IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. DRONE ADVISORY COMMITTEE, et al., Defendants.	Civ. Action No. 18-833 (RC)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully opposes the Motion by Defendants Drone Advisory Committee ("DAC") et al. to dismiss EPIC's Complaint. Defs.' Mem. Supp. Mot. Dismiss ("Defs.' Mem."), ECF No. 16.

This case concerns the failure of the Government (1) to make the meetings of the DAC's subgroups "open to the public," as required by 5 U.S.C. app. 2 § 10(a)(1), and (2) to make "available for public inspection and copying" the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents" of the DAC, as required by 5 U.S.C. app. 2 § 10(b). Access to these nonpublic meetings and records would reveal how, if at all, the Drone Advisory Committee and its subcomponents have addressed the threat that Unmanned Aerial Vehicles ("drones") pose to privacy rights in the United States.

EPIC has plausibly alleged seven claims to compel the Government to comply with its FACA transparency obligations. Complaint at ¶¶ 102–39, ECF No. 1. The Government now moves to dismiss, arguing—*implausibly*—that EPIC has failed to state a claim and lacks Article III standing to compel open meetings. These arguments fail in their entirety. EPIC's Complaint seeks the disclosure of DAC records that fall indisputably within the disclosure mandate of § 10(b). EPIC is also entitled to DAC subgroup records, which—as records of the DAC itself—are subject to release under the FACA. And even if subcommittees were generally exempt from document disclosure obligations, all four DAC subgroups are subject to § 10(b) because they are advisory committees in their own right. Finally, the Government offers no basis to conclude that DAC subgroup records are exempt from release as "staff work." As result, EPIC's document disclosure claims must survive.

The Government's open meeting arguments fare no better. The DAC subgroups, as advisory committees, must comply fully with the open meeting requirements of § 10(a). EPIC also has Article III standing to raise this issue because the Government's refusal to provide notice of subgroup meetings deprives EPIC of information to which it is legally entitled. EPIC's open meeting claims must therefore survive, too.

Finally, EPIC has properly brought claims under the FACA and the Declaratory Judgment Act; EPIC has correctly named the Drone Advisory Committee as a Defendant; and EPIC already agreed to dismiss its claims against RTCA Advisory Committee weeks ago. For these reasons, the Government's Motion to Dismiss must be denied.

BACKGROUND

I. The Formation and Structure of the Drone Advisory Committee

On May 4, 2016, Michael Huerta—then the Administrator of the Federal Aviation Administration ("FAA")—stated that the FAA was "establishing" the Drone Advisory Committee. Compl. ¶ 24. Huerta described the DAC as "a broad-based advisory committee that will provide advice on key unmanned aircraft integration issues." Compl. ¶ 24. The DAC was in fact "established" by the FAA on or before August 31, 2016. Compl. ¶ 25. The DAC was originally "formed under the RTCA federal advisory committee." *Id.* The chairman and the original members of the DAC were appointed by the FAA in the summer of 2016, *id.*, and the Committee held its first public meeting on September 16, 2016, in Washington, D.C. Compl. ¶ 26.

The DAC Terms of Reference—which the FAA "issued," Compl. ¶ 24—charge the DAC with providing an "open venue" for Committee members to "identify and recommend a single, consensus-based set of resolutions for issues regarding the efficiency and safety of integrating

[unmanned aircraft systems] into the [national airspace] and to develop recommendations to address those issues and challenges." Compl. ¶ 29. However, the Committee is to "conduct more detailed business through a subcommittee and various task groups that will *help the FAA* prioritize its activities, including the development of future regulations and policies." *Id.* (emphasis added).

The DAC Subcommittee ("DACSC" or "Subcommittee") was established at some point between the first full DAC meeting (September 16, 2016) and the second full DAC meeting (January 31, 2017). Compl. ¶ 30. The date of the Subcommittee's first meeting, as with nearly all DACSC proceedings, was not announced and is not publicly known. *Id.* The DACSC Terms of Reference—which the FAA "issued"—state that the Subcommittee's role is to "support" the DAC, to "present findings to DAC," and to "[f]orward recommendations and other deliverables to DAC for consideration." Compl. ¶ 31. However, contrary to the DACSC Terms of Reference, FAA officials have repeatedly circumvented the full DAC and worked directly with the Subcommittee.

For example, FAA officials have "brief[ed]" and "educat[ed]" the DACSC; provided "guidance and assistance to the DAC Subcommittee"; and personally participated in multiple DAC meetings at which the Subcommittee delivered reports to FAA officials. Compl. ¶ 32. Moreover, the DAC's Designated Federal Officer—previously Acting FAA Deputy Administrator Victoria B. Wassmer, now Acting Administrator Daniel K. Elwell—is required by both the RTCA Charter and the FACA to be intimately involved in the proceedings of the DACSC. The "DFO or alternate" must "[c]all, attend, and adjourn all the committee/ subcommittee meetings"; "[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." Compl ¶ 33.

The DAC also includes at least three "FAA-approved Task Groups," each of which must "have a specific, limited charter" that is "approved by the FAA Administrator." Compl ¶ 34. According to the FAA, the agency's "traditional way of providing tasking" to Task Groups is to "finalize and approve the tasking statement and forward it to the [Committee] to execute." Compl ¶ 34. Task Group 1 was established at some point between the first full DAC meeting and the second full DAC meeting. Compl. ¶ 35. The FAA instructed Task Group 1 to "[d]evelop a set of consensus based recommendations" concerning "the roles and responsibilities of federal, state, and local governments in regulating and enforcing drone laws." Compl. ¶ 35. Task Group 2 was also established at some point between the first full DAC meeting and the second full DAC meeting. Compl ¶ 36. The FAA instructed Task Group 2 to "provide recommendations on UAS operations/missions beyond those currently permitted" and "define procedures for industry to gain access to the airspace." Compl ¶ 36. Task Group 3 was established sometime between the second full DAC meeting and the third full DAC meeting (May 3, 2017). Compl ¶ 37. The FAA instructed Task Group 3 to "develop recommendations as to the UAS community's preferred method(s) for funding Federal activities and services required to support UAS operations for the next two years, and beyond." Compl ¶ 37.

The DACSC Terms of Reference nominally require the Task Groups to perform their work "at the direction of the DACSC," rather than at the direction of FAA officials. Compl. ¶ 38. Nevertheless, FAA officials have personally directed, guided, participated in, and received the work and recommendations of the Task Groups. *Id.* For example, in early 2017, Acting Deputy Administrator Wassmer "issued" the detailed tasking statements for all three Task Groups. Compl. ¶ 39. The tasking statements included fact-finding assignments for each Task Group, topics that each Task Group should advise on, and deadlines by which each Task Group should

deliver its recommendations and reports. Compl. ¶ 39. As Wassmer made clear to the DAC, "tasking statements from the FAA should guide the work of the DAC, DACSC, and TGs." Compl. ¶ 39.

Wassmer and Acting Administrator Elwell also personally attended DAC meetings at which the Task Groups delivered substantive recommendations and reports. Compl. ¶ 41. And because the Task Groups constitute subcommittees of the DAC, Wassmer and Elwell were (or are) required to be intimately involved in the proceedings of the Task Groups in their capacity as Designated Federal Officer. Compl. ¶ 42. Under the RTCA Charter, the "DFO or alternate" must "[c]all, attend, and adjourn all the committee/subcommittee meetings"; "[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." Compl. ¶ 42.

