

**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

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Less than two months from today, the National Security Commission on Artificial Intelligence (“AI Commission”) will submit a report to Congress and the President that “comprehensively address[es] the national security and defense needs of the United States” concerning artificial intelligence (“AI”).¹ Created by Congress and chaired by former Google CEO Eric Schmidt, the AI Commission is charged with “review[ing] advances in artificial intelligence, related machine learning developments, and associated technologies”² and making AI policy recommendations that will have far-reaching implications for the American public. The Commission could make recommendations concerning real-name identification requirements for users of the Internet, the scoring of air travelers, the tracking of visitors to the United States, the adoption of opaque algorithms for automated decisionmaking, the real-time identification of people subject to observation by cameras, the retention of personal data by federal agencies, the transfer of personal data from the government to the private sector for analysis and profiling, and the modification of federal privacy laws that safeguard the rights of Americans.

Yet the Commission has operated in near-total secrecy. None of the Commission’s meetings have been announced in advance or opened to the public or the press. No agendas, minutes, or meeting materials have been published. The Commission did not even have a website until late July; when that website finally launched, it contained only the barest descriptions of past meetings. The first report of the Commission was hosted on a web server of Google, the company once led by the Commission’s Chairman. In short, the public has been shut out and remains in the

¹ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1051(b)(1), 132 Stat. 1636, 1964 (2018)

² *Id.* § 1051(a)(1).

dark about the work of the AI Commission—even as the Commission prepares to make recommendations to Congress and the President in the next several weeks.

Accordingly, the Electronic Privacy Information Center (“EPIC”) brought this suit under the Freedom of Information Act (“FOIA”) and Federal Advisory Committee Act (“FACA”). EPIC, one of the leading organizations in the country with respect to the privacy and human rights implications of AI use, seeks to ensure public access to, and participation in, the ongoing activities of the Commission. Over the past seven months, EPIC filed FOIA requests for records about the AI Commission’s work with both the Commission and the U.S. Department of Defense (“DOD”). EPIC sought expedited processing of both requests, warning that AI use poses imminent threats to privacy, human rights, and democratic institutions and that AI policy should be developed with the full participation of an informed public. Yet neither the Commission nor the DOD has issued a determination or disclosed records responsive to EPIC’s FOIA Requests, and both agencies have unlawfully failed to process EPIC’s requests on an expedited basis.

EPIC now seeks a preliminary injunction ordering the AI Commission and DOD to grant EPIC’s requests for expedited processing and to immediately process and issue a determination on EPIC’s FOIA Requests. The requirements for an injunction are readily satisfied: (1) EPIC is likely to succeed on the merits of its relevant claims against the AI Commission and DOD; (2) EPIC will be irreparably harmed absent an injunction because the requested records are central to the public’s understanding of the Commission’s work and the ongoing development of U.S. AI policy; and (3) the balance of the equities and public interest heavily favor the requested injunction, which would merely require the AI Commission and DOD to fulfill their statutory obligation to expeditiously process EPIC’s FOIA Requests for documents that are of exceptional value to the public. Accordingly, the Court should order the AI Commission and the DOD to

process EPIC’s FOIA Requests on an expedited basis and order the agencies to make an immediate determination on each of EPIC’s requests.

BACKGROUND

I. The Privacy Risks Posed by the Use of AI

Artificial intelligence presents unique threats to privacy, human rights, and democratic institutions. The deployment of AI systems tests long-standing privacy safeguards governing the collection and use of personal data. For example, privacy laws require data minimization—the requirement that only necessary data be retained. *See, e.g.*, 18 U.S.C. § 2710(e) (“A person subject to this section shall destroy personally identifiable information as soon as practicable, . . .”). Yet “[i]n the search for new connections and more precise analyses, it is tempting to give [a] system access to as much data as possible.” Int’l Working Group on Data Prot. in Telecomm., *Working Paper on Privacy and Artificial Intelligence* 9 (2018).³ China, for instance, uses sophisticated AI surveillance technology to profile and control Muslim minority populations. Paul Mozur, *Inside China’s Dystopian Dreams: AI, Shame and Lots of Cameras*, N.Y. Times (July 8, 2018).⁴ Automated decisionmaking and profiling with AI systems can produce biased and inaccurate decisions, with serious consequences for the persons improperly targeted. Similarly, unrepresentative data sets can produce flawed AI models. Int’l Working Group on Data Prot. in Telecomm., *supra*, at 8.

There is a clear need for human rights protections for AI systems in the national security context, where public oversight is often limited. Yet there are already indications that the U.S. Intelligence Community has failed to invest in vital AI safeguards. In May 2019, the Inspector General of the Intelligence Community highlighted a lack oversight for the use of AI, warning

³ <https://epic.org/IWG/WP-AI.pdf>.

