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)

Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Failure to State a Claim upon Which Relief Can Be Granted

Defendants, by and through undersigned counsel, hereby move to dismiss this action in its entirety. Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendants move to dismiss Counts I, II, III, IV, and VII for lack of subject matter jurisdiction. Pursuant to Rule 12(b)(6), defendants move to dismiss Counts II, III, V, and VI for failure to state a claim upon which relief can be granted. Additionally, defendants move to dismiss all claims against the Drone Advisory Committee and the RTCA Advisory Committee, both of which were improperly named as defendants. The Court should grant the motion for the reason stated in the attached memorandum of points and authorities. A proposed order is attached.

Dated: July 3, 2018

Respectfully submitted,

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Introduction

In this case, plaintiff the Electronic Privacy Information Center (EPIC) asserts that by publicizing the meetings, documents, and reports of the Federal Aviation Administration's Drone Advisory Committee (DAC)—but not the preparatory work conducted by certain DAC subgroups known as the Drone Advisory Committee Subcommittee (DACSC) and Task Groups (collectively, the "DAC subgroups ")—defendants failed to comply with the public disclosure requirements of the Federal Advisory Committee Act (FACA). EPIC's claim is baseless. The alleged failure to make certain meetings and records of DAC *subgroups* available to the public did not violate FACA because FACA's disclosure provisions do not apply to a federal advisory committee's subgroups, such as the DAC subgroups, that do not on their own qualify as "advisory committees" under FACA. EPIC's allegations do not support the legal conclusion that the DAC subgroups on their own could be considered "advisory committees" under FACA. Additionally, FACA's implementing regulations plainly exclude from the disclosure requirements the kind of preparatory and administrative work to which EPIC seeks access.

The numerous, publicly disclosed, DAC advisory-committee-records appended as exhibits to the complaint belie EPIC's contentions that defendants failed to comply with FACA. The DAC operated as a federal advisory committee under the umbrella of the RTCA Advisory Committee, pursuant to charter issued by the Federal Aviation Administration (FAA). The DAC, in turn, acted as a parent committee to which the DAC subgroups reported. FACA's disclosure requirements applied to the RTCA Advisory Committee and the DAC, but not to the DAC subgroups. DAC meetings were held open to the public. DAC documents were made available to the public, and posted online. DAC subgroups reported to the DAC, not directly to the FAA. Any recommendations for the FAA arising out of the DAC

subgroups were vetted by the DAC, and if approved were submitted to the FAA by the DAC. Subgroup recommendations and reports considered by the DAC at its meetings were disclosed to the public as DAC meeting materials.

The Court lacks subject matter jurisdiction over EPIC's non-documentary claims that defendants unlawfully failed to hold open meetings of the DAC subgroups. EPIC lacks standing with regard to those claims because EPIC did not seek to attend any meetings and thus cannot establish injury. EPIC's direct claims under FACA and the Declaratory Judgment Act also fail for lack of subject matter jurisdiction because neither statute provides a private right of action.

With respect to EPIC's document-disclosure-related Administrative Procedure Act (APA) claims, the complaint fails to state a claim for which relief can be granted. EPIC's complaint does not allege any facts that plausibly suggest the DAC *subgroups* qualified on their own as "advisory committees" under FACA. Therefore, it was neither unlawful, nor arbitrary and capricious, for the FAA to decline to apply FACA's disclosure provisions to the DAC *subgroups*.

Finally, the DAC and the RTCA Advisory Committee, which no longer exist as constituted at the time the complaint was filed, are not proper defendants. Neither the DAC nor the RTCA Advisory Committees were agencies, and the APA only provides judicial review of "agency action."

Statutory and Regulatory Background

A. The Federal Advisory Committee Act and Implementing Regulations

Congress enacted the Federal Advisory Committee Act in 1972, finding that the "numerous committees, boards, commissions, councils, and similar groups" established to advise federal officers and agencies "are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. app. 2 § 2 (2012); *see also Pub. Citizen v. U.S. Dep't*

of Justice, 491 U.S. 440, 445–47 (1989). FACA provides standards and uniform procedures for the establishment, operation, administration, and duration of advisory committees. 5 U.S.C. app 2 § 2(b)(4).

The Act includes several provisions designed to keep "the Congress and the public … informed with respect to the number, purpose, membership, activities, and cost of *advisory committees*." *Id.* § 2(b)(5) (emphasis added). FACA defines the term "advisory committee" as

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee "), which is … established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

Id. § 3(2). Under this definition, a "subcommittee or subgroup" may itself qualify as an "advisory committee" *if* (1) the subgroup is "established or utilized" by a federal agency, and (2) it furnishes "advice or recommendations" to the federal agency. *See id.* Subcommittees and subgroups themselves typically do not meet this definition,[1] and thus they are "generally not subject to the Act." 41 C.F.R. § 102-3.25.