II. The Activities of the Drone Advisory Committee

On September 16, 2016, the DAC held its first full Committee meeting in Washington, D.C. Compl. ¶ 54. Acting Deputy Administrator Wassmer, then the Committee's DFO, attended the meeting and delivered remarks. *Id.* DAC Secretary Al Secen presented the results of a survey conducted among DAC members. Compl. ¶ 55. Members of the DAC *identified privacy as the second-highest public concern around drones*, narrowly trailing safety and reliability. *Id*. Yet, in the same survey, DAC members *ranked privacy last among their regulatory and policy priorities*. Compl. ¶ 56. Between the DAC's September 2016 and January 2017 meetings, the DACSC, Task Group 1, and Task Group 2 were formed and began engaging in official Committee business. Compl. ¶ 59.

On January 31, 2017, the DAC held its second full Committee meeting in Reno, Nevada. Ex. 5. Acting Deputy Administrator Wassmer, then the Committee's DFO, attended the meeting

and delivered remarks. Compl. ¶ 62. The DACSC, Task Group 1, and Task Group 2 each delivered a progress report to the DAC at the January 2017 meeting. Compl. ¶ 63. Task Group 1 and Task Group 2 discussed their substantive recommendations to the FAA. *Id*. The DAC also "approved the DACSC to go through the process of creating TG3 [Task Group 3]" based on the tasking statement issued by the FAA. *Id*. Between the DAC's January 2017 and May 2017 meetings, the DACSC, Task Group 1, and Task Group 2 continued engaging in official Committee business. Compl. ¶ 65. Task Group 3 was also formed during this period and began engaging in official Committee business. *Id.*

On May 3, 2017, the DAC held its third full Committee meeting in Herndon, Virginia. Compl. ¶ 68. Acting Deputy Administrator Wassmer, then the Committee's DFO, attended the meeting and delivered remarks. *Id*. The DACSC and each of the Task Groups delivered a progress report to the DAC at the May 2017 meeting. Compl. ¶ 69. Task Group 1 and Task Group 2 discussed their substantive recommendations to the FAA. *Id*. Between the DAC's May 2017 and July 2017 meetings, the DACSC and the Task Groups continued engaging in official Committee business. Compl. ¶ 71.

On July 21, 2017, the DAC held its fourth full Committee meeting via digital conference. Compl. ¶ 74. Mr. Elwell, then the FAA Deputy Administrator, attended the meeting as the Committee's newly-appointed DFO. *Id.* Elwell also delivered remarks during the meeting. *Id*. Both Task Group 1 and Task Group 3 delivered a progress report and recommendations to the DAC at the July 2017 meeting. Compl. ¶ 75. Task Group 3 also presented an interim report intended for the FAA concerning funding mechanisms for the introduction of drones into the national airspace. *Id.* Between the DAC's July 2017 and November 2017 meetings, the DACSC and the Task Groups continued engaging in official Committee business. Compl. ¶ 79.

On October 23, 2017, the Washington Post published a report that Task Group 1—a group that includes "industry insiders with a financial stake in the outcome" of the Committee process—"has been holding confidential meetings to shape U.S. policy on drones, deliberating privately about who should regulate a burgeoning industry that will affect everything from package delivery to personal privacy." Compl. ¶ 82. The Washington Post also reported that the Task Group 1 process had "been riven by suspicion and dysfunction" and that "[m]onths of tensions came to a head" when "an FAA contractor that manages the group told members they had to sign a far-reaching confidentiality agreement to keep participating. After some raised concerns, several groups were blocked from receiving draft documents meant to represent their own 'common ground' positions, emails show." Compl. ¶ 83. On November 8, 2017, San Francisco Mayor Ed Lee sent a letter to DAC Chairman Brian Krzanich warning that "Task Group 1's process has been marred by a lack of transparency and poor management," including "lack of agendas, last minute rescheduling of meetings, failure to have minutes of any proceedings, conflicting advice and guidance by RTCA and Requirements to sign documents that public employees cannot sign." Compl. ¶ 84.

On the same day—November 8, 2017—the DAC held its fifth full Committee meeting at the Amazon Meeting Center in Seattle, Washington. Compl. ¶ 85. Mr. Elwell, then the FAA Deputy Administrator, attended the meeting and delivered remarks. *Id.* The DACSC and each of the Task Groups delivered a progress report to the DAC at the November 2017 meeting. Compl. ¶ 86. Each Task Group discussed its substantive recommendations to the FAA. *Id.* Task Group 2 also presented a final report intended for the FAA concerning drone access to airspace. Compl. ¶ 87. The DAC approved the report. *Id.* The DACSC and the DAC Task Groups continued to meet, confer, and engage in official Committee business after the November 2017 meeting.

Compl. ¶ 89. On March 9, 2018, the DAC held its sixth full Committee meeting in McLean, Virginia. Compl. ¶ 92. The DAC's next full Committee meeting is scheduled for today, July 17, 2018. Compl. ¶ 94.

Although the DACSC and DAC Task Groups have met, conferred, and conducted committee business on a regular basis throughout the existence of the DAC, the Government has failed to publicly notice or announce any meetings of the DACSC or the DAC Task Groups. Compl. ¶¶ 60, 66, 72, 80, 90. The Government has similarly failed to make any DACSC or Task Group records available for public inspection, apart from the limited information presented to the DAC at its meetings. Compl. ¶¶ 61, 67, 73, 81, 91.

III. The Transparency Obligations of the Drone Advisory Committee

The DAC, according its Terms of Reference, must conduct its work in the "open, transparent venue of a federal advisory committee (FAC). As with all FACs, the Drone Advisory Committee (DAC) will be designed to: ensure transparency, include broad and balanced representation across the industry, encourage innovation and remain consistent with US anti-trust laws." Compl. ¶ 42.

Under the FACA, the meetings of each advisory committee—defined as any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" which is "established or utilized" by an agency—"shall be open to the public." 5 U.S.C. app. 2 §§ 3(2), 10(a)(1). The Charter of the RTCA—of which the DAC, the DACSC, and the DAC Task Groups were all part—confirms that "RTCA Advisory Committee and subcommittee meetings will be open to the public, except as provided by section 10(d) of the FACA and applicable regulations. Meetings will be announced in the Federal Register at least 15 days before each meeting, except in emergencies." Compl. ¶ 44. The DAC

Terms of Reference further underscore that "The DAC functions as a Federal advisory committee with meetings that are open to the public, unless otherwise noted as authorized by section 10(d) of the FACA and applicable regulations . . . ." Compl. ¶ 45.

Likewise, under the FACA, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist." 5 U.S.C. app. 2 § 10(b). The RTCA Charter confirms that "[s]ubject to the Freedom of Information Act, 5 U.S.C. § 552, records, reports, transcripts, minutes, or meeting summaries, and other materials presented to or prepared for the RTCA Advisory Committee are available for public inspection." Compl. ¶ 47. The DAC Terms of Reference state that "[i]n accordance with the Federal Advisory Committee Act, meeting summaries and related information will be available to the public via RTCA's website. Documents undergoing final review can be obtained by contacting RTCA." Compl. ¶ 48.

The RTCA Charter also states that the "records of the committee, formally and informally established subcommittees, or other work or task subgroup of the subcommittee, shall be handled in accordance with the General Records Schedule 6.2, or other approved agency records disposition schedule." *Id.* General Records Schedule 6.2 "covers Federal records created or received by Federal advisory committees and their subgroups[.]" Compl. ¶ 50. General Records Schedule 6.2 requires the "[p]ermanent" preservation of "Substantive Committee Records," including "documentation of advisory committee subcommittees" and "records that

document the activities of subcommittees that support their reports and recommendations to the chartered or parent committee." Compl. ¶ 51.