⁴ <https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html>.

that “[i]nvestment asymmetry between mission performance and intelligence oversight in AI efforts could lead to an accountability deficit. . . . [T]here is little indication that investments in oversight of AI are currently a high priority.” Press Release, Office of the Inspector Gen. of the Intelligence Cmty., The Inspector General of the Intelligence Community Issues Statement on Artificial Intelligence (May 30, 2019).⁵

Privacy, security, and discrimination are not the only civil liberties and human rights issues raised by use of AI systems. International AI policy frameworks—including the OECD AI Principles (to which the United States is a signatory) and the Universal Guidelines for Artificial Intelligence—set out explicit rights and responsibilities concerning the use of AI systems. These include transparency and identification requirements, testing requirements, fairness, data quality, public safety, contestability, reliability, termination, and more.

II. Public Participation in AI Policymaking

The vast majority of AI policymaking around the world is conducted transparently and relies on public participation.

National governments and international organizations routinely seek public input on AI policy. Europe’s High-Level Expert Group on Artificial Intelligence—a group of academic, civil society, and industry representatives—held a public consultation on Europe’s draft Ethics Guidelines for AI. Eur. Comm’n, *Draft Ethics Guidelines for Trustworthy AI* (Dec. 18, 2018).⁶ The Council of Europe invited public comments on a draft recommendation concerning the human rights impacts of algorithmic systems. Council of Eur., *Invitation to Comment by 19 August 2019* (July 5, 2019).⁷ The Organisation for Economic Cooperation and Development

⁵ <https://www.dni.gov/files/ICIG/Documents/News/ICIG%20News/2019/May%2030%20-%20AI/Press%20Release%20-%20AI.pdf>.

⁶ <https://ec.europa.eu/digital-single-market/en/news/draft-ethics-guidelines-trustworthy-ai>.

⁷ <https://www.coe.int/en/web/freedom-expression/-/invitation-to-comment-by-19-august-2019>.

(“OECD”) established the Artificial Intelligence Group of Expert (“AIGO”) to represent OECD member organizations, held several meetings, sought comments from civil society, and produced the OECD Principles on Artificial Intelligence, which were endorsed by 42 nations and the G20. OECD, *OECD Principles on AI* (June 2019).⁸

Governments around the world have conducted transparent consultations on AI policy. Japan conducted a public consultation and published a draft AI research and development guidelines to prompt international debate over AI policymaking. Japan, *Draft AI R&D Guidelines for International Discussions* (July 28, 2017).⁹ The Australian government published a proposed AI ethics framework for public consultation. Austl. Gov’t, *Artificial Intelligence: Australia’s Ethics Framework* (2019).¹⁰ And Canada and France made a joint public proposal for an international panel on artificial intelligence. Int’l Panel on Artificial Intelligence, *Mandate for the International Panel on Artificial Intelligence* (2018).¹¹ All told, Australia, Canada, China, Denmark, the European Commission, Finland, France, Germany, India, Italy, Japan, Kenya, Malaysia, Mexico, New Zealand, Nordic-Baltic Region, Poland, Russia, Singapore, South Korea, Sweden, Taiwan, Tunisia, the UAE, the United Kingdom, and the U.S. have publicly released AI strategies. Tom Dutton, *An Overview of National AI Strategies*, Medium (June 28, 2018).¹²

In the United States, EPIC—joined by leading scientific organizations and nearly 100 experts—filed a petition calling for public participation in federal efforts to develop AI policy.

⁸ <https://www.oecd.org/going-digital/ai/principles/>.

⁹ http://www.soumu.go.jp/main_content/000507517.pdf.

¹⁰ https://consult.industry.gov.au/strategic-policy/artificial-intelligence-ethics-framework/supporting_documents/ArtificialIntelligenceethicsframeworkdiscussionpaper.pdf.

¹¹ <https://pm.gc.ca/en/news/backgrounders/2018/12/06/mandate-international-panel-artificial-intelligence>.

¹² <https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd>.

EPIC et al., *Petition to OSTP for Request for Information on Artificial Intelligence Policy* (July 4, 2018).¹³ The coalition stated:

The reach of AI is so vast, so important, and encompasses so many issues, it is imperative that the Administration provide the American public the opportunity to comment on proposed policy initiatives impacting the American public. AI has the potential to improve our society, but only if proper policies are in place to provide the guidance needed to address the potential risks that accompany the potential benefits.

Id. at 3. The National Science Foundation subsequently announced it would seek public comment on AI policy. EPIC, *Following EPIC Petition, National Science Foundation Seeks Public Comment on AI Policy* (Sept. 26, 2018).¹⁴

The National Institute of Standards and Technology recently published a plan for developing technical AI standards and sought public comments. NIST, *U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools* (2019).¹⁵ The Office of Management and Budget solicited public comment about the use of federal data for AI research and development. Identifying Priority Access or Quality Improvements for Federal Data and Models for Artificial Intelligence Research and Development (R&D), and Testing; Request for Information, 84 Fed. Reg. 32,962 (July 10, 2019). And the President’s Executive Order on “Maintaining American Leadership in Artificial Intelligence” states that “[m]aintaining American leadership in AI requires a concerted effort to promote advancements in technology and innovation, while protecting American technology, economic and national security, civil liberties, privacy, and American values and enhancing international and industry collaboration with foreign partners and allies.” Exec. Order No. 13,859, 84 Fed. Reg. 3,967 (Feb. 11, 2019).