Those entities that meet the FACA definition of "advisory committee" must comply with FACA's transparency procedures. Section 10 of the Act requires each "advisory committee meeting" to be "open to the public," unless the agency head determines that some portion(s) of the advisory committee meeting "may be closed to the public in accordance with subsection (c)" of 5 U.S.C. § 552b, the Government

[1] "Most subcommittees … report only to a parent advisory committee and it is the parent committee that is normally responsible for providing advice or recommendations to the Government. In this conventional scenario, the subcommittee is not subject to the Act because it is not providing advice to the Government." 66 Fed. Reg. 37,728, 37,729 (July 19, 2001).

in the Sunshine Act. 5 U.S.C. app. 2 §§ 10(a)(1), 10(d). Agencies must publish in the Federal Register "timely notice" of each advisory committee meeting, *id.* § 10(a)(2), and must permit "interested persons ... to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations" as may be prescribed by the Administrator of the General Services Administration, *id.* § 10(a)(3). FACA requires "advisory committee" documents—including "reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda" and "other documents which were made available to or prepared for or by each advisory committee "—to be made available to the public, subject to the exceptions and exemptions of the Freedom of Information Act (which is codified as amended at 5 U.S.C. § 552). 5 U.S.C. app. 2 § 10(b). The record-disclosure requirements continue "until the advisory committee ceases to exist." *Id.*

FACA explicitly authorizes the General Services Administration (GSA) to promulgate "rules," "regulations," and "administrative guidelines" applicable to federal advisory committees. *Id.* §§ 3(1), 7(c); *See also Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999) (noting that GSA is the federal agency "charge[d] … with prescribing regulatory guidelines and management controls applicable to advisory committees "). GSA's FACA-implementing regulations are entitled "Federal Advisory Committee Management" and codified, as amended, at 41 C.F.R. pt. 102-3. These regulations "do not necessarily carry the force of law, but they are at very least instructive because the GSA is 'the agency responsible for administering FACA ....'" *ACLU v. Trump*, 266 F. Supp. 3d 133, 140 (D.D.C. 2017) (quoting *Pub. Citizen*, 491 U.S. at 465 n.12).

The Federal Advisory Committee Management regulations address the role and usage of advisory committee "subcommittees." *See* 41 C.F.R. §§ 102-3.25, 102-3.35, 102-3.70(c), 102-3.75(b), 102-3.105(i), 102-3.115(a), 102-3.120, 102-3.135, 102-3.145. Section 102-3.25 defines "subcommittee" as "a group, generally not subject to

the Act, that reports to an advisory committee and not directly to a Federal officer or agency, whether or not its members are drawn in whole or in part from the parent advisory committee." An advisory committee wishing to use a "subcommittee" to help conduct its business must receive permission from the federal agency which established the advisory committee. *Id.* § 102-3.35(b) ("The creation and operation of subcommittees must be approved by the agency establishing the parent advisory committee. "). The requirements of FACA and the implementing regulations generally "do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency." *Id.* § 102-3.35(a). For example, subcommittee meetings need not be conducted in accordance with the "openness requirements" of the Federal Advisory Committee Management regulations unless a subcommittee "makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee." *Id.* § 102-3.145.

The regulations also provide parameters for FACA's open meeting and record disclosure requirements with respect to "advisory committees." The regulations outline "[w]hat activities of an advisory committee are not subject to the notice and open meeting requirements of the Act," providing:

> The following activities of an advisory committee are excluded from the procedural requirements contained in this subpart [regarding Advisory Committee Meeting and Recordkeeping Procedures]:
>
> (a) *Preparatory work.* Meetings of two or more advisory committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee; and

> (b) *Administrative work*. Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the advisory committee or to receive administrative information from a Federal officer or agency.

41 C.F.R. § 102-3.160 (emphasis added).

B. The Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, establishes a waiver of sovereign immunity and a cause of action for injunctive or declaratory relief for parties "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* § 702; *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985). These provisions apply only to "*[a]gency action* made reviewable by statute and final *agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added); *see also id.* § 701(b)(1). The APA does not provide a cause of action for directly suing an advisory committee because an "entity cannot be at once both an advisory committee and an agency." *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 33 (D.D.C. 2011).

Facts Alleged and Procedural History

The following facts are alleged in EPIC's complaint or conveyed in documents incorporated into the complaint.

A. Allegations regarding the operation of the Drone Advisory Committee and its subgroups, the Drone Advisory Committee Subcommittee and Task Groups

In April 2015, the Federal Aviation Administration (FAA) renewed the charter "for using the RTCA, Inc. … and some of its components as an advisory committee in accordance with the provisions of the Federal Advisory Committee Act." Defs.'

Ex. 1 at 10.[2] On August 31, 2016, the FAA established the Drone Advisory Committee (DAC) as a "component" of the RTCA Advisory Committee, by amending the April 2015 charter of the RTCA Advisory Committee.[3] *See* Ex. 1 at 9 (FAA Order 1110.77V); *id.* at 12, 18; *see also* Compl. ¶ 25. That charter amendment provided that the DAC would "comply with the provisions of the RTCA Charter" and certain "DAC specific provisions" issued by the FAA. Defs.' Ex. 1 at 18. It described the DAC's "objective and scope" as follows:

> The Objective of the DAC is to provide an open venue for FAA and UAS [unmanned aerial system] stakeholders to work in partnership to identify and recommend a single, consensus-based set of resolutions for near-term issues regarding the efficiency and safety of integrating UAS into the NAS [national airspace] and to develop recommendations to address those issues and challenges. The DAC will also provide the FAA with recommendations which may be used for tactical and strategic planning purposes. … The DAC will track and report progress and activities of FAA-approved subcommittees, provide suggested guidance for their work, and will coordinate final products for submittal to the FAA Administrator.

Id.; accord Compl. Ex. 1 at 2.