The General Services Administration, which is "responsible for all matters relating to advisory committees," and "prescribe[s] administrative guidelines and management controls applicable to advisory committees," 5 U.S.C. app. 2 § 7, instructs that: "Whether subcommittees are open to the public or not, the agency must . . . [c]omply with recordkeeping requirements (i.e., minutes)" and "[a]llow public access to subcommittee records." Compl. ¶ 52. FACA regulations also dictate that a committee or agency "may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA." Compl. ¶ 53; 41 C.F.R. § 102-3.170.

IV. EPIC's Attempts to Obtain Drone Advisory Committee Records

On March 20, 2018, EPIC sent a records request via email to Acting FAA Administrator Elwell, DOT Committee Management Officer David W. Freeman, DAC Secretary Al Secen, and the RTCA's general information email address. Compl. ¶ 95. In its request, EPIC stated that it wished to access "all 'records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by' the DAC or any DAC subcomponent. 5 U.S.C. App. 2 § 10(b)." Compl. ¶ 96. EPIC asked the agency and Committee recipients to "direct EPIC to the URL or location where the full collection of DAC and DAC subcomponent records is available for public inspection and copying." Compl. ¶ 97. EPIC also advised the FAA, DAC, and RTCA of their records disclosure obligations under the FACA. Compl. ¶ 98. EPIC received no response to its request. Compl. ¶ 99.

V. Procedural History

On April 11, 2018, EPIC filed the instant suit against the Drone Advisory Committee; the Federal Aviation Administration; Daniel K. Elwell, in his official capacity as Acting Administrator of the Federal Aviation Administration and Designated Federal Officer of the Drone Advisory Committee and RTCA Advisory Committee; the RTCA Advisory Committee; the United States Department of Transportation; and David W. Freeman, in his official capacity as Committee Management Officer of the Department of Transportation. Complaint, ECF No. 1.

EPIC alleged seven claims in all: failure to open advisory committee meetings to the public in violation of § 10(a)(1) of the FACA (Count I); failure to open advisory committee meetings to the public in violation of § 10(a)(1) and 5 U.S.C. § 706(1) (Count II); unlawful holding of nonpublic committee meetings in violation of § 10(a)(1) and 5 U.S.C. § 706(2) (Count III); failure to make committee records available for public inspection in violation of § 10(b) of the FACA (Count IV); unlawful withholding of committee records in violation of § 10(b) and 5 U.S.C. § 706(1) (Count V); unlawful carrying on of committee business without disclosing committee records in violation of § 10(b) and 5 U.S.C. § 706(2) (Count VI); and a claim under the Declaratory Relief Act, 28 U.S.C. § 2201(a) (Count VII). On July 3, 2018, the Government filed a Motion to Dismiss EPIC's Complaint in its entirety. ECF No. 16.

STANDARD OF REVIEW

I. 12(b)(1)

Where a "claim arises under the laws of the United States," the Court's jurisdiction is established—and a motion under Fed. R. Civ. P. 12(b)(1) defeated—"[u]nless the alleged claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or [is] wholly insubstantial and frivolous." *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995).

Though "the plaintiff bears the burden of establishing that the court has jurisdiction," the Court "must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff[.]" *Barry Farm Tenants v. D.C. Hous. Auth.*, No. CV 17-1762 (EGS), 2018 WL 2016478, at *4 (D.D.C. Apr. 30, 2018). Further, the Court "the court 'may consider materials outside the pleadings' in determining whether it has jurisdiction to hear the case." *Id.* (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

II. 12(b)(6)

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A court considering such a motion presumes the factual allegations of the complaint to be true and construes them liberally in the plaintiff's favor." *Duberry v. Inter-Con Sec. Sys., Inc.*, 898 F. Supp. 2d 294, 297 (D.D.C. 2012). The Federal Rules of Civil Procedure "do not require 'detailed factual allegations' for a claim to survive a motion to dismiss," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Though plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," it is not a "probability requirement." *Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint should be allowed to proceed 'even if it strikes a savvy judge that actual proof

of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). "When a federal court reviews the sufficiency of a complaint . . . [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Mehrbach v. Citibank, N.A.*, No. CV 17-2739 (RC), 2018 WL 3381315, at *2 (D.D.C. July 11, 2018) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

ARGUMENT

The Government's arguments for dismissal of EPIC's Complaint are based on a misreading of FACA and the APA and on contested issues of fact that cannot be resolved at the motion to dismiss stage. EPIC has stated plausible claims for the disclosure of documents under 5 U.S.C. app. 2 § 10(b) and the APA. EPIC's Complaint seeks undisclosed records of the DAC parent committee, which fall squarely within § 10(b), as well as records arising from the DAC subgroups, which are likewise subject to release. Even if some hypothetical subgroup records were exempt from disclosure in other cases, EPIC would still have valid claims to the disclosure of DAC subgroup records in this case. Each of the DAC's subgroups constitutes an "advisory committee" in its own right, 5 U.S.C. app. 2 § 3(2), making its records subject to § 10(b). Lastly, EPIC has pled ample facts to show that—contra the Government—the supposed "staff work" exception to document disclosure does not apply to all (or even most of) the records EPIC seeks. Defs.' Mem. 26. If the Government wishes to assert disclosure exemptions as to *particular* records that EPIC has requested, it may do so at a later phase on based on a more developed factual record. In the meantime, EPIC has stated valid claims for failure to disclose advisory committee records, and the Government's Motion to Dismiss must be denied.

EPIC has also stated valid claims for the opening of DAC subgroup meetings. As established, the DAC subgroups constitute advisory committees in their own right. The subgroups are therefore fully subject to the open meeting requirement of § 10(a). Moreover, EPIC has informational standing to pursue these claims, as the Government's failure to open DAC subgroup meetings prevents EPIC from obtaining information to which it is legally entitled.

Finally, EPIC's Complaint properly seeks relief under the FACA and the Declaratory Judgment Act; EPIC has properly named the Drone Advisory Committee as a Defendant; and EPIC has already agreed to the dismissal of its claims against the RTCA Advisory Committee. For all of these reasons, the Government's Motion to Dismiss must be denied.

I. EPIC IS ENTITLED TO THE RELEASE OF ALL NON-EXEMPT RECORDS OF THE DRONE ADVISORY COMMITTEE AND ITS SUBGROUPS.

EPIC has properly stated claims for the release of DAC records for four reasons. First, EPIC seeks records from the DAC parent committee, which are indisputably subject to § 10(b). Second, records arising from the DAC subgroups—many of which have not been made available to the public—qualify as records of the DAC itself, and are thus subject to disclosure. Third, the DAC subgroups are acting as advisory committees in their own right subject to § 10(b). Finally, EPIC has demonstrated that many of the records it seeks would fall outside of any "staff work" exception that might exist.

A. EPIC's Complaint seeks the disclosure of all DAC records, not just records pertaining to DAC subcomponents.

EPIC plausibly alleges that the Government has failed to "make 'available for public inspection and copying'" numerous DAC records and asks the Court to order the disclosure of "all records prepared for or by the DAC . . . ." Compl. ¶ 119 (quoting 5 U.S.C. app. 2 § 10(b));

Compl. p. 27. Yet the Government, in an attempt to artificially narrow EPIC's Complaint, argues that EPIC seeks the release only of "*subgroup* documents." Defs.' Mem. 20 (emphasis added). This is simply false. EPIC's Complaint is explicitly "not limited to records arising out of the DACSC and DAC Task Groups," but rather covers *all* undisclosed DAC records:

> Defendants have failed to make "available for public inspection and copying" numerous "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the DAC, including but not limited to records arising out of the DACSC and DAC Task Groups.

