 552(f). However, Plaintiff does not respond at all to the subsequent court decisions in the D.C. Circuit and elsewhere applying a functional analysis to entities outside the Executive Office of the President to interpret FOIA's provisions establishing what government entities constitute "agencies" under that statute.[2] *See generally* Opp. at 21-22. In addition, even when Congress does not explicitly say that it intends to incorporate the doctrine of constitutional avoidance, that doctrine still instructs courts to interpret statutes in light of "the reasonable presumption that Congress did not intend [an] alternative [statutory construction] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Plaintiff has thus given no reason for the Court to disregard this well-established doctrine, which has particular relevance and application to the FOIA statute.

Fourth, Plaintiff argues that it would be constitutional for the AI Commission to be located within the executive branch because the members of the Commission are only

[2] When interpreting 5 U.S.C. § 552(f)—the 1974 expansion of FOIA's definition of "agency" upon which Plaintiff relies in this case—courts apply *Soucie*'s functional analysis, even when a government entity exists outside the Executive Office of the President. *See Dong*, 125 F.3d at 881. *See also Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974) (applying the *Soucie* precedent to hold that initial review groups were a type of advisory entity, not an agency subject to FOIA). When interpreting 5 U.S.C. § 551(1)—the original definition of "agency" that, *inter alia*, excludes the judicial and legislative branches—courts apply an analysis based on an entity's functions. *See Byers v. U.S. Tax Court*, 211 F. Supp. 3d 240, 252 (D.D.C. 2016); *Megibow*, 2004 WL 1961591, at *5.

employees. Opp. at 22-23. However, the Commission members' constitutional status and the effect of that status on separation of powers issues is precisely the kind of constitutional determination that Congress and the D.C. Circuit have instructed courts to avoid making when interpreting FOIA and, indeed, statutes generally. *Judicial Watch, Inc.*, 726 F.3d at 224, 227. *See also Clark*, 543 U.S. at 381. The Court should therefore decline Plaintiff's invitation to disregard the constitutional avoidance doctrine here and address the underlying constitutional issues if FOIA's definition of "agency" were interpreted to include the Commission.

Moreover, Plaintiff's argument that members of the Commission are only employees not governed by the Appointments Clause contains two logical missteps. For one, Plaintiff makes a false distinction between government functionaries that are defined as employees by statute, like the members of the Commission, and those that qualify as officers of the United States under the Constitution. *See Lucia v. SEC*, 138 S.Ct. 2044, 2062 (2018) (Breyer, J., concurring in part) (stating that certain "statutory features, while highly relevant, need not always prove determinative" in determining if a position is governed by the Appointments Clause). *See also Freytag*, 501 U.S. at 882 (1991) (looking to an appointee's duties and authority to determine if he or she is a constitutional officer). For another, Plaintiff wrongly conflates the type of authority necessary to raise constitutional issues with the type necessary to qualify as an agency under the *Soucie* test. *See* Opp. at 23 (noting that the Commission is purely advisory). Although Plaintiff is correct that the Commission can only make recommendations about federal policies, not enact them itself, the D.C. Circuit has explained that a government functionary possessing only "purely recommendatory powers" is not necessarily dispositive of whether he or she is an officer subject to the Appointments Clause. *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (interpreting *Freytag*, 501 U.S. at 882). In sum, the McCain Act raises precisely the kind

of complicated constitutional issues that courts should avoid under the constitutional avoidance doctrine.

Fifth, Plaintiff argues—without any supporting authority—that "there is no constitutional prohibition on applying the FOIA to entities outside the executive branch." Opp. at 23. Setting aside any constitutional issues,[3] Congress exempted both the legislative and judicial branches from FOIA's definition of "agency." 5 U.S.C. § 551(1). *See also Mayo v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993) (explaining that "Congress" and "the courts of the United States" in 5 U.S.C. § 551(1) encompass the full legislative and judicial branches). If the McCain Act had the effect of establishing the AI Commission within the legislative branch for FOIA purposes, the Commission would not be subject to FOIA. This alternate construction of the McCain Act would avoid any constitutional issues, but it would not help Plaintiff. Indeed, if the Court were to apply a functional analysis to the Commission and conclude that it functions as a part of the legislative branch, that conclusion would constitute an independent basis to dismiss Plaintiff's FOIA claims against the Commission. *See Byers*, 211 F. Supp. 3d at 252 (applying such a functional analysis to hold that the U.S. Tax Court fell within 5 U.S.C. § 551(1)'s exclusion of the judicial branch). This would be true even if the Commission were "a part of the Executive Branch for [other] purposes." *Id.*

C. Under the *Soucie* test, the AI Commission is Not an Agency Subject to FOIA.

Plaintiff never argues that the AI Commission falls within FOIA's definition of "agency" if the Court were to apply *Soucie*'s functional test to interpret that term. *See generally* Opp. at 11-23. To the contrary, Plaintiff concedes that the Commission "'possesses no independent

[3] Although not relevant here, it is by no means clear that Congress could subject the judicial branch to FOIA without creating separation of powers issues.

authority and 'is purely advisory in nature.'" Opp. at 23 (quoting Defs.' Mot. at 12). By failing to respond to Defendants' argument, Plaintiff has conceded it. *See Koker v. Aurora Loan Servicing*, 915 F. Supp. 2d 51, 64 (D.D.C. 2013). Therefore, if the Court applies a functional analysis—as it should—Plaintiff has conceded that the Court should hold that the Commission is not an agency under FOIA.