¹³ <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf>.

¹⁴ <https://epic.org/2018/09/following-epic-petition-white-.html>.

¹⁵ https://www.nist.gov/sites/default/files/documents/2019/08/10/ai_standards_fedengagement_plan_9aug2019.pdf.

There are 11 references to “privacy” in the President’s Executive Order. *Id.* The National Science and Technology Council makes 63 references to “privacy” in the supplement to the President’s fiscal year 2020 budget. NSTC, *Supplement to the President’s FY2020 Budget* (2019).¹⁶ Yet there are no public references to any work on “privacy” or any consideration of “privacy” by the AI Commission, despite the Commission holding at least thirteen meetings and receiving more than 100 briefings over the past six months. Ex. H at 1–2.

III. The Formation and Structure of the AI Commission

Congress created the National Security Commission on Artificial Intelligence through the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“NDAA”), Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1962–65 (2018), 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). 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. *Eric Schmidt*, National Security Commission on Artificial Intelligence (2019).¹⁷ The Vice Chairman of the Commission is Robert O. Work, former Deputy Secretary of Defense. *Robert O.*

¹⁶ <https://www.whitehouse.gov/wp-content/uploads/2019/09/FY2020-NITRD-AI-RD-Budget-September-2019.pdf>.

¹⁷ <https://www.nscai.gov/about/commissioners/schmidt>.

Work, National Security Commission on Artificial Intelligence (2019).¹⁸ The Commission consists of thirteen other members, including representatives of Google, Microsoft, Amazon, and Oracle. *Commissioners*, National Security Commission on Artificial Intelligence (2019).¹⁹

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[.]” Ex. H at 2. One of the Commission’s special projects concerns “the responsible and ethical use of AI for national security[.]” *Id.*

The AI Commission is “supported by a professional staff of about 20, including direct hires and detailees from the military services and government agencies. The staff is organized into three teams, focused on research and analysis, outreach and engagement, and operations.” *Id.* at 4. The Commission’s Executive Director is Ylli Bajraktari. *See* Bill Gertz, *Democrats Dominate Artificial Intelligence Commission*, Wash. Times (Mar. 13, 2019).²⁰

IV. The Secrecy of the AI Commission’s Proceedings

Between March 2019 and today, the AI Commission has held at least thirteen plenary and working group meetings and has received more than 100 briefings. Ex. H at 1–2. None of these

¹⁸ <https://www.nscai.gov/about/commissioners/work>.

¹⁹ <https://www.nscai.gov/about/commissioners>.

²⁰ <https://www.washingtontimes.com/news/2019/mar/13/democrats-dominate-artificial-intelligence-commiss/>.

meetings have been noticed in the Federal Register or open to the public, nor has the AI Commission published any agendas, minutes, or materials from these meetings.

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.” Ex. A at 1.

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. EPIC, *US AI Commission Holds Secret Meeting on National AI Policy* (Mar. 15, 2019).²¹ Only after the fact—in a March 12, 2019 press release—did the Commission acknowledge that the March 11 meeting had occurred. Ex. D.

The AI Commission has not disclosed the details of its March 11 meeting to EPIC or the public. The Commission has stated simply that it “received briefs from the Defense and Commerce departments, the intelligence community, and Members of Congress,” *id.*, including Sen. Martin Heinrich, Rep. Elise Stefanik, and Rep. Jerry McNerney. 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.

On May 20, 2019, the AI Commission held its second plenary meeting in Cupertino, California. *Id.* at 1–2. The Commission did not publish a notice in the Federal Register or

²¹ <https://epic.org/2019/03/us-ai-commission-holds-secret-.html>.

otherwise announce the meeting in advance. Only nine days after the fact—in a May 29, 2019 press release—did the Commission acknowledge that the May 20 meeting had occurred. Ex. F.

The AI Commission has not disclosed the details of its May 20 meeting to EPIC or the public. 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,” *id.*, 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.” 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. EPIC, *US AI Commission Continues Secret Meetings* (July 15, 2019).²² Only after the fact—in a July 12, 2019 press release—did the Commission acknowledge that the July 11 meeting had occurred. Ex. G.

The AI Commission has not disclosed the details of its July 11 meeting to EPIC or the public. 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.” *Id.* 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

²² <http://epic.org/2019/07/us-ai-commission-continues-sec.html>.

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.

Between September 18 and September 19, 2019, the AI Commission held another meeting in Arlington, Virginia. U.S. Dep’t of State, *Public Schedule – September 19, 2019* (Sep. 19, 2019) (“Under Secretary Thompson delivers remarks at the National Security Commission on Artificial Intelligence, in Arlington, Virginia.”);²³ Charlotte Stanton (@CharlotteStant), Twitter (Sep. 19, 2019, 12:17 PM) (“Really enjoyed briefing the U.S. National Commission on #ArtificialIntelligence yesterday about our study: What the Machine Learning Value Chain Means for Geopolitics[.]”).²⁴ The Commission did not publish a notice in the Federal Register or otherwise announce the meeting in advance. EPIC, *Secret AI Policy Meetings Continue* (Sep. 19, 2019).²⁵ The AI Commission has not disclosed the details of its September meeting to EPIC or the public.