Compl. ¶ 119 (quoting 5 U.S.C. app. 2 § 10(b)); *accord* Compl. ¶¶ 125, 132. Even if the Government were allowed to categorically withhold DAC records pertaining to the Committee's subcomponents—which, to be clear, it is not—EPIC would still have valid claims for the release of DAC records.

For example, Counts IV–VI of EPIC's Complaint allege that the Government has failed to disclose records "made available to or prepared for or by" the DAC, including its parent committee. Compl. ¶ 119 (quoting 5 U.S.C. app. 2 § 10(b)); *accord* Compl. ¶¶ 125, 132. The Government concedes that the DAC parent committee is fully subject to the FACA because it was "established" by the FAA. *See* Defs.' Mem. 23. Thus, DAC records pertaining to the parent committee are indisputably within the scope of § 10(b). *See* Defs.' Mem. 4. And because the Court must assume based on EPIC's Complaint that the Government has failed to disclose one or more DAC records made available to the parent committee, EPIC has stated valid claims for relief under Counts IV, V, and VI.[1] *See* Fed. R. Civ. P. 8(a)(2); Fed. R. Civ. P. 12(b)(6); *Project on Military Procurement v. Dep't of Navy*, 710 F. Supp. 362, 366 (D.D.C. 1989) ("[D]efendant

[1] EPIC explains below why the Government's jurisdictional arguments concerning Count IV also fail. *See infra* Part II.B.

has failed to recognize that the substantive contents of even a single document may substantially enrich the public domain . . . .").

Indeed, the Complaint amply demonstrates EPIC's entitlement to relief. First, EPIC alleges that the Government has failed to disclose DAC records generally—not merely records pertaining to DAC subcomponents:

- "Plaintiff Electronic Privacy Information Center ('EPIC') specifically challenges . . . Defendants' failure to make 'available for public inspection and copying' the 'records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents' *of the DAC*[.]" Compl. ¶ 3 (emphasis added) (quoting 5 U.S.C. app. 2 § 10(b)).

- "[T]he vast majority of *DAC records* and subcommittee meetings remain closed to the public in violation of the FACA." Compl. ¶ 23 (emphasis added).

- "Defendants have failed to make 'available for public inspection and copying' numerous 'records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by' the DAC, including *but not limited to* records arising out of the DACSC and DAC Task Groups." Compl. ¶ 119 (emphasis added) (quoting 5 U.S.C. app. 2 § 10(b)); *accord* Compl. ¶¶ 125, 132

Moreover, EPIC's Exhibits refer to multiple documents from the DAC parent committee that have never been made public. To begin with, the DAC Terms of Reference reveal the existence of an online "workspace" made available to all DAC members:

> RTCA will maintain an online workspace to facilitate the consensus process of the committee. Content of the DAC workspace will include calendar, roster, documents created by the DAC, documents under review, background materials for meetings, meeting minutes among other things. Workspace will also be used to facilitate document review and commenting in the final stages of the consensus process.

Compl. Ex. 1 at 6. The precise contents of this workspace are not known, because the DAC has failed to make it available for public inspection. *See RTCA, Inc. Workspace*, RTCA (2018) (requiring login credentials to access DAC records).[2] And there is no indication that certain

[2] https://workspace.rtca.org/kwspub/home/.

categories of workspace records—e.g., "calendars" and "comment[s]" shared by DAC members during the document review process, *id.*—have ever been made "available for public inspection and copying." § 10(b).

The same is true of other records referenced in EPIC's Exhibits. The minutes from the DAC's January 31, 2017 meeting state that "The FAA has issued a legal fact sheet that provides regional contacts when questions arise. FAA will make that fact sheet available to RTCA to post on the DAC and DACSC Workspace website." Compl. Ex. 5 at 4. This fact sheet has not been publicly released. *See Drone Advisory Committee*, RTCA (Mar. 9, 2018).[3] The January 31 meeting minutes also identify as an action item: "Add SC-228 briefing to the DAC agenda for May (obtain related materials presented to Subcommittee and then post on the DAC Workspace website)." Compl. Ex. 5 at 10; *accord id.* at 13; *see also* Compl. Ex. 10 at 17 ("RTCA to coordinate a webinar for SC-228 that can be reviewed by all DAC members"). Again, despite being made available to the DAC parent committee, these briefing materials have not been publicly released. *See Drone Advisory Committee*, *supra*. So too with Task Group 1's "[m]eeting notes and data," which were "posted to Workspace for members to review" as of November 8, 2017, yet never disclosed to the public. Ex. 12 at 9.

In 2017, members of the DAC parent committee also attended a series of meetings organized by Task Group 3—described as "listening sessions"—in which FAA drone policy was discussed and deliberated. Compl. Ex. 12 at 17; *see also* Compl. Ex. 11 at 5. Under FACA regulations, these gatherings were necessarily "approve[d] or call[ed]" by the Designated Federal Officer. 41 C.F.R. § 102-3.120. As such, they qualify as "meeting[s]" of the DAC parent committee for the purposes of the FACA. *See* 41 C.F.R. § 102-3.25 (defining "committee

[3] https://www.rtca.org/content/meeting-archives-dac.

meeting" as "any gathering of advisory committee members . . . held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations"). Yet no minutes of these DAC meetings have been published, despite the FACA's requirement that "[d]etailed minutes of each meeting of each advisory committee [ ] be kept . . . ." 5 U.S.C. app. 2 § 10(c); *see also* 5 U.S.C. app. 2 § 10(b) (requiring committee "minutes" to be disclosed). The Government's failure to publish these records is well within the scope of EPIC's Complaint.

In view of the facts alleged in EPIC's Complaint and Exhibits, it is highly likely—or, at a minimum, highly plausible—that the Government has failed to disclose numerous DAC records subject to disclosure under § 10(b). As a result, Counts IV, V, and VI of EPIC's Complaint cannot be dismissed.

B. Records from the DAC's subgroups are also records of the DAC itself, and must be disclosed.

The Government, in arguing for the dismissal of EPIC's document disclosure claims, draws a false distinction between records that arise from the DAC parent committee and records that arise from DAC "subgroups." Defs.' Mem. 20. The Government overlooks the obvious: *both* categories of documents constitute records of the Drone Advisory Committee. As such, both are subject to disclosure under 5 U.S.C. app. 2 § 10(b). *See Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 178 n.13 (D.C. Cir. 1977) ("FACA specifically provides that subgroups of advisory committees are subject to the provisions of the Act.").

As the Government repeatedly concedes, the DAC is a "parent committee" of the DACSC and DAC Task Groups, which in turn are the "subgroups" of the DAC. *E.g.*, Defs.' Mem. 20. Any record belonging to a subgroup also belongs, by definition, to the group. *See Subgroup*, Collins English Dictionary (2018) (defining "subgroup" as "a subdivision of a

group").[4] A record that is "made available to or prepared for or by" a particular subpart of the DAC is necessarily "made available to or prepared for or by" the DAC itself. § 10(b). The Government may not arbitrarily wall off large volumes of DAC records from disclosure simply because they were generated or acquired by a particular subpart of the DAC. *Cf. Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 64 (D.D.C. 2012) ("The mere fact that the subgroup drafts were not ultimately passed on to the final decisionmaker does not lead to the conclusion that they were not before the agency.").