II. The Court Should Dismiss Plaintiff's Counts VI and VII Against All Defendants.

Even if it were to hold the Commission is subject to FOIA, the Court should nonetheless dismiss Plaintiff's claims against both the AI Commission and DoD for expedited processing and for not making final determinations on Plaintiff's FOIA requests within the applicable statutory deadlines. *See* Mot. at 15-20. Plaintiff's contentions to the contrary lack merit.

A. Defendants are Entitled at this Time to Move to Dismiss Plaintiff's Claims for Expedition and Failure to Comply with Statutory Timelines.

Plaintiff first contends that the Court should not consider Defendants' motion to dismiss Counts VI or VII because the Court's October 16, 2019 Order, ECF No. 18, required Defendants by October 31, 2019, to file only a partial motion to dismiss based on the AI Commission not being an agency under FOIA. Opp. at 23-24. Plaintiff provides no legal argument or authority justifying this contention. *See generally id.* While filing a partial motion to dismiss would have tolled Defendants' obligation to respond to the remainder of the Complaint, *see Kangethe v. D.C. Dep't of Employ't Servs.*, 891 F. Supp. 2d 69, 71 (D.D.C. 2012), it does not prevent Defendants from addressing other aspects of the Complaint in their Motion. Notably, the Court did not state that Defendants should brief only the issue of the Commission's agency status. *Id.* Moreover, although courts in this jurisdiction permit successive motions under Federal Rule of Civil procedure 12(b)(6), consolidated motions are considered more respectful of limited judicial resources. *See United States v. Comstor Corp.*, 308 F. Supp. 3d 56, 72 n.8 (D.D.C. 2018); *Butler*

v. Fairbanks Capital, No. Civ.A. 04-0367(RMU), 7, 18, No. 18, 2005 WL 5108537, at *2 (D.D.C. Jan. 3, 2005). Thus, Defendants properly filed a single motion to dismiss in which they made all the arguments they intend to assert for dismissal of Plaintiffs' FOIA claims.[4]

B. Plaintiff's Expedition Claims Should be Dismissed Because Plaintiff has Failed to Establish Urgency.

As demonstrated in the Motion, Plaintiff has not shown that there is sufficient urgency to the disclosure of the records it seeks from either the AI Commission or DoD to justify expedited processing of its FOIA requests. Mot. at 16-20. This lack of urgency is evident from the overbreadth of Plaintiff's requests, the absence of any imminent government action that could be affected by the release of the requested records, and Plaintiff's delay in challenging DoD's denial of expedited processing. *Id.* Moreover, Plaintiff's current attempt to delay indefinitely the Court's resolution of the expedition claim undercuts any claim to urgency. *See* Opp. 24 (arguing that the Defendants' motion to dismiss the expedition claim is not properly before the Court).

As an initial matter, Plaintiff disputes the applicability of the D.C. Circuit's holding that 5 U.S.C. § 552(a)(4)(B) provides for *de novo* review of agencies' denials of requests for expedited processing based on the record before the agency. Opp. at 25-26 (discussing *Al-Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001). Plaintiff argues that this standard does not apply to motions to dismiss because the D.C. Circuit in that case was reviewing the denial of a preliminary injunction. *Id.* However, courts in this circuit apply *de novo* review of the administrative record at the summary judgment stage as well, *see, e.g.*, *Tripp v. Dep't of Defense*, 193 F. Supp. 2d 229, 241 (D.D.C. 2002), and the same standard applies for motions to dismiss and for summary

[4] Defendants' time to respond to Plaintiffs' claims under the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16, has not yet run. *See* Fed. R. Civ. P. 12(a)(3). Defendants will timely respond to those claims in a separate filing.

judgment in record review cases, *see Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222-23 (D.C. Cir. 1993); *Nat'l Auto Dealers Ass'n v. FTC*, 864 F. Supp. 2d 65, 72 (D.D.C. 2012). There is therefore no need to look beyond the justifications provided to Defendants (which were attached to, and therefore incorporated into, Plaintiff's Complaint) when reviewing the failure to grant Plaintiff's requests for expedition.

Plaintiff next contends that it met its burden on the expedition claim for the reasons in its original requests and attempts to rebut the Defendants' arguments to the contrary.[5] Opp. at 26-27. However, Plaintiff's responses to Defendants' arguments are simply a litany of specious distinctions between the cases Defendants cite and this case that do not engage with the actual arguments.

In response to Defendants' argument that Plaintiff cannot show an urgent need for disclosure because its justifications apply only to a small subset of the records it seeks, Plaintiff asserts that the case cited for that proposition is inapposite because it involved an overly broad justification, not an overly broad request. Opp. at 26 (discussing *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98 (D.D.C. 2004)). Plaintiff's assertion is unavailing because it does not respond to the full scope of Defendants' argument. Plaintiff addresses neither the underlying legal principle relied on in the Motion that a FOIA requester must justify its urgent need for the specific types of records it seeks, *see Elec. Privacy Info. Ctr.*, 355 F. Supp. 2d at 102, nor the logical inconsistency of Plaintiff seeking so many irrelevant records that processing them would inevitably delay the processing of those few records relevant to Plaintiff's justifivations for

[5] At one point, Plaintiff appears to argue that, at the motion to dismiss stage, the Court must accept the legal conclusions Plaintiff draws from the factual assertions in its expedition requests. Opp. at 25. This is not the case. Courts accept as true only factual allegations and reasonable inferences therefrom, not legal conclusions, when deciding a motion to dismiss. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006).

urgently needing disclosure, *see* Defs.' Opp to Pl.'s Mot. for a Preliminary Injunction, ECF No. 16, at 12.

In the Motion, Defendants argued that there is no urgency to the release of the requested records because the records would not affect any imminent government action. Plaintiff addresses this argument by pointing to the AI Commission's forthcoming report set for October 2020. Opp. at 26-27.[6] However, courts review claims for expedition based on the justifications presented to agencies. 5 U.S.C. § 552(a)(6)(E)(iii). Plaintiff therefore cannot rely on the October 2020 report because it was not relied upon in either of its requests for expedited processing, both of which relied instead on the Commission's now-issued Interim Report and the generalized need to understand the Commission's work.[7] *See* Compl. Ex. B at 4 & Ex. I at 8-9.

Finally, Plaintiff completely fails to engage with Defendants' arguments that (1) there was no urgent need for release of records related to the Interim Report because Congress did not include a right for the public to participate in the drafting of that report and (2) Plaintiff's delay in appealing DoD's denial of expedited processing undercuts its claim to urgency. *See* Opp. at 27. *See also* Mot. at 17-19. Rather, Plaintiff notes the decisions Defendants cite in support of these propositions were made in the context of motions for preliminary injunctions, not motions to dismiss. Opp. at 27. This response does nothing to undercut the logic of these arguments or their applicability to this case. Further, as noted in the Motion, there is a close "relationship

[6] Although Plaintiff mentions the AI Commission's now-issued Interim Report, Plaintiff appears to acknowledge that past events cannot justify urgency, even if the events had not yet occurred when the requester asked for expedited processing. Opp. at 26-27. *See also Harvey v. Lynch*, 123 F. Supp. 3d 3, 7 (D.D.C. 2015) (holding that the release of documents moots FOIA claims seeking those documents).

[7] Furthermore, Plaintiffs lacked an urgent need for the Interim Report because Plaintiff and the public have an opportunity to review and comment on that report before the AI Commission issues its conclusive findings and recommendations. *See* Mot. at 3.

between the irreparable harm analysis and the FOIA inquiry into whether plaintiff has an 'urgency to inform' and thus a 'compelling need' for expedition." Mot. at 19 (quoting *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 11 n.6 (D.D.C. 2014)). This relationship makes the rationale for deciding a motion for a preliminary injunction applicable to deciding a motion to dismiss.

* * *

Plaintiff's inability to rebut any of the reasons that it is not entitled to expedited processing of its FOIA requests to DoD or the AI Commission (if the Commission were even subject to FOIA) clearly illustrates why the Court should dismiss those claims.

C. Failure to Comply with FOIA's Statutory Deadlines is Not an Independent Claim for Relief, so Plaintiff's Claims on that Basis Should be Dismissed.

An agency's failure to respond to a FOIA request within the statutory deadline constructively exhausts the requester's administrative remedies, permitting it to seek judicial review, but it "is not an independent basis for a claim." *Rosebury-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). In response to this black letter law, Plaintiff offers the anodyne *non sequitur* that courts have authority to issue injunctive relief to address delays in processing records. Opp. at 24 (citing *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 783 (D.C. Cir. 2018)). This proposition is irrelevant to whether failure to make a final determination on a FOIA request within the applicable statutory timeline gives rise to a claim independent from the failure to grant that request. Plaintiff then tries to distinguish the cases Defendants relied on in their Motion on the ground that those decisions were not ruling on motions to dismiss. Opp. at 24-25. Plaintiff, however, provides no explanation of why the procedural posture before the court would affect the general propositions of law recited in those cases. *See generally id.* To the extent it matters, the principle that an agency's failure to make a

determination within FOIA's statutory deadlines does not alone give rise to a claim has been the rationale for dismissing claims pursuant to Federal Rule of Civil Procedure 12(b)(6) as well as disposing of such claims in other procedural postures. *See, e.g., Am. Ctr. for Law & Progress v. U.S. Dep't of State*, 249 F. Supp. 3d 275, 283 (D.D.C. 2017). Plaintiff's arguments regarding this claim are therefore baseless, and the Court should dismiss the claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss all Plaintiff's FOIA claims against the AI Commission as well as Plaintiff's claims challenging DoD's denial of Plaintiff's request for expedited processing of its request and failure to comply with FOIA's statutory deadlines.

Dated: November 14, 2019

Respectfully submitted,

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