The DAC held its meetings open to the public. Compl. ¶¶ 26, 45; Compl. Ex. 1 at 2. Prior to each DAC meeting, the FAA published a notice in the Federal Register

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[2] Defendants' Exhibit 1 contains the charters (and charter amendments) of the RTCA Advisory Committee in effect during the time period described in the complaint. These charter documents are incorporated into the complaint because they are the official, legal instruments by which the FAA "established" and/or "utilized" the RTCA Advisory Committee and the DAC. *See* Compl. ¶¶ 11, 12; *see also* Fed. R. Civ. P. 10(c); *Banneker Ventures v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (observing that "a legally operative document that is a necessary element of the claim … is integral to the plaintiff's claim ") (quotation omitted).

[3] The FAA had previously, in May 2016, announced that it would be "establishing" the DAC. Compl. ¶ 24 (citing May 2016 press release attached as Compl. Ex. 2).

advising the public of the upcoming meeting. *See* 81 Fed. Reg. 60,402 (Sept. 1, 2016); 82 Fed. Reg. 3071 (Jan. 10, 2017); 82 Fed. Reg. 18,682 (Apr. 20, 2017); 82 Fed. Reg. 28,929 (June 26, 2017); 82 Fed. Reg. 47,072 (Oct. 10, 2017); 83 Fed. Reg. 7284 (Feb. 20, 2018).[4] Records of the DAC—including membership lists, meeting minutes, presentations, reports, and other documents—were made available to the public via RTCA's website. Compl. ¶ 48; Compl. Ex. 1 at 2; Compl. Ex. 3 at 2; *see also, e.g.*, Compl. Ex. 5 at 1 (listing attachments to publicly-posted meeting minutes). EPIC included in its complaint multiple examples of these publicly disclosed documents.

Under the DAC were several "FAA-approved" subcommittees. Defs.' Ex. 1 at 18. Included among these subgroups—which all reported to the DAC—was the Drone Advisory Committee Subcommittee (DACSC). Compl. ¶ 11; Compl. Ex. 6 at 2. The purpose of the DACSC was "to support the DAC," *id.* at 1; the DAC used the DACSC "to conduct more detailed business." Compl. ¶ 29. "In essence, the DACSC provid[ed] *the staff work* for the DAC, applying knowledge and expertise to forge consensus on critical issues and providing input to the DAC for public deliberation and the development of recommendations to be forwarded to the FAA." Compl. Ex. 6 at 1 (emphasis added). DACSC meetings were generally not open to the public, *id.* at 3, but DACSC taskings were discussed at each of the DAC meetings—which were open to the public.[5] FAA officials "briefed and educated" and "provided guidance and

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[4] The Court may take judicial notice of the Federal Register notices. *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993) ("[A]s matters of public record, statements in the Federal Register can be examined on 12(b)(6) review. ").

[5] At the first DAC meeting, in September 2016, the DAC discussed establishing the DACSC, the proposed membership of the DACSC, and an initial tasking for the DACSC. *See* Compl. Ex. 4 at 7. DACSC work was discussed at each of the subsequent DAC meetings, several of which featured presentations by the DACSC

assistance" to the DACSC. Compl. ¶ 32. But "[n]o recommendations … flow[ed] directly from the DACSC … to the FAA." Compl. Ex. 6 at 3. All recommendations developed by the DACSC were "vetted in a public DAC meeting." *Id.*

The DACSC oversaw three other DAC subgroups known as Task Group 1, Task Group 2, and Task Group 3 (collectively, the "Task Groups "). Compl. ¶ 11. These Task Groups were "establish[ed]" by the DAC, Compl. Ex. 1 at 2, and "approved" by the FAA, Compl. ¶ 34. Compared to the DACSC, the Task Groups were "shorter-lived groups established to forge consensus-based recommendations in response to specific taskings handed down from the DAC and disbanded upon completion of their work." Compl. Ex. 6 at 2. The DACSC "provided guidance and oversight for the Task Groups." *Id.* The Task Groups, in turn, presented their work product and recommendations "to the DACSC for review and deliberation, and if so directed by the DACSC, [later] presented [those items] to the DAC for consideration at its public meetings." *Id.* at 4.

The Task Groups meetings were not open to the public, *see* Compl. ¶¶ 60, 66, 72, 80; Compl. Ex. 6 at 4, but the Task Groups delivered their "substantive recommendations and reports" at the publicly-open meetings of the DAC, *id.* ¶ 40.[6] FAA officials personally attended DAC meetings at which the Task Groups delivered reports and recommendations to the DAC. *Id.* In addition, the FAA's DAC Designated Federal Officer (DFO)[7] issued "detailed tasking statements for all three

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co-chairs. *See, e.g.*, Compl. Ex. 5 at 2–3; Compl. Ex. 10 at 8; Compl. Ex. 11 at 5; Compl. Ex. 12 at 7.

[6] Indeed, each public meeting of the DAC included updates and significant amounts of discussion regarding the work of the Task Groups. *See, e.g.*, Compl. Ex. 5 at 3–7; Compl. Ex. 10 at 9–16; Compl. Ex. 11 at 3–9; Compl. Ex. 12 at 7–18.