To date, the lone public event scheduled by the AI Commission is a conference set for November 5, 2019, “held in conjunction with the submission of NSCAI’s interim report to Congress[.]” Ex. K; *see also* NSCAI, *Strength Through Innovation* (Sep. 2019).²⁶ According to the Commission, conference participants will “discuss the Commission’s initial assessments on the state of A.I. and U.S. national security outlined in the report and develop concepts for the way ahead.” *Id.*

The AI Commission has not announced any further plenary or working group meetings prior to the Commission’s completion of its interim report to Congress and the President; the

²³ <https://www.state.gov/public-schedule-september-19-2019/>.

²⁴ <https://twitter.com/CharlotteStant/status/1174719245579481088>.

²⁵ <https://epic.org/2019/09/secret-ai-policy-meetings-cont.html>.

²⁶ https://www.nscai.gov/conference_1.

Commission has not provided the public an opportunity to review or comment on the substance of the interim report before it is finalized; and the Commission has not disclosed any of the source materials, deliberations, or assessments associated with the interim report.

V. The FOIA and Its Progeny

The purpose of the Freedom of Information Act is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 352, 261 (1976). The FOIA applies to “agenc[ies],” a term that includes any “establishment in the executive branch of the Government[.]” 5 U.S.C. § 552(f).

In 1996, Congress passed the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048 (1996), which require agencies to process certain categories of requests on an expedited basis. *Id.* § 8 (codified at 5 U.S.C. § 552(a)(6)(E)). Typically, a FOIA request must be processed within twenty business days. 5 U.S.C. § 552(a)(6)(A)(i). However, expedited processing is to be granted when there is an “urgency to inform the public concerning actual or alleged Federal Government activity” and the “request [is] made by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v). In these cases, an agency must process the FOIA request “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii).

VI. 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”). Ex. I. 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. 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. Ex. J. Today—September 27, 2019—is the sixteenth 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.

VII. EPIC’s FOIA Request to the DOD

On February 22, 2019—seventeen days before the Commission held its closed-door inaugural meeting—EPIC submitted a FOIA Request via email to the Department of Defense. Ex. B. 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”); Memorandum from Michele Bail, Dir., Program & Fin. Control, Dep’t of Def., to Asst. Sec. of the Army, Fin. Mgmt. & Comptroller, et al. (Dec. 26, 2018) (implementing the transfer of \$10,000,000 from the DOD to the AI Commission).²⁷

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.

Ex. B 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. Ex. B at 6–7.

²⁷

https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/letter/19-05_LTR_DoD_Directed_Transfer_Commission_Artificial_Intelligence.pdf.

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. Ex. C. In the letter, that DOD stated that it would deny EPIC’s request for expedited processing. *Id.* at 1. Today—September 27, 2019—is the 151st working day since the DOD received EPIC’s FOIA Request. The DOD has not made a determination on EPIC’s FOIA Request.

On April 30, 2019, EPIC filed an administrative appeal of the DOD’s denial of expedited processing. Ex. E. EPIC reiterated the grounds for expedition set forth in EPIC’s DOD FOIA Request. *Id.* at 2–5. Today—September 27, 2019—is approximately the 104th working day since

the DOD received EPIC's FOIA Appeal concerning the agency's denial of expedited processing. The DOD has not made a determination regarding EPIC's FOIA Appeal.

VIII. EPIC's FOIA and FACA 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. Complaint, ECF No. 1. EPIC stated eight claims for relief.

First, EPIC charged that the AI Commission, Chairman Schmidt, and Executive Director Bajraktari failed to notice and open Commission meetings to the public in violation of the FACA, 5 U.S.C. app. 2 §§ 10(a)(1)–(2). Compl. ¶¶ 112–18 (Count I).

Second, EPIC charged that the AI Commission failed to notice and open Commission meetings to the public in violation of the APA, 5 U.S.C. § 706(1). Compl. ¶¶ 119–25 (Count II).

Third, EPIC charged that the AI Commission unlawfully held non-noticed, nonpublic Commission meetings in violation of the APA, 5 U.S.C. § 706(2). Compl. ¶¶ 126–33 (Count III).

Fourth, EPIC charged that the AI Commission, Chairman Schmidt, and Executive Director Bajraktari failed to make Commission records available to the public in violation of the FACA, 5 U.S.C. app. 2 § 10(b). Compl. ¶¶ 134–39 (Count IV).

Fifth, EPIC charged that the AI Commission failed to make Commission records available to the public in violation of the APA, 5 U.S.C. § 706(1). ¶¶ 140–45 (Count V).

Sixth, 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).

Seventh, 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).