This commonsense conclusion is reflected in General Records Schedule 6.2, which governs the handling of all "Federal records created or received by Federal advisory committees and their subgroups . . . ." Compl. Ex. 15 at 130; *see also* Compl. Ex. 13 at 4 ("[R]ecords of the committee, formally and informally established subcommittees, or other work or task subgroup of the subcommittee, shall be handled in accordance with the General Records Schedule 6.2 . . . ."). Among the types of "Substantive Committee Records" identified in Schedule 6.2 are "documentation of advisory committee subcommittees (i.e., working groups, or other subgroups)" and "records that document the activities of subcommittees that support their reports and recommendations to the chartered or parent committee." Compl. Ex. 15 at 130–32. Subcommittee records are thus a subset of advisory committee records—not a distinct category of documents beyond the reach of the FACA.

The General Services Administration has made clear that "Whether subcommittees are open to the public or not, the agency must . . . [c]omply with recordkeeping requirements (i.e., minutes)" and "*[a]llow public access to subcommittee records*." Compl. Ex 16 at 2 (emphasis added). This is apparent, too, from the GSA's regulations implementing the FACA. Whereas

[4] https://www.collinsdictionary.com/us/dictionary/english/subgroup.

FACA regulations distinguish between the meetings of advisory committees (which must be "accessible to the public," 41 C.F.R. § 102-3.140(a)) and the meetings of subcommittees (which may be closed to the public more readily, *see* 41 C.F.R. §§ 102–3.35, 102–3.145), the regulations make no distinction between the *records* of a parent committee and its subgroups. *See* 41 C.F.R. § 102-3.170. The Government must publish all DAC records, subject only to the exemptions of 5 U.S.C. § 552(b). *See* § 10(b).

The implausibility of the Government's position is clear by analogy to the Freedom of Information Act. Under the Government's logic, the FAA could categorically refuse to release records arising out of an agency subcomponent—for example, the Office of the FAA Administrator—merely because that subcomponent is not an agency in its own right. *See* 5 U.S.C. § 552(a) (imposing disclosure obligations only on "agenc[ies]"). That is plainly not what the FOIA requires, or what the FACA requires, and yet the Government's reading of the FACA would produce that absurd result here. In order to evade the FACA's document disclosure obligations, an advisory committee would only need to (1) form a token subcommittee; (2) conduct all of its substantive work and deliberations in secret at the subcommittee level; and (3) upon completion of the subcommittee's closed-door proceedings, release the bare minimum information necessary for the parent committee to vote on the subcommittee's recommendations. The FACA process was not meant to be such a fig leaf, particularly when the statute explicitly refers to "task force[s]," "subcommittees," and "subgroup[s]" as being subject to its transparency requirements. 5 U.S.C. app. 2 § 3(2); *see also* § 10(b).

In sum, the Government urges an unreasonably narrow reading of a statute that was enacted to "allow the public to monitor [the] existence, activities, and cost" of advisory committees. *Animal Legal Def. Fund, Inc. (ALDF) v. Shalala*, 104 F.3d 424, 426 (D.C. Cir.

1997). The FACA does not permit the blanket withholding of DAC records arising from the DAC's subcomponents. EPIC's disclosure claims must therefore survive the Government's Motion to Dismiss.

C. The DACSC and DAC Task Groups are advisory committees in their own right, subject fully to § 10(b) of the FACA.

Even if subcommittees were categorically exempt from § 10(b) of the FACA, EPIC would still be entitled to the disclosure of DAC subgroup records because the DACSC and Task Groups are acting as "advisory committee[s]" in their own right. 5 U.S.C. app. 2 § 3(2). Under the FACA, a group constitutes an "advisory committee" if it is "established or utilized" by an agency "in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." 5 U.S.C. app. 2 § 3(2). The D.C. Circuit has identified three different ways to meet the "established or utilized" test:

> First, the government "establishes" an advisory committee when the government directly forms it. *Food Chem. News v. Young*, 900 F.2d 328, 332 (D.C. Cir. 1990) (citing *Pub. Citizen* [*v. United States Dep't of Justice*], 491 U.S. at 460–62). Second, the government "utilizes" a privately-formed advisory committee when agency officials exercise actual management or control over that committee. *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994). Third, even if a non-government entity forms an advisory committee, that committee will still fall under the FACA if the organization forming it is "quasi-public." *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 431 (D.C. Cir. 1997).

Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d 24, 32 (D.D.C. 2010). The DAC subgroups easily satisfy the first two elements—"established" and "utilized"—because subgroups were formed and managed by FAA officials. Even if that were not the case, the subgroups would satisfy the third ("quasi-public") test in the alternative.

1. "Established"

First, the FAA "established" the DAC subgroups as advisory committees because "the agency form[ed]" them. *Byrd v. EPA*, 174 F.3d 239, 246 (D.C. Cir. 1999). The FAA announced the formation of the DACSC and DAC Task Groups on August 31, 2016, before the DAC had even held its first meeting. *See* Compl. Ex. 3 at 2 ("The committee will conduct more detailed business through a subcommittee and various task groups that will help the FAA prioritize its activities, including the development of future regulations and policies."). According to former Deputy Administrator Wassmer, the FAA "issued" the DACSC Terms of Reference, which constitute the foundational document of the Subcommittee. Compl. Ex. 10 at 4. The Terms of Reference exhaustively laid out the purpose, structure, operating guidelines, membership breakdown, meeting procedures, and deliverables for the DACSC. Compl. Ex. 6 at 117–21. The Terms of Reference also clarified that the "FAA seeks to *establish* a venue and process to enable stakeholders to advise the FAA on the needs of these new and expanding users of the National Airspace System . . . ." Compl. Ex. 6 at 117. From these facts, it is clear—and certainly plausible—that the FAA established the DACSC within the meaning of 5 U.S.C. app. 2 § 3(2).

The same holds for the DAC Task Groups. The formation of the Task Groups was announced before the DAC even met. *See* Compl. Ex. 3 at 2. Each of the Task Groups "ha[d] a specific, limited charter," or Tasking Statement, that was "issued" and "approved by the FAA Administrator." Compl. Ex. 10 at 4; Compl. Ex. 1 at 2. According to the FAA, the agency's "traditional way of providing tasking" to Task Groups is to "finalize and approve the tasking statement and forward it to the [Committee] to execute," as occurred here. Compl. Ex. 5 at 10. The Tasking Statements provided by the FAA included factfinding assignments for each Task Group, topics that each Task Group should advise on, and deadlines by which each Task Group

should deliver its recommendations and reports. *See* Compl. Ex. 7; Compl. Ex. 8; Compl. Ex. 9. The DACSC Terms of Reference—which, again, were issued by the FAA—also state that "Task Groups will be established as outlined" in the same document. Compl. Ex. 6 at 120. This, too, plausibly constitutes "establish[ment]" within the meaning of 5 U.S.C. app. 2 § 3(2).