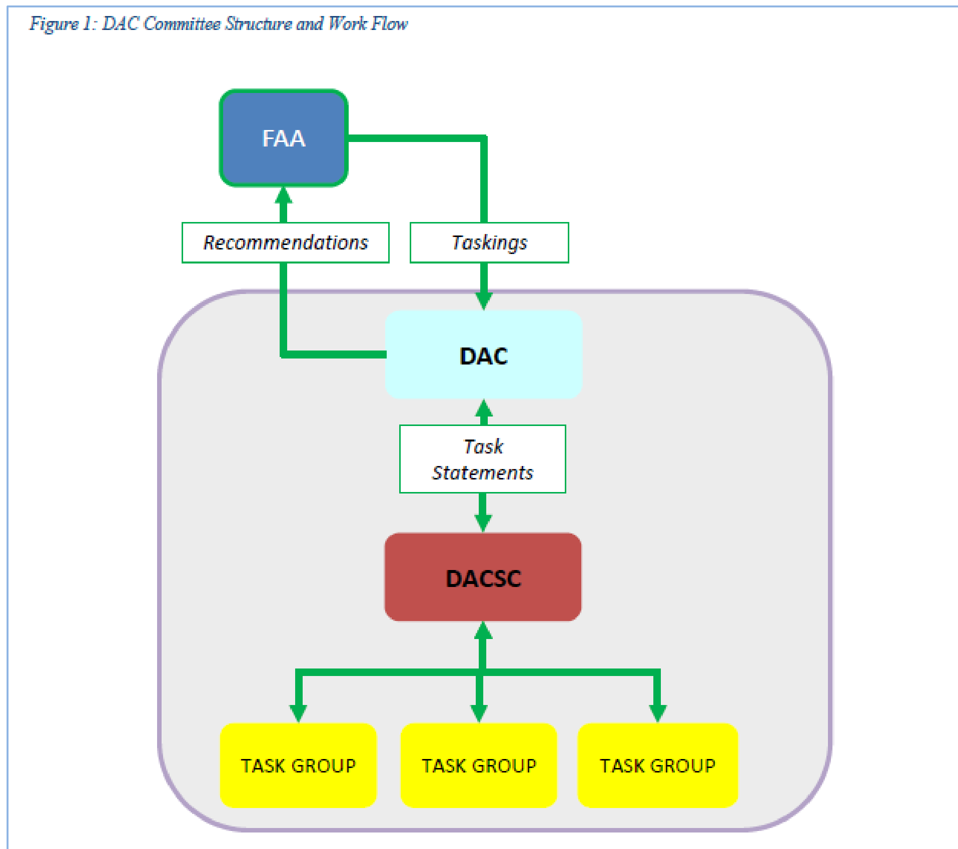
[7] The term "Designated Federal Officer (DFO)" means "an individual designated by the agency head, for each advisory committee for which the agency head is responsible, to implement the provisions of FACA … and any advisory committee procedures of the agency." 41 C.F.R. § 102-3.25. Agency heads "must designate a

Task Groups." Compl. ¶ 39. These tasking statements outlined work-product responsibilities that the DFO either recommended or requested the DACSC assign to each Task Group. *Id.*; *see also* Compl. Ex. 7 (tasking statement for Task Group 1); Compl. Ex. 8 (tasking statement for Task Group 2); Compl. Ex. 9 (tasking statement for Task Group 3). As with the DACSC, "[n]o recommendations … flow[ed] directly" from the Task Groups to the FAA. Compl. Ex. 6 at 3. Any Task Group recommendations for the FAA were "vetted in a public DAC meeting" and only "transmitted to the FAA upon approval by the DAC." *Id.* The FAA made available to the public those presentation slides, reports, and other documents prepared by the Task Groups and considered by the DAC at the DAC's meetings.[8]

The following diagram, attached to the complaint, shows the relationship between the FAA, the DAC, the DACSC, and the Task Groups:

Federal officer or employee … to be the DFO for each advisory committee *and its subcommittees*." *Id.* § 102-3.120 (emphasis added). FAA Acting Administrator Daniel K. Elwell served as the DFO of the DAC and the RTCA Advisory Committee. Compl. ¶ 14.

[8] For example, complaint Exhibit 5 includes a 13-page excerpt of an 80-page DAC pdf (Portable Document Format) document made available to the public via RTCA's website. The full document includes presentation slides associated with reports by Task Group 1 and Task Group 2, and a presentation by Task Group 3. *See* Defs.' Ex. 2 at 2, 37–58, 59–66, 68–72.



Compl. Ex. 6 at 2.

On April 1, 2017, at the completion of the two-year term of the FAA's April 2015 RTCA Advisory Committee charter, *see* Defs.' Ex. 1 at 7 (establishing two-year term), the FAA renewed the RTCA Advisory Committee's charter for a six-month term, *see id.* at 22. Six months later, on September 29, 2017, the FAA renewed the RTCA Advisory Committee's charter for another six-month term. *Id.* at 28. On March 29, 2018, the FAA renewed the RTCA Advisory Committee's charter for a final two-month term. *Id.* at 33. The RTCA Advisory Committee's charter expired May 29, 2018, at which point the RTCA Advisory Committee ceased to exist as a federal advisory committee. *See id.* The DAC as it was then-constituted under the RTCA Advisory Committee also expired on May 29, 2018. *See id.*

On May 31, 2018, the FAA published notice in the Federal Register that it was establishing a new Drone Advisory Committee (referred to herein as "New DAC "),

as a stand-alone federal advisory committee, for a period of two years. *See* 83 Fed. Reg. 25,102 (May 31, 2018). The FAA issued the charter for the New DAC on June 15, 2018. *See* FAA Order 1110.157 (attached as Defs.' Ex. 3).[9] On July 3, 3018, the FAA published notice in the Federal Register that the New DAC will hold its first meeting on July 17, 2018. *See* 83 Fed. Reg. 31,254 (July 3, 2018). Attendance at the meeting "is open to the interested public." *Id.*