ARGUMENT

EPIC moves the Court to issue a preliminary injunction ordering the AI Commission and DOD to (1) grant expedited processing of its FOIA Requests; (2) immediately process and make a determination on EPIC's FOIA Requests; and (3) produce records responsive to EPIC's FOIA Requests "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). This Court has jurisdiction under the FOIA to award such relief. 5 U.S.C. § 552(a)(4)(B). Moreover, EPIC is entitled to a preliminary injunction because EPIC is likely to succeed on the merits of its claims; because EPIC will suffer irreparable harm if the AI Commission and DOD are permitted to further defer action on EPIC's FOIA Requests; and because the balance of the equities and public interest favor the expeditious processing of EPIC's FOIA Requests. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008).

I. THE COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

The FOIA grants this Court jurisdiction to consider this matter and to grant appropriate relief. "[T]he district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). "Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of [5 U.S.C. § 552(a)(6)]." 5 U.S.C. § 552(a)(6)(C); *see also Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir. 1990) ("If the agency has not responded within the statutory time limits, then . . . the requester may bring suit.").

Moreover, “[a]gency action to deny or affirm denial of a request for expedited processing . . . and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review[.]” 5 U.S.C. § 552(a)(6)(E)(iii); *see also EPIC v. DOJ*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) (citing *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)) (“[T]he FOIA imposes no limits on courts’ equitable powers in enforcing its terms’ and ‘unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent such abuses.’”).

The AI Commission has failed to issue a determination on EPIC’s request for expedited processing within the time limit of ten calendar days established by 5 U.S.C. § 552(a)(6)(A)(i). Similarly, the DOD has failed to issue a determination on EPIC’s appeal of the agency’s denial of expedited processing within the twenty-working day limit of 5 U.S.C. § 552(a)(6)(A)(ii) and § 552(a)(6)(E)(ii)(II). EPIC’s administrative remedies have therefore been exhausted, giving the Court jurisdiction to consider EPIC’s lawsuit and to grant appropriate relief.

II. EPIC IS ENTITLED TO A PRELIMINARY INJUNCTION

EPIC is entitled to a preliminary injunction because the unlawful failure of the AI Commission and the DOD to expeditiously process EPIC’s FOIA Requests causes EPIC irreparable harm and conflicts with the public interest. A plaintiff is entitled to a preliminary injunction upon demonstrating “that [the plaintiff] is likely to succeed on the merits, that [the plaintiff] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [the plaintiff’s] favor, and that an injunction is in the public interest.” *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 39 (D.C. Cir. 2019) (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). The final two elements of the preliminary injunction test “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). EPIC readily satisfies each of these factors.

First, EPIC is likely to succeed on its relevant claims under the FOIA. The AI Commission has violated the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i) by failing to make a determination on EPIC’s request for expedited processing of its FOIA Request within ten calendar days, Compl. ¶¶ 146–52; the DOD has violated the deadlines set forth in 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i) by failing to make a timely determination on EPIC’s FOIA Appeal, Compl. ¶¶ 146–52; and both the AI Commission and the DOD have unlawfully denied—actually or constructively—expedited processing of EPIC’s FOIA Request notwithstanding the exceptional public interest and urgency in disclosure of the requested records. Compl. ¶¶ 153–58.

Second, absent an injunction, EPIC will suffer irreparable harm from the failure of the AI Commission and the DOD to expeditiously process and make a determination on EPIC’s FOIA Requests. EPIC has a right to timely disclosure of records concerning the work of the AI Commission *before* the Commission finalizes its interim report to Congress—a right that cannot be vindicated after the fact.

Third, the balance of the equities favors relief because EPIC has a strong interest in the expeditious processing of its FOIA Requests, whereas other parties will bear no undue burden. The AI Commission and DOD can hardly claim that compliance with their statutory obligation to expeditiously process qualifying FOIA requests constitutes a hardship. Moreover, granting an injunction would be in the public interest. The FOIA was enacted to promote government transparency and to ensure that persons are able to participate in public debates in an informed manner. Absent expedited processing of EPIC’s FOIA Requests, a fully informed public debate over federal AI policymaking and the AI Commission’s forthcoming findings and recommendations will be impossible.

For these reasons, this Court should grant EPIC's motion and order the AI Commission and the DOD to immediately process EPIC's FOIA Requests on an expedited basis.

A. EPIC is likely to succeed on the merits of its claims.

EPIC is likely to succeed on the merits of the two relevant claims alleged in EPIC's Complaint. Thus, EPIC satisfies the first prong of the preliminary injunction test.

The AI Commission has violated the statutory processing deadlines of the FOIA. Compl. ¶¶ 147–53. EPIC submitted a FOIA Request to the AI Commission via email on September 11, 2019. Ex. J. EPIC sought expedited processing of its FOIA Request. *Id.* at 8–9. The AI Commission acknowledged receipt of EPIC's FOIA Request by email dated September 12, 2019. Ex. K. Today—September 27, 2019—is the sixteenth calendar day since the Commission received EPIC's FOIA Request, yet the Commission has failed to make a determination on EPIC's request for expedited processing. The Commission has therefore violated 5 U.S.C. § 552(a)(6)(E)(ii)(I) (“[A] determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request.”).