Contra the Government, *Byrd* does not state that an agency must "actually select" the members of a body *in every case* in order to establish an advisory committee. Defs.' Mot 22. The *Byrd* court simply held that the plaintiff—on the facts of *that* case—could not show that a putative advisory committee was "government-formed" because the EPA had at no point exercised authority over committee membership selection. *Byrd*, 174 F.3d at 246–47. The Court was clear that the outcome in *Byrd* "might have been different if"—as in this case—the agency "had exercised its authority" in the "panel selection process." *Id.* at 247. Here, the FAA "issued" the DACSC Terms of Reference, Compl. Ex. 10 at 4, which established detailed criteria for membership selection and committee composition. Compl. Ex. 6 at 120; *see also* Compl. Ex. 4 at 4 ("Ms. Jenny also reiterated the FAA and DAC Chairman's belief that they should quickly establish DAC subcommittee with a representative from each DAC member along with additional member organizations from pool of DAC applicants and others as appropriate to address high priority issues."). Through the same Terms of Reference, the FAA specifically dictated that agency personnel would "take part in the DACSC's deliberations" as "Non-voting Members." Compl. Ex. 6 at 120. Similarly, the FAA exercised authority over the composition of the Task Groups and selection of its members. *See* Compl. Ex. 1 at 2 ("Unlike the DAC and DACSC, members of TG[s] . . . are selected for their expertise in the subject matter rather than their affiliation."); *accord* Compl. Ex. 6 at 120. Finally, member selections for both the DACSC and Task Groups were subject to the approval of the DAC DFO, *see* Compl. Ex. 10 at 4, who at

all times was a top-ranking FAA official. These facts readily distinguish EPIC's Complaint from the plaintiff's inadequate allegations in *Byrd*.

2. "Utilized"

Second, the FAA has "utilized" the DAC subgroups within the meaning of 5 U.S.C. app. 2 § 3(2). "Utilized" means "something along the lines of actual management or control of the advisory committee." *Wash. Legal Found*, 17 F.3d at 1450. A committee meets the "management or control" standard if it ultimately "answers to" an agency. *Id.* at 1451.

EPIC's Complaint is replete with allegations that FAA officials managed and controlled the DACSC. First and foremost, the FAA "issued" the DACSC Terms of Reference, which provided the DACSC with its marching orders. Compl. Ex. 10 at 4. As noted, the Terms of Reference laid out the purpose, structure, operating guidelines, membership breakdown, meeting procedures, and deliverables for the DACSC. Compl. Ex. 6 at 117–21; *see also* Compl. Ex. 1 at 2 (assigning "responsibilities" to DACSC). The DAC Terms of Reference also charged the "Director of the FAA UAS Integration Office" with "oversee[ing] the DAC Subcommittee." Compl. Ex. 1 at 5. Over the past two years, FAA officials have "brief[ed]" and "educat[ed]" the DACSC, Compl. Ex. 10 at 8; provided "guidance and assistance to the DAC Subcommittee," Compl. Ex. 11 at 2; 23 and personally participated in DAC meetings at which the Subcommittee delivered reports and recommendations. *See, e.g.*, Compl. Ex. 5 at 2–3; Compl. Ex. 10 at 3–4, 8; Compl. Ex. 12 at 2, 7. Moreover, the DAC's DFO—at all times a top-level FAA official—was required to be intimately involved in the proceedings of the DACSC. The "DFO or alternate" must "[c]all, attend, and adjourn all the committee/ subcommittee meetings"; "[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." Compl. Ex. 13 at 2–3; *see also* 5 U.S.C. app. 2 § 10(e)–(f).

EPIC's Complaint also demonstrates FAA management or control of the Task Groups. For example, Acting Deputy Administrator Wassmer "issued" the detailed tasking statements for all three Task Groups. Compl. Ex. 10 at 4. As noted, the tasking statements included factfinding assignments for each Task Group, topics that each Task Group should advise on, and deadlines by which each Task Group should deliver its recommendations and reports. *See* Compl. Ex. 7; Compl. Ex. 8; Compl. Ex. 9. As Wassmer made clear to the DAC, "tasking statements from the FAA should guide the work of the . . . TGs." Ex. 10 at 4. Wassmer and Acting Administrator Elwell also personally attended DAC meetings at which the Task Groups delivered substantive recommendations and reports. *See, e.g.*, Compl. Ex. 10 at 2, 9–17; Compl. Ex. 11 at 1, 3–9; Compl. Ex. 12 at 2, 8–18. And again, the DAC's DFO (or alternate) was required to be intimately involved in the proceedings of the DACSC, "[c]all[ing], attend[ing], and adjour[ing]n all the committee/ subcommittee meetings"; "[a]pprov[ing] all committee/subcommittee agendas"; and "[c]hair[ing] meetings when directed to do so by the FAA Administrator." Compl. Ex. 13 at 2–3; *see also* 5 U.S.C. app. 2 § 10(e)–(f).

The Government asserts, without explanation, that these sorts of activities do "not rise to the level of 'management or control'" by the FAA. Defs.' Mem. 24. But if these facts do not constitute "management or control" of a committee, it is difficult to imagine what would. *See Wash. Legal Found*, 17 F.3d at 1450. The FAA variously determined for each subgroup (1) who the subgroup would report to; (2) how the subgroup would be structured; (3) what categories of people could serve as subgroup members; (4) what operating procedures the subgroup had to follow; (5) what topics the subgroup would research; (6) what types of recommendations the subgroup would make; (7) when the subgroup could meet; (8) what would appear on the subgroup's meeting agendas; and (9) who would chair the subgroup's meetings. The record also

shows that the FAA was in constant contact with the subgroups, providing input directly to them and receiving recommendations directly from them—often through the head of the FAA. The Government cannot seriously deny that these facts plausibly allege "management or control" of the subgroups by the FAA.

Finally, the Government appears to believe that a DFO's control over a subcommittee has no bearing on whether the DFO's agency exercises control over the subcommittee. *See* Defs.' Mem. 24–25. In other words, the Government would rewrite the FACA to exclude any committee that an agency "utilize[s]" through its DFO. 5 U.S.C. app. 2 § 3(2)(C). But there is no such carveout in § 3(2)(C). Indeed, the text of the FACA suggests that the agency's assignment of a DFO to a subgroup is a tacit admission that the subgroup constitutes an "advisory committee" under § 3(2)(C). *See* 5 U.S.C. app. 2 § 10(e) ("There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each *advisory committee.*" (emphasis added)). And whatever force the Government's argument might have in another context, it is simply nonsensical where—as here—the DFO is the *head of the agency* that is supposedly not "utilizing" the committee. When the Acting Administrator of the FAA is in charge of a subgroup meeting, it is clearly "plausible" that the subgroup is advising the FAA.

3. "Quasi-Public"

Third, even if the Government is correct that the "DAC, not the FAA, . . . actually established the DAC subgroups," Defs.' Mem. 23, the subgroups would still qualify as advisory committees under the "quasi-public" rule of *ALDF*, 104 F.3d 424. In *ALDF*, the D.C. Circuit concluded that FACA's definition of "advisory committee" also extends to "the offspring of 'quasi-public' organizations 'permeated by the Federal government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 463). An advisory body thus constitutes a FACA committee if

the organization that created it (1) was quasi-public rather than "purely private"; (2) was "formed and funded" by the Government; and (3) was "formed 'for the explicit purpose of furnishing advice to the Government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 460 n.11).

The Drone Advisory Committee—which on the Government's view "established" the DAC subgroups, Defs.' Mem. 23—readily meets the *ALDF* criteria. First, the DAC was established as an advisory committee by the FAA, Defs.' Mem. 23, yet it was placed under the management of RTCA, Inc., "a private, non-for-profit association." Compl. Ex. 13 at 1. The DAC was also populated with a mixture of government and non-government members. Compl. Ex. 14. The DAC was thus a quasi-public organization. *See ALDF*, 104 F.3d at 429. Second, the DAC was formed, supported, and funded by the Government. *See* Compl. Ex. 1 at 5 ("DAC Subcommittee (DACSC) Oversight"); *see also* 5 U.S.C. app. 2 § 12 ("Fiscal and administrative provisions; record-keeping; audit; agency support services"). And third, the DAC was "formed 'for the explicit purpose of furnishing advice to the Government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 460 n.11); see Compl. Ex. 1 at 2 ("The purpose of the DAC is to . . . identify a single, consensus-based set of resolutions for issues regarding the efficiency and safety of integrating [unmanned aircraft systems] into the [national airspace system] and to develop recommendations to address those issues and challenges.").