B. Plaintiff's email to the Acting Administrator of the Federal Aviation Administration, seeking unspecified records of the Drone Advisory Committee and its subgroups

EPIC alleges that it sent a "records request via email" to the FAA on March 20, 2018.[10] Compl. ¶ 95; Compl. Ex. 18 (copy of email). The email, sent from John Davisson, Counsel, Electronic Privacy Information Center, and addressed to the Acting Administrator of the FAA, stated: "I am writing on behalf of [EPIC] … to obtain access to the records of the Drone Advisory Committee… and DAC subcomponents. … Please note that the FACA's disclosure mandate applies to the records of the Drone Advisory Subcommittee ('DACSC'), DAC Task Groups, and any other subcomponent of the DAC." *Id.* The email included a general request for "access [to] 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,'" *id.* (quoting FACA § 10(b)), but did not identify any particular record or document EPIC believed to be missing from the DAC materials published on RTCA's website. Instead, the email

[9] The charter can also be found at https://www.faa.gov/regulations_policies/orders_notices/.

[10] The email was sent from John Davisson, Counsel, Electronic Privacy Information Center, to email addresses for FAA Acting Administrator Elwell, Department of Transportation official David W. Freeman, DAC Secretary Al Secen, and "info@rtca.org." Compl. ¶ 95. It was addressed "Dear Mr. Elwell (or current Drone Advisory Committee DFO)." Compl. Ex. 18.

included only the conclusory (and unsupported) statement that "DAC records [that] have been published [on the RTCA's website] … constitute only a small subset of the records which the DAC is obligated to make available." *Id.* The email provided the following "example" of allegedly missing documents: "For example, rtca.org lists no meeting minutes or agendas for the DACSC or DAC's working groups." *Id.* The email pertained only EPIC's broad (and vague) request for document disclosure, and not to any attempt by EPIC to attend meetings of the DAC or DAC subgroups. The email lacked any reference to the open meeting provisions of FACA and the Federal Advisory Committee Management regulations. The email did not request to attend any such meetings; nor did it indicate that EPIC had attempted to attend any such meetings. *Id.*

C. Purported claims included in the complaint

EPIC's complaint names six separate defendants: the DAC itself; the RTCA Advisory Committee; the FAA; the Department of Transportation (DOT); Acting Administrator of the FAA Daniel K. Elwell, who "is also the Designated Federal Officer ('DFO') of the DAC and the RTCA within the meaning of" FACA § 10; and DOT official David W. Freeman, "the Committee Management Officer ('CMO') of the DOT within the meaning of FACA § 8." Compl. ¶¶ 11–16.

The complaint contains seven purported claims. Three of the claims (Counts I, II, III) assert that defendants failed to hold open meetings of the DACSC and Task Groups in violation of FACA, citing 5 U.S.C. app. 2 § 10(a)(1), and the APA, citing 5 U.S.C. § 706(1), (2). *See* Compl. ¶¶103–05, 108–10, 113–16. Three of the claims (Counts IV, V, and VI) assert that defendants failed "to make available for public inspection and copying numerous records" of the "DAC, including but not limited to records arising out of DACSC and DAC Task Groups," in violation of FACA, citing 5 U.S.C. app. 2 § 10(b), and the APA, citing 5 U.S.C. § 706(1), (2). Compl. ¶¶ 119, 125,

132. Count VII asserts a direct claim under the Declaratory Relief Act, 28 U.S.C. § 2201(a).

Standard of Review

Defendants move to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure EPIC's non-document, open meeting claims (Counts I, II, III) because EPIC lacks standing to assert those claims. Defendants also move to dismiss under Rule 12(b)(1) EPIC's claims brought directly under FACA (Counts I and IV) and the Declaratory Judgment Act (Count VII) because there is no private right of action under those statutes, and therefore the Court lacks subject matter jurisdiction over those claims. To withstand a Rule 12(b)(1) motion for lack of jurisdiction, the plaintiff bears the burden of establishing that the court possesses subject matter jurisdiction over its claim. *See, e.g.,* M*oms Against Mercury v. FDA,* 483 F.3d 824, 828 (D.C. Cir. 2007). The Court must keep in mind that "[f]ederal courts are courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and should "presume that it 'lack[s] jurisdiction unless the contrary appears affirmatively from the record. '" *State of W. Va. v. U.S. Dep't of Health & Human Servs.*, 145 F. Supp. 3d 94, 97 (D.D.C. 2015) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)).

Defendants move to dismiss under Rule 12(b)(6) EPIC's APA claims (Counts II, III, V, and VI) for failure to state a claim. To survive defendants' Rule 12(b)(6) motion, EPIC's "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). The rules of pleading require factual allegations "plausibly suggesting," and "not merely consistent with," the elements of a valid claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (citations omitted); *see also id.* at 555 (observing that to survive a motion to dismiss,

the complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ").

In considering defendants' motion to dismiss for failure to state a claim, the Court must accept "well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). The Court should accept neither "inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint," nor "legal conclusions cast in the form of factual allegations." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Moreover, the Court "need not 'accept as true the … complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice.'" *Scahill v. District of Columbia*, 286 F. Supp. 3d 12, 21–22 (D.D.C. 2017) (quoting *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004)).