Similarly, it is beyond dispute that the DOD has violated the statutory processing deadlines of the FOIA. EPIC submitted a FOIA Request to the DOD via email on February 22, 2019. Ex. C. EPIC sought expedited processing of its FOIA Request. The DOD acknowledged receipt of EPIC's FOIA Request by letter dated February 28, 2019, but the DOD denied EPIC's request for expedited processing. Ex. D at 1. EPIC filed an administrative appeal of the DOD's denial of expedited processing on April 30, 2019. Ex. H. Today—September 27, 2019—is approximately the 104th working day since the DOD received EPIC's FOIA Appeal concerning expedited processing, yet the DOD has failed to make a determination on the appeal. The DOD has therefore violated 5 U.S.C. § 552(a)(6)(A)(ii) (requiring agencies to “make a determination

with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal”) and 5 U.S.C. § 552(a)(6)(E)(ii)(II) (requiring “expeditious consideration of administrative appeals of . . . determinations of whether to provide expedited processing”).

Second, EPIC is likely to succeed on its claim that the AI Commission and the DOD unlawfully refused to process EPIC’s FOIA Requests on an expedited basis. Compl. ¶¶ 154–59. Under 5 U.S.C. § 552(a)(6)(E)(i), an agency must “provid[e] for expedited processing of requests for records . . . in cases in which the person requesting the records demonstrates a compelling need[.]” A “compelling need” includes an “urgency to inform the public concerning actual or alleged Federal Government activity” when the request is “made by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). Although judicial review of an expedited processing determination “shall be based on the record before the agency at the time of the determination,” 5 U.S.C. § 552(a)(6)(E)(iii), the Court must conduct its review *de novo*. *Al-Fayed v. CIA*, 254 F.3d 300, 305 (D.C. Cir. 2001).

The administrative record that was before the AI Commission readily demonstrates EPIC’s entitlement to expedited processing of its September 11 FOIA Request. EPIC explained that it was ““a representative of the news media,”” Ex. J at 9 (quoting *EPIC*, 241 F. Supp. at 15), and thus qualifies as “an organization ‘primarily engaged in disseminating information.’” *Id.* (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). Moreover, EPIC explained that it was ““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.” *Id.* at 8–9. EPIC added: “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 9. Given the urgency of EPIC’s FOIA Request and the value of the requested records to the public, the AI Commission violated 5 U.S.C. § 552(a)(6)(E)(v)(II) by constructively denying expedited processing.

Similarly, the administrative record that was before the DOD demonstrates EPIC’s entitlement to expedited processing of EPIC’s February 22 FOIA Request. EPIC explained that it was “‘a representative of the news media,’” Ex. C at 5 (quoting *EPIC*, 241 F. Supp. at 15), and thus qualifies as “an organization ‘primarily engaged in disseminating information.’” *Id.* (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II)). Moreover, EPIC explained that because “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.’ AI Commission’s findings, recommendations, and proceedings will . . . 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.* at 4. Given the urgency of EPIC’s FOIA Request and the value of the requested records to the public, the DOD violated 5 U.S.C. § 552(a)(6)(E)(v)(II) by denying expedited processing.

Because EPIC will succeed on its two relevant FOIA claims, EPIC has demonstrated a likelihood of success on the merits sufficient for a preliminary injunction.

B. EPIC will suffer irreparable harm if relief is not granted.

EPIC will suffer irreparable harm absent an order directing the AI Commission and the DOD to immediately process and issue determinations on EPIC’s FOIA Requests. As the D.C. Circuit has emphasized, “stale information is of little value[.]” *Judicial Watch, Inc. v. DHS*, 895

F.3d 770, 778 (D.C. Cir. 2018) (quoting *Payne Enters.*, 837 F.2d at 494); *see also* *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (“Byrd’s injury, however, resulted from EPA’s failure to furnish him with the documents until long after they would have been of any use to him.”). Thus, “the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter.” *EPIC v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C. 2017), *aff’d on other grounds*, 878 F.3d 371 (D.C. Cir. 2017); *see also* *Washington Post v. DHS*, 459 F. Supp. 2d 61, 75 (D.D.C. 2006) (“Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff’s FOIA request does not receive expedited treatment.”).

The records EPIC seeks are “highly relevant to an ongoing and highly public matter.” *EPIC v. Presidential Advisory Comm’n*, 266 F. Supp. 3d at 319. First, the requested records would directly reveal the activities of the AI Commission, which—despite its secrecy—has attracted significant public and press attention. *See, e.g.*, Yasmin Tadjeh, *Breaking: Commission on Artificial Intelligence Releases Initial Report*, National Defense (July 31, 2019);²⁸ Kelsey D. Atherton, *Why Won’t the National Security Commission Share its Thoughts on AI?*, C4ISRNET (July 15, 2019);²⁹ Bill Gertz, *Democrats Dominate Artificial Intelligence Commission*, Wash. Times (Mar. 13, 2019);³⁰ Justin Doubleday, *Top Tech Execs Named to New National Security*

²⁸ <https://www.nationaldefensemagazine.org/articles/2019/7/31/commission-on-artificial-intelligence-releases-initial-report>.