The DAC is thus on all fours with the National Academy of Sciences in *ALDF*, which (1) was created by the Government "to answer the government's requests for investigations, examinations, experiments, and reports," and (2) is financially "take[n] care of" by the Government when it performs those duties. *ALDF*, 104 F.3d at 429. Because the DAC constituted a "quasi-public" entity within the meaning of *ALDF*, any subgroups it (allegedly)

established necessarily constituted "advisory committees" under 5 U.S.C. app. 2 § 3(2). The records of the DACSC and DAC Task Groups are therefore subject to disclosure under § 10(b), even if the Government is correct that the DAC established its own subgroups.

D. The Government's attempts to withhold "preparatory" and "administrative" records are baseless.

The Government erroneously argues that it may deny EPIC access to subgroup records because—on the Government's telling—those records consist only of staff work and drafts.[5] Defs.' Mem. 26. As an initial matter, the language on which the Government principally relies for this argument ("preparatory work" and "administrative work") is from a FACA regulation that does not even apply to documents. 41 C.F.R. § 102-3.160. By its plain terms, § 102-3.160 excludes certain "*activities* of an advisory committee"—not records—from "the procedural requirements contained in [Subpart D of the FACA regulations]." *Id.* These "activities" include (1) meetings convened "solely to gather information, conduct research, or analyze relevant issues and facts . . . or to draft position papers for deliberation by the advisory committee"; and (2) meetings convened "solely to discuss administrative matters of the advisory committee or to receive administrative information from a Federal officer or agency." *Id.* But this provision contains no exemption from the FACA records disclosure requirements. *See id.* The government's reliance on § 102-3.160 to withhold documents is thus misplaced.

Moreover, EPIC's Complaint makes clear that the work of the DACSC and Task Groups went well beyond preparatory and administrative matters. The subgroup reports presented at DAC meetings frequently contained fully formed policy recommendations—advice that was only briefly deliberated by the parent committee before the DAC endorsed it. For example, on

[5] Notably, "drafts" and "working papers" are specifically identified as committee documents that must be disclosed under 5 U.S.C. app. 2 § 10(b).

July 21, 2017, Task Group 3 presented a report on funding mechanisms for the integration of drones into the NAS. *See* Compl. Ex. 11 at 3–5. Mark Aitken, a member of Task Group 3, reported that the subgroup had divided into teams "to define the short-term government, industry, and collaborative efforts to fund [the FAA's drone integration] activities, and then provided written (draft) recommendations. The reports were circulated and discussed, and consensus was reached on the recommendations." *Id.* at 4. The results of this lengthy process, which took place entirely in closed-door meetings, were endorsed by the DAC after just four questions and two comments. *See id.* at 5–6, 9. Given this sequence of events, it strains credulity to characterize Task Group 3's efforts as mere staff work.

The same is true of Task Group 1, which had internal subgroup deliberations that grew so intense as to attract national media attention. *See* Compl. Ex. 20 ("A government advisory group has been holding confidential meetings to shape U.S. policy on drones, deliberating privately about who should regulate a burgeoning industry that will affect everything from package delivery to personal privacy."). It is simply implausible to say, as a categorical matter, that all records generated from Task Group 1 and the DAC's subgroups were mere "staff work" beyond the FACA's reach. *Nat'l Anti-Hunger Coal. (NAHC) v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983). The Government's reliance on dicta in lone a nonbinding case is thus unavailing. *See* Defs.' Mem. 26 (quoting *NAHC*, 557 F. Supp. at 529). [6]

[6] As the D.C. Circuit has since noted, the Court of Appeals in *NAHC* "did not explicitly approve the [district] judge's reasoning relating to the supposed staff groups," but rather "rejected an effort to challenge [the district court's] decision based on new information not in the record." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 912 (D.C. Cir. 1993).

Finally, although the Government is eager to put its spin on the allegations in EPIC's Complaint, the Government's selective quotations (e.g., "staff work") and unsubstantiated claims about the records EPIC seeks (e.g., "early drafts") represent factual disputes that are not appropriate at this early juncture. Defs.' Mem. 26. At the Motion to Dismiss stage, EPIC need only allege facts from which the Court could *plausibly* conclude that there are one or more undisclosed DAC records subject to § 10(b). *See Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). EPIC has easily cleared this low bar with respect to its document disclosure claims.

II. EPIC IS ENTITELD TO OPEN MEETINGS OF THE DAC SUBGROUPS.

EPIC has stated valid claims under the FACA's open meeting provisions, as all of the DAC subgroups qualify as advisory committees subject to 5 U.S.C. app. 2 § 10(a). EPIC has also established informational standing to pursue those claims, as the Government's failure to open DAC subgroup meetings prevents EPIC from obtaining information to which it is entitled.

A. The DACSC and DAC Task Groups are advisory committees in their own right, subject fully to § 10(a) of the FACA.

The Government's argument that DAC subgroup meetings may be closed to the public rests on the erroneous view that the DACSC and Task Groups are not themselves "advisory committees" within the meaning of 5 U.S.C. app. 2 § 3(2). It is true that subcommittees which do not report "directly to a Federal officer or agency" are generally exempt from the open meeting requirements of the FACA. 41 C.F.R. §§ 102-3.35(a), *see also* 102-3.145. But as EPIC has demonstrated, the DAC subgroups (1) were established by the FAA, *supra* Part I.C.1; (2) were utilized by the FAA, *supra* Part I.C.2; (3) were, in the alternative, established by the quasi-public DAC, *supra* Part I.C.3; and (4) issued recommendations directly to the FAA on a regular basis, *supra* Part I.C.1–2. The DAC subgroups therefore qualify as advisory committees in their own

right and must comply with the open meeting requirements of 5 U.S.C. app. 2 § 10(a) ("Each advisory committee meeting shall be open to the public."). Moreover, EPIC has adequately alleged that many of the subgroups' proceedings fall outside of the "preparatory work" and "administrative work" that might justify closure under 41 C.F.R. § 102-3.160. And the Government has certainly not demonstrated that *all* of the DAC subgroups' meetings qualify as "administrative" or "preparatory," which is the high bar the Government would need to clear in order to justify dismissal of EPIC's open meeting claims at this stage. *See id*.

B. EPIC has established informational standing to pursue its open meeting claims under the FACA.

The Government makes the curious claim that EPIC lacks Article III standing to pursue its open meeting claims because it did not "seek" those meetings out. Defs.' Mem. 17. This argument does not withstand scrutiny. First, it is apparent from the Complaint that EPIC *did* seek to enforce the FACA's open meeting provisions. EPIC's email to the FAA and RTCA sought "all 'records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by' the DAC or any DAC subcomponent." Compl. Ex. 18 (quoting 5 U.S.C. app. 2 § 10(a)); *see also* Compl. ¶ 100 (describing an unreturned voicemail left by EPIC with the RTCA). Had the DAC subgroups fulfilled their open meeting obligations, EPIC would have obtained—pursuant to its request—an advance Federal Register notice of each subgroup meeting. § 10(a)(2). That notice, in turn would have identified: "(1) The name of the advisory committee (or subcommittee, if applicable); (2) The time, date, place, and purpose of the meeting; [and] (3) A summary of the agenda, and/or topics to be discussed[.]" 41 C.F.R. § 102-3.150(a). Apart from asking for these basic meeting details (which EPIC did), it is not clear how EPIC could "seek" out subgroup meetings that the Government simply refuses to announce. Defs.' Mem. 17. EPIC thus suffers two distinct

informational injuries: one from the unlawful denial of access to the pre-meeting notice, and another from the denial of access to the meeting itself.

And second, the Government mischaracterizes EPIC's informational standing burden by selectively quoting from *Public Citizen*. Defs. Mem. 17. The Court in *Public Citizen* observed that "Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show *more* than that they sought and were denied specific agency records." *Pub. Citizen*, 491 U.S. at 449 (emphasis added). But the Court did not state that "s[eeking] and [being] denied" information was an irreducible minimum of informational standing applicable in all cases. Indeed, as the D.C. Circuit has explained, the requirements of Article III standing are even simpler for FACA claims: "In the context of a FACA claim, an agency's refusal to disclose information that the act requires be revealed constitutes a sufficient injury." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009). This rule, which does not obligate a plaintiff to "seek" FACA records in order to establish informational standing, is consistent with the operation of the statute. The FACA "affirmatively obligates the Government to provide access to the identified materials, regardless of whether a FOIA request has been filed." *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992); *Cummock v. Gore*, 180 F.3d 282, 289 (D.C. Cir. 1999) ("[T]he Government must make [FACA] materials available for public inspection and copying, even in the absence of a particular request[.]"). To demand that a party "seek" records in order to establish standing would thus undermine the operation of the FACA.

By failing to open DAC subgroup meetings, Government has "refus[ed] to disclose information" that FACA requires it to make public. *Judicial Watch, Inc.*, 583 F.3d at 873. EPIC, as a result, has suffered an informational injury sufficient for Article III standing.[7]

III. EPIC HAS PROPERLY ALLEGED THAT IT IS ENTITLED TO RELIEF UNDER THE FACA AND THE DECLARATORY JUDGMENT ACT.

The Government separately, and erroneously, contends that Counts I and IV of EPIC's Complaint should be dismissed because the FACA lacks a private right of action. Defs.' Mem. 18. Although EPIC has properly relied on the Administrative Procedure Act to enforce the Government's FACA obligations, *see* Compl. ¶¶ 107–17, 124–37, EPIC is entitled to bring its case under the FACA as well.

The D.C. Circuit has long held that "members of the public possess enforceable rights to obtain information under FACA." *Cummock*, 180 F.3d at 292. A private right of action for the public exists when Congress "displays an intent to create . . . a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "[T]he legislative history of FACA shows that Congress intended for the public to have access to section 10(b) materials." *Food Chem. News*, 980 F.2d at 1472. EPIC is asking for precisely the kind of remedy Congress intended the FACA to provide: open meetings and the disclosure of records. EPIC is therefore entitled to bringing claims under the FACA.

[7] The Government muses that "Even if EPIC had requested access to the DAC subgroup meetings, it might still not be able show an informational injury" because "[t]he complaint fails to identify whether and to what extent relevant information was only made available at the DAC subgroup meetings, and not at the meetings of the DAC[.]" Defs.' Mem. 18 n.11. But this is an extremely implausible interpretation of the facts alleged, and the Court should reject it. Rarely, if ever, do minutes and secondhand accounts of a meeting capture every piece information discussed at the underlying event. Common sense dictates that the open meeting requirements for DAC subgroups cannot be satisfied in the way the Government urges.

The Government attempts to escape this result by alluding to a series of district court decisions and arguing that FACA lacks a cause of action. But the D.C. Circuit has consistently held the opposite. *See Cummock*, 180 F.3d at 292; *see also NRDC v. Johnson*, 488 F.3d 1002 (D.C. Cir. 2007) (reversing the district court's dismissal of a FACA claim); *Ctr. for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978) (granting summary judgment with respect to plaintiff's FACA claim even after dismissing its APA claim); *ALDF*, 104 F.3d at 425 (reversing the district court's grant of summary judgment for the government on a FACA claim); *Cal. Forestry Ass'n v. United States Forest Serv.*, 102 F.3d 609 (D.C. Cir. 1996) (granting plaintiff's cross-motion for summary judgment on its FACA claim). EPIC's FACA claims must therefore survive dismissal.

Finally, the Government argues that the Declaratory Judgment Act, 28 U.S.C. § 2201, lacks a private right of action and that Count VII must be dismissed. Defs.' Mem. 19–20. But the Government's argument fails on its own terms. If the Declaratory Judgment Act "provides a remedy" as long as "a judicially remedial right otherwise exists," *id.* at 20, EPIC is still entitled to seek that relief on the basis of its remaining claims (Counts I-VI). And as EPIC has explained, the Government's attempts to dismiss Counts I-VI are groundless. Count VII of EPIC's Complaint must therefore survive dismissal, too.

IV. EPIC HAS PROPERLY NAMED THE DRONE ADVISORY COMMITTEE AS A DEFENDANT IN THIS CASE.

The Government inappropriately urges the dismissal of the Drone Advisory Committee from this case. EPIC notes, contra the Government, that advisory committees may be named as defendants in FACA lawsuits. *See, e.g.*, *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989); *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, No. CV 17-2361 (CKK), 2018 WL 3150217 (D.D.C.

June 27, 2018). Because EPIC has stated two claims for relief under the FACA, the Drone Advisory Committee is a proper party to this suit, as well.

But even if the Court were to dismiss Counts I and IV of EPIC's Complaint, the FACA obligations of the DAC and DAC subgroups would still fall on the FAA. *See, e.g.*, *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987) (ascribing actions of subordinate entity to parent agency in APA case); *Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1, 19 (D.D.C. 2016) (ascribing actions of subordinate entity to parent agency in APA case). Thus, EPIC's entitlement to relief does not depend on the continued presence of the Drone Advisory Committee as a party to this suit. *See, e.g.*, *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 227 (D.D.C. 2017) (citing *Cummock*, 180 F.3d at 292) ("A claim for document disclosure survives the termination of a FACA advisory committee, at least until all of the relevant materials have been disclosed.").

The Government also spends several paragraphs arguing—in a contradictory fashion—that EPIC's claims against the RTCA Advisory Committee were not properly dismissed, *see* Defs.' Mem. 27 n.14, and that EPIC's claims against the RTCA Advisory Committee must now be dismissed, *see* Defs.' Mem. 28. As far as EPIC is concerned, EPIC has no remaining claims against the RTCA Advisory Committee. EPIC filed a Notice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), eight days before any Defendant served a response to EPIC's Complaint, dismissing EPIC's claims against the RTCA Advisory Committee. ECF No. 13.[8] If the Court is inclined to dismiss those claims again for clarity's sake, EPIC does not object. But EPIC notes

[8] The Government lays great stress on the fact that EPIC's notice of dismissal was styled as a "stipulation of dismissal," Defs.' Mem. 27 n.14, but regardless of the title of the document, it satisfies all the parameters of Fed. R. Civ. P. 41(a)(1)(A)(i). It therefore operated to dismiss all of EPIC's claims against RTCA Advisory Committee.

that its agreement with the party represented by Wiley Rein LLP is still effective, *see id.*, whether the Government chooses to call that party RTCA Advisory Committee or something else.

CONCLUSION

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

Respectfully Submitted,

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