Under Rule 10(c) of the Federal Rules of Civil Procedure, a "copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Thus, "[i]n determining whether to dismiss, courts treat documents attached to a complaint as if they are part of the complaint." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). Exhibits incorporated into the complaint under Rule 10(c) are to be evaluated under the same standard applicable to the complaint itself; the Court may examine the factual content therein but should not accept unsupported inferences or legal conclusions cast as factual allegations. *See Browning*, 292 F.3d at 242; *see also* 5A The Late Charles Alan Wright et al., Federal Practice and Procedure § 1327 (3d ed.) ("The district court obviously is not bound to accept the pleader's allegations as to the effect of the exhibit[s], but can independently examine the document[s] and form its own conclusions as to the proper construction and meaning to be given the attached material. "). Additionally, under the incorporation by reference doctrine, the Court may consider at the pleading stage a

document not attached by the plaintiff but specifically referenced in the complaint and integral to the plaintiff's claims. *See* Fed. R. Civ. P. 10(c); *see also*, *e.g.*, *Banneker Ventures*, 798 F.3d at 1133; *Kaempe*, 367 F.3d at 965 (The Court may consider this material on a motion to dismiss without treating the motion "as one for summary judgment under Rule 56 ").

Argument

A. The Court should dismiss the claims regarding defendants' alleged failure to hold "open meetings" of the Drone Advisory Committee's subgroups; plaintiff lacks standing to pursue those claims.

Article III of the Constitution limits the jurisdiction of federal courts to "the adjudication of actual, ongoing cases or controversies." *E.g.*, *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 222 (D.D.C. 2017). "This limitation gives rise to the doctrine[] of standing." *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003). Courts consider standing on a "claim by claim" basis. *See, e.g.,* E*lec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity,* 878 F.3d 371, 377 (D.C. Cir. 2017).

EPIC bears the burden to establish standing. *Id.* . Standing requires that a plaintiff have "'a personal stake in the outcome of the controversy ....'" *Lawyers' Comm. for Civ. Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, 265 F. Supp. 3d 54, 63 (D.D.C. 2017) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Consequently, a plaintiff cannot be a mere bystander or interested third-party, or a self-appointed representative of the public interest." *Id.* . The elements of Article III standing include:

> (1) that the plaintiff [has] suffered an "injury in fact "—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of

> the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (quotation and citations omitted). Here, the allegations in EPIC's complaint do not suffice to show standing with respect to the open-meeting claims because plaintiff does not demonstrate injury, under an "informational injury" theory or otherwise.

To carry its burden of demonstrating a "sufficiently concrete and particularized *informational injury*," a plaintiff must show that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Id.* (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)) (emphasis added). The standard does not require a plaintiff to explain "why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose." *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006). However, "those requesting information … [must] show … that they *sought* and were *denied*" information. *Pub. Citizen*, 491 U.S. at 449 (emphasis added); *accord Zivotofsky,* 444 F.3d at 617; *see also Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 576 F. Supp. 2d 172, 177 (D.D.C. 2008) ("The plaintiff must … demonstrate that it sought and was denied access to agency meetings. "), *rev'd on other grounds*, 583 F.3d 871 (D.C. Cir. 2009).

EPIC cannot show particularized injury relating to its open-meeting claims because EPIC did not "seek" to attend any meetings or otherwise attempt to enforce FACA's open meeting provisions; therefore, EPIC was not "denied" information available at the meetings. *Cf. Pub. Citizen*, 491 U.S. at 449 (explaining that to show informational injury, plaintiff must seek and be denied the information at issue).

EPIC's email request to the FAA sought only to enforce the document disclosure provisions of FACA, not the open meeting provisions. *See* Compl. Ex. 18 (copy of email). Therefore, EPIC cannot show it was "deprived of information" based on the alleged non-openness of DAC subgroup meetings.[11] *See Judicial Watch*, 576 F. Supp. 2d at 177; *cf. Cummock*, 180 F.3d at 290 (holding that plaintiff "suffered an injury under FACA insofar as the Commission denied her requests for information that it was required to produce ").

B. Neither the Federal Advisory Committee Act nor the Declaratory Judgment Act provide a private right of action, and the Court should dismiss those purported claims for lack of subject matter jurisdiction.

Counts I, IV, and VII of EPIC's complaint purport to bring claims pursuant to FACA or the Declaratory Judgment Act, but there is no private right of action under either statute. The Court should dismiss Counts I, IV, and VII for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *See Shipman v. AMTRAK*, 76 F. Supp. 3d 173, 181 (D.D.C. 2014) (dismissing claim for lack of subject matter jurisdiction where no cause of action existed to waive the government's sovereign immunity); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit[;] … [s]overeign immunity is jurisdictional in nature. ") (citations omitted).

In *Sandoval*, the Supreme Court held that with respect to causes of action, the "judicial task is to interpret the statute Congress has passed to determine whether

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[11] Even if EPIC had requested access to the DAC subgroup meetings, it might still not be able show an informational injury based on lack of access to those meetings. The open-to-the-public DAC meetings included reports from the DAC subgroups, and thus made available at least some of the information that presumably would have been available during a subgroup meeting. The 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, and thus does not sufficiently allege that holding closed subgroup meetings deprived EPIC of the benefit of information.

it displays an intent to create not just a private right but also a private remedy.... Without it, a cause of action does not exist and courts may not create one." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citation omitted). Following *Sandoval*, courts in the D.C. Circuit have consistently held that "FACA does not provide a cause of action, given that none is apparent from the statutory text. "[12] *Ctr. for Biological Diversity*, 239 F. Supp. 3d at 221; *see also, e.g.,* D*unlap v. Presidential Advisory Comm'n on Election Integrity,* 286 F. Supp. 3d 96, 99–105 (D.D.C. 2017); *Lawyers' Comm. for Civ. Rights Under Law*, 265 F. Supp. 3d at 66; *Freedom Watch, Inc.*, 807 F. Supp. 2d at 32–33; *Judicial Watch v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 29 (D.D.C. 2010).