²⁹ <https://www.c4isrnet.com/artificial-intelligence/2019/08/01/national-security-commission-will-offer-big-ai-report-in-2021/>.

³⁰ <https://www.washingtontimes.com/news/2019/mar/13/democrats-dominate-artificial-intelligence-commiss/>.

Commission on Artificial Intelligence, Inside Defense (Jan. 10, 2019);³¹ Tajha Chappellet-Lanier, *Alphabet, Microsoft Leaders Named to National Security Commission on Artificial Intelligence*, FedScoop (Nov. 14, 2018);³² “*National Security Commission on Artificial Intelligence*”, Google News (Sep. 27, 2019) (listing 144 news articles about the year-old AI Commission).³³

The requested records are also highly relevant to the broader subject of U.S. AI policymaking, which is an active focus of the President, Congress, and the public at large. *See, e.g.*, NIST, *U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools* (2019);³⁴ Identifying Priority Access or Quality Improvements for Federal Data and Models for Artificial Intelligence Research and Development (R&D), and Testing; Request for Information, 84 Fed. Reg. 32,962 (July 10, 2019); *Artificial Intelligence: Societal and Ethical Implications: Hearing Before the H. Comm. on Sci., Space, & Tech.*, 116th Cong. (2019); *National Security Challenges of Artificial Intelligence, Manipulated Media, and Deepfakes: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. (2019); Exec. Order No. 13,859, 84 Fed. Reg. 3,967, 3,967 (Feb. 11, 2019) (“Maintaining American Leadership in Artificial Intelligence”); “*Artificial Intelligence*” & “*United States*”, Google News (Sep. 27, 2019) (listing 5.7 million news articles containing the terms “artificial intelligence” and “United States”).³⁵

³¹ <https://insidedefense.com/insider/top-tech-execs-named-new-national-security-commission-artificial-intelligence>.

³² <https://www.fedscoop.com/alphabet-microsoft-leaders-named-national-security-commission-artificial-intelligence/>.

³³ <https://www.google.com/search?tbm=nws&q=%22National+Security+Commission+on+Artificial+Intelligence%22>.

³⁴ https://www.nist.gov/sites/default/files/documents/2019/08/10/ai_standards_fedengagement_plan_9aug2019.pdf.

³⁵ <https://www.google.com/search?tbm=nws&q=%22National+Security+Commission+on+Artificial+Intelligence%22>.

Thus, absent the requested preliminary injunction, EPIC will “be precluded . . . from obtaining in a timely fashion information vital to the current and ongoing debate” concerning U.S. policymaking on AI. *EPIC*, 416 F. Supp. 2d at 41. This harm to EPIC will be irreparable, as “[o]ngoing public and congressional debates about issues of vital national importance cannot be restarted or wound back.” *Protect Democracy Project*, 263 F. Supp. 3d at 300 (quoting *Elec. Frontier Found. v. Office of Dir. of Nat’l Intelligence*, 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007)).

Second, the records EPIC seeks are highly relevant to specific government proceedings that are active or imminent. In particular, the requested records would reveal key information about the (a) the ongoing meetings of the Commission and its working groups, and (b) the findings and recommendations that the AI Commission will submit to Congress and the President in early November. Currently, the proceedings of the AI Commission, the details of its research, and the likely content of its Interim Report are almost entirely hidden from the public. This type of secret policymaking is precisely what Congress meant to prevent when it enacted the FOIA and the FACA. *See Robbins*, 437 U.S. at 242; 5 U.S.C. app. 2 § 2(a)(5) (finding that “the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees”). And the requested information will be significantly less valuable to EPIC and the public two months from now, when the ink has already dried on the Commission’s interim recommendations to Congress.

Finally, absent an injunction, EPIC’s mission of educating the public about AI and U.S. AI policy will be irreparably harmed. EPIC is one of the leading organizations in the country with respect to the privacy and human rights implications of AI use. For years, EPIC has urged decisionmakers—often successfully—to solicit public input on AI policy. *E.g.*, EPIC et al.,

Petition for OSTP to Conduct Public Comment Process on Big Data and the Future of Privacy (Feb. 10, 2014);³⁶ EPIC et al., *Petition to OSTP for Request for Information on Artificial Intelligence Policy* (July 4, 2018).³⁷ EPIC has led international campaigns to promote “algorithmic transparency,” EPIC, *Algorithmic Transparency: End Secret Profiling* (2019),³⁸ and to adopt the Universal Guidelines for Artificial Intelligence, a framework for AI governance based on the protection of human rights. The Public Voice, *Universal Guidelines for Artificial Intelligence* (Oct. 23, 2018).³⁹ EPIC has shared AI expertise and policy recommendations with Congressional committees, e.g., Statement of EPIC to the Senate Comm. on the Judiciary (Nov. 30, 2018) (concerning “the development of US policy concerning artificial intelligence”);⁴⁰ federal agencies, e.g., Comments of EPIC to Office of Mgmt. and Budget (Aug. 9, 2019) (concerning “Federal Data and Models for Artificial Intelligence Research and Development and Testing”);⁴¹ and international organizations, e.g., Comments of EPIC to Council of Eur. (Aug. 15, 2019), (concerning “the human rights impacts of algorithmic systems”).⁴² Throughout these efforts, EPIC has educated the public about AI policy via EPIC’s website, epic.org; EPIC’s biweekly newsletter, EPIC, *EPIC Alert* (2019);⁴³ major news organizations, see EPIC, *EPIC in the News* (2019);⁴⁴ and EPIC publications, e.g., EPIC, *EPIC AI Policy Sourcebook 2019* (2019).⁴⁵ In short, few if any organizations have a greater interest in obtaining and disseminating records

³⁶ <https://epic.org/privacy/Ltr-to-OSTP-re-Big-Data.pdf>.

³⁷ <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf>.

³⁸ <https://epic.org/algorithmic-transparency/>.

³⁹ <https://thepublicvoice.org/ai-universal-guidelines/>

⁴⁰ <https://epic.org/testimony/congress/EPIC-SJC-AIRoundtable-Nov2018.pdf>.

⁴¹ <https://epic.org/privacy/AI/EPIC-OMB-AI-Comments.pdf>.

⁴² <https://epic.org/privacy/intl/EPIC-comments-AI-COE.pdf>.

⁴³ <https://epic.org/alert/>.

⁴⁴ <https://epic.org/news/>.

⁴⁵ <https://epic.org/bookstore/ai2019/>.

about the AI Commission while its work is ongoing. Yet the failure of the AI Commission and the DOD to expeditiously process EPIC's FOIA Requests prevents EPIC from sharing information with the public at a critical moment in the national discourse on AI policy, thereby causing EPIC irreparable harm.

Thus, the failure to enforce EPIC's statutory right to expedited processing of its FOIA Requests would result in irreparable harm to EPIC. *See EPIC*, 416 F. Supp. 2d at 40–41 (“[T]he statutory right to expedition in certain cases underlined Congress’ recognition of the value in hastening release of certain information . . . [T]he loss of that value constitutes a cognizable harm. As time is necessarily of the essence in cases like this such harm will likely be irreparable.” (internal citations and quotation marks omitted)).

C. The balance of the equities and the public interest favor relief.

The balance of the equities and the public interest favor entry of the preliminary injunction that EPIC seeks. EPIC and the public both have a compelling interest in ensuring the immediate processing of EPIC's FOIA Requests, whereas no parties will be harmed by EPIC's proposed order.

For the reasons identified above, EPIC has powerful equities in the disclosure of the requested records. EPIC has a clear interest in obtaining information relevant to the ongoing national debate over U.S. AI policy. EPIC also has an equitable interest in obtaining the requested records prior to key events, including meetings of the Commission and the Commission's imminent submission of recommendations to Congress and the President. Finally, EPIC has a compelling interest in ensuring the timely dissemination of the requested records to the public at large.

The AI Commission and the DOD, meanwhile, cannot claim to be burdened by a requirement to comply with their statutory obligations. “[T]here is generally no public interest in

the perpetuation of unlawful agency action.” *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citing *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511–12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). To the contrary: “there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *Id.*

Nor will other FOIA requesters will be unduly affected if this Court orders the AI Commission and the DOD to make immediate determinations on EPIC’s FOIA Requests. The expedited processing system envisions that some requests will be prioritized over others. In amending the FOIA to include an expedited processing provision, Congress recognized that there was “value in hastening release of certain information.” *EPIC*, 416 F. Supp. 2d at 39. And indeed, EPIC’s FOIA Requests demonstrated a “compelling need” for the requested information by showing an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). Thus, prioritizing EPIC’s FOIA Requests would simply be in keeping with the intent of the statute’s expedited processing provisions.

Granting EPIC’s preliminary injunction would also serve the public interest. An agency’s compliance with a mandatory statutory regime such as FOIA is “presumptively always in the public interest.” *Protect Democracy Project*, 263 F. Supp. 3d at 301. Moreover, in enacting the FOIA, Congress recognized that the public must be able to participate in debates over issues of national importance in an informed and meaningful way. *Robbins*, 437 U.S. at 242 (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”). The information EPIC seeks is absolutely essential to permit vigorous, informed public debate over U.S. AI policy generally and the work of the AI Commission specifically.

The D.C. Circuit has rightly said that “[s]tale information is of little value.” *Payne Enters., Inc.*, 837 F.2d at 494. So too here. Both EPIC and the public have a right to a full and current account of U.S. policymaking on artificial intelligence.

CONCLUSION

For the above reasons, the Court should grant EPIC’s Motion for a Preliminary Injunction; order the AI Commission and the DOD to process EPIC’s FOIA Requests on an expedited basis; and order both agencies to make immediate determinations on each of EPIC’s requests.

Respectfully Submitted,

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