

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

JOINT STATUS REPORT

Pursuant to the Court’s February 4, 2020 Minute Order, Plaintiff Electronic Privacy Information Center (“EPIC”) and Defendants National Security Commission on Artificial Intelligence (“AI Commission” or “Commission”), Eric Schmidt, in his official capacity as Chairman of the AI Commission, Ylli Bajraktari, in his official capacity as Executive Director of the Commission, and the United States Department of Defense (“DOD”) (collectively, “Defendants”), by and through undersigned counsel, respectfully submit this Joint Status Report concerning EPIC’s Freedom of Information Act (“FOIA”) request.

1. Status of Plaintiff’s FOIA Requests

Plaintiff’s Statement:

The AI Commission granted expedited processing of EPIC’s September 11, 2019 FOIA request on January 27, 2020. The Commission has made two productions of records to EPIC. The Commission is continuing to process records responsive to EPIC’s FOIA request.

The Department of Defense acknowledged receipt of EPIC’s February 22, 2019 FOIA request on February 28, 2019. The DOD has not yet produced any records responsive to EPIC’s FOIA request.

Defendants' Statement:

To date, the AI Commission has processed 248 pages of agency records responsive to EPIC's FOIA request and made two productions.¹ In addition, as agreed upon by EPIC, the Commission has directed EPIC to 76 publicly available responsive records rather than reproduce them. The Commission has also identified more than 560 pages of potentially responsive records that were ultimately determined to be nonresponsive. The Commission is continuing to process EPIC's request.

DOD anticipates making its first production of responsive agency records on Friday, March 6, 2010. DOD is continuing to process EPIC's request.

2. Anticipated Number of Documents Responsive to Plaintiff's FOIA Requests

Plaintiff's Statement:

EPIC defers to the Government on the anticipated number of responsive documents.

Defendants' Statement:

The AI Commission has identified approximately 145,000 records potentially responsive to Plaintiff's FOIA request. The Commission intends to work with EPIC to narrow the scope of its FOIA request to reduce the number of records requiring review.

DOD has identified approximately 100 to 130 pages of records potentially responsive to Plaintiff's FOIA request.

¹ Although the AI Commission is producing records in response to EPIC's FOIA request, the Commission preserves for appeal its position that it is not an agency subject to FOIA.

3. Anticipated Date(s) for Release of Requested Agency Records

Plaintiff's Statement:

EPIC proposes substantially the same production schedule as set out in EPIC's Dec. 19, 2019 Status Report.

With respect to EPIC's September 11, 2019 FOIA request to the AI Commission, EPIC proposes:

- By March 31, 2020, the AI 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 nonexempt, reasonably segregable portions thereof

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).

With respect to EPIC's February 22, 2019 FOIA request to the DOD, EPIC proposes:

- By March 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.

Defendants' Statement:

The AI Commission continues to increase the size of its staff available for processing FOIA records. The Commission has already added a lawyer to its legal staff and is in the process of adding two FOIA specialists. At present, the Commission can process approximately 800 pages of potentially responsive records per month. Defendants ask that the Court enter this production schedule for the next three months (*i.e.*, until May 6, 2020), then revisit the issue in light of the Commission's capacity at that time.

DOD proposes finishing its production of responsive agency materials no later than May 8, 2020.

4. Possible Motion for *Open America* Stay

Plaintiff's Statement:

EPIC does not believe that an *Open America* stay is warranted because "exceptional circumstances" are not present in this case. 5 U.S.C. § 552(a)(6)(C)(i). EPIC believes that the Court should order the production of records consistent with the above schedule.

Defendants' Statement:

At this time, Defendants do not intend to seek an *Open America* stay but reserve their rights to seek such stays should circumstances warrant.

5. Possible Need for Vaughn Index

Parties' Joint Statement:

The parties agree that Defendants will produce *Vaughn* indexes in conjunction with productions of records to EPIC.

6. Briefing Schedule for Dispositive Motions, If Required

Parties' Joint Statement:

The parties do not yet know whether summary judgment briefing on EPIC's FOIA claims will be necessary. They therefore propose that, within two weeks of Defendants' final production, the parties file a joint status report proposing a schedule for further proceedings, including any necessary summary judgment briefing.

Respectfully submitted,

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

JOSEPH H. HUNT
Assistant Attorney General

ALAN BUTLER, D.C. Bar #1012128
EPIC General Counsel
butler@epic.org

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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

/s/ Gary D. Feldon
GARY D. FELDON
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW, Room 11104
Washington, DC 20005
Tel: (202) 514-4686
Fax: (202) 616-8460
E-mail: gary.d.feldon@usdoj.gov

ELECTRONIC PRIVACY
INFORMATION CENTER
1519 New Hampshire Ave NW
Washington, D.C. 20036
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)
davisson@epic.org

Attorneys for Defendants

Attorneys for Plaintiff EPIC