Sandoval made "clear that courts cannot read into statutes a cause of action that has no basis in the statutory text." *Id.* at 33 (citing *Sandoval*, 532 U.S. at 286). FACA lacks statutory language expressly creating a cause of action. *Id.*; *see also* 5 U.S.C. app. 2. Nor does anything else in the statute indicate Congressional intent to create both a "private right" and a "private remedy." *See Sandoval*, 532 U.S. at 286. This Court cannot read a cause of action into FACA. *See Judicial Watch*, 219 F. Supp. 2d at 33. Consequently, the Court must dismiss EPIC's purported FACA claims (Counts I and IV of the complaint) for lack of subject matter jurisdiction. *See Judicial Watch*, 736 F. Supp. 2d at 29 (holding that FACA did not provide plaintiff with private right of action based on "determinative" fact that FACA does not explicitly confer private remedy).

Nor does the Declaratory Judgment Act, 28 U.S.C. § 2201, provide a cause of action. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also* 28 U.S.C. §

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[12] Prior to *Sandoval*, courts sometimes assumed without elaboration that FACA provides a cause of action. *See Judicial Watch v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 34 (D.D.C. 2002) (collecting cases), subjected on other grounds to writ of mandamus issued by In re Cheney, 406 F.3d at 731.

2201. The Declaratory Judgment Act merely provides a remedy if a judicially remedial right otherwise exists. *Id.* Based on the Court of Appeals' recognition of the "well-established rule that the Declaratory Judgment Act 'is not an independent source of federal jurisdiction,'" *Ali*, 649 F.3d at 778 (quoting *C&E Servs. v. D.C. Water & Sewer Auth., 310 F.*3d 197, 201 (D.C. Cir. 2002)), this Court must dismiss the purported Declaratory Judgment Act claim (Count VII), *see Id.*

C. Plaintiff's contention that the Drone Advisory Committee's *subgroups* were required to hold open meetings and publicly disclose documents fails as a matter of law, and thus the complaint fails to state a claim upon which relief can be granted under the Administrative Procedure Act.

EPIC's complaint advances two separate APA theories, one under 5 U.S.C. § 706(1) and the other under 5 U.S.C. § 706(2).[13] Both theories depend on the complaint's central contention that defendants failed to comply with § 10 of FACA by not holding DAC subgroup meetings open to the public, and by limiting public disclosure of subgroup documents to those presentations, reports, and documents that were actually used in the DAC's (parent committee) deliberations. The allegations in the complaint, taken as true, do not, however, state a claim for which relief that can be granted under the APA because FACA does not require subgroups to hold open meetings or make documents available to the public. The complaint does not allege that the DACSC and Task Groups were themselves advisory committees, or that the FAA—as opposed to the DAC itself—"established or

[13] Counts II and V of the complaint assert that defendants' alleged violations of FACA constitute "agency action unlawfully withheld or unreasonably delayed "under § 706(1). *See* Compl. ¶¶ 109–10, 127–28 (citing 5 U.S.C. § 706(1)). Counts III and VI of the complaint advance a § 706(2) theory, asserting that by allegedly violating FACA, defendants "have engaged in conduct that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c)." Compl. ¶¶ 114, 134.

utilized" the DACSC and Task Groups in a way that would trigger application of FACA.

1. The Drone Advisory Committee's subgroups do not themselves qualify as "advisory committees" subject to the Federal Advisory Committee Act because they were not "established or utilized" by the FAA.

FACA's disclosure provisions apply to bodies qualifying as "advisory committee[s]." 5 U.S.C. app. 2 § 10 (applying FACA to "each advisory committee," with some exceptions). In order to meet the definition of an "advisory committee" subject to FACA, a group must be either "established by statute or reorganization plan" or "established or utilized" by the President or one or more agencies, and the group's establishment or utilization must be "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. 2 § 3(2).

The Supreme Court interpreted this provision in *Public Citizen*, which dealt with the Justice Department's consultations with an American Bar Association (ABA) committee in the judicial nomination process. *Pub. Citizen*, 491 U.S. at 440. The Court recognized that the terms of § 3(2), if taken literally, could lend themselves to an expansive interpretation that could encompass "any formal organization[] from which the President or an Executive agency seeks advice." *Pub. Citizen*, 491 U.S. at 452. But the Court concluded that Congress clearly did not intend the statute to reach that broadly. The Court wrote, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Id.* at 453.

Accordingly, the Court concluded that Congress included the term "utilized" in the FACA so that the statute not only covered government-created committees, but also reached a narrow class of privately formed committees. *Id.* at 462. However, the Court concluded that a privately formed committee "not amenable to . . . strict management by agency officials" would not fall within the reach of the statute. *Id.* at 457–58. Hence, even though the Justice Department undoubtedly "utilized" the ABA committee in a commonly used sense, the committee was not an "advisory committee" subject to FACA. *See id.* at 452, 463–65.

In keeping with this approach, the D.C. Circuit has consistently accorded a restrictive interpretation to the terms "established" and "utilized." *See generally Byrd v. U.S. EPA*, 174 F.3d 239, 245–46 (D.C. Cir. 1999). The D.C. Circuit has determined that an advisory committee is "established" by the government only if it is "actually formed" by the government. *Id.* at 245 (citing *Pub. Citizen*, 491 U.S. at 452, 456–57). This means the government must do more than conceive, encourage, or facilitate the creation of the body in question. The government must actually select the group's members. *Id.* at 246–47 (finding that even though the EPA had conceived the need for a panel, had hired a private consulting firm to select and manage the panel, and had had considerable involvement and authority in the panel's selection, the fact that the panel's members were selected by the consulting firm and not directly by the EPA meant that the plaintiff "cannot show" that the panel was "established" by the EPA); *Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990) (holding that an expert panel convened by a private scientific organization under contract with the FDA was not directly "established" by the FDA).

The D.C. Circuit has also elaborated on the Supreme Court's interpretation of the term "utilized." "The word 'utilized' . . . is a stringent standard, denoting something along the lines of actual management or control of the advisory

committee." *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *see id.* at 1451 (holding that an advisory group was not "utilized" by the Department of Justice even though the Department of Justice would have significant influence on the group's deliberations); *Byrd*, 174 F.3d at 247 ("[E]ven 'significant' influence does not represent the level of control necessary to establish that a government agency 'utilized' an advisory panel ") (citing *Wash. Legal Found.*); *id.* at 247–48 (concluding that the EPA's participation in the panel's activities did not amount to "actual management or control "); *Food Chem. News*, 900 F.2d at 333 (holding that an expert panel managed by a private scientific organization under contract with the FDA was not "utilized" by the FDA).

The complaint alleges that the DAC "was established … *by* the FAA," Compl. ¶¶ 11, 25 (emphasis added), a proposition confirmed by the exhibits, *see e.g.*, Compl. Ex. 1 at 1. But with respect to the DAC subgroups, the complaint merely states that each one "was established," without alleging who did the establishing. *See* Compl. ¶¶ 30, 35, 36, 37. The complaint does not allege that the FAA, as opposed to the DAC and its members, created the subgroups. Nor does the complaint support that inference. Indeed, the exhibits to the complaint confirm that—while the FAA may have recommended their creation—it was the DAC, not the FAA, that actually established the DAC subgroups. *See, e.g.*, Compl. Ex. 4 at 4, 7, 8, 18. To the extent EPIC alleges that the FAA played some role in approving the creation and operation of the DAC subgroups, *see* Compl. ¶ 34, the complaint still cannot be plausibly read as alleging the FAA established the DAC subgroups as FACA advisory committees, *i.e.*, for the purpose of obtaining advice pursuant to FACA. The complaint contains no allegation that the FAA intended the DAC subgroups to operate as FACA advisory groups, or that the DAC subgroups directly advised the FAA.

Nor does the complaint allege facts showing that the FAA managed or controlled the DAC subgroups, such that the FAA can be said to have utilized them as advisory committees. *See Wash. Legal Found.*, 17 F.3d at 1450. At most, the complaint alleges that FAA officials worked with and guided the DAC subgroups. *See, e.g.*, Complaint ¶¶ 31-32, 34-40. For example, the complaint alleges that FAA officials "briefed," "educated," and provided guidance and assistance to the DACSC, as well as participated in DAC meetings at which the DACSC delivered reports on its work. Compl. ¶ 32. Similarly, the complaint alleges that FAA officials "directed, guided, participated in, and received the work and recommendations of the Task Groups," *id.* ¶ 38; that the "Acting Deputy [FAA] Administrator 'issued' the detailed tasking statements for all three Task Groups," *id.* ¶ 39; and that FAA officials attended DAC meetings at which the Task Groups delivered recommendations and reports. *Id.* ¶ 40.

Not only do these activities not rise to the level of "management or control," they are fully consistent with the role the GSA regulations proscribe for an agency with respect to subcommittees. The regulations required the FAA to designate a Designated Federal Officer (DFO) "for each advisory committee and its subcommittees." 41 C.F.R. § 102-3.105(i). The DFO, in turn, must approve or call the meeting "of the advisory committee or subcommittee," approve the agenda, and attend the meetings. *Id.* § 102-3.120. Indeed, the complaint itself acknowledges the appropriateness of the DFO's involvement with the proceedings of the subgroups. Compl. ¶¶ 33, 41.

Despite this proscribed role for the agency in the subcommittees, the regulations nonetheless provide that a subcommittee is subject to the procedural requirements of FACA *only* if "a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory

committee." 41 C.F.R. § 102-3.145. *See also id.* § 102-3.35 (the requirements of FACA, do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency); *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529-30 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983) (holding that FACA's requirements did not apply to task forces that did not directly advise the President or any federal agency, but rather provided information and recommendations for consideration to the parent committee).

Here, there are no allegations that the DAC subgroups made recommendations directly to the FAA, or that its recommendations would be adopted by the DAC without further deliberations by the DAC. In fact, the exhibits to the complaint state the contrary. Complaint Ex. 6 at 3 ("No recommendations will flow directly from the DACSC or DAC [Task Groups] directly to the FAA. All must be vetted in a public DAC meeting and transmitted to the FAA upon approval by the DAC. "); Ex. 10 at 4 ("the work that is done by the [Task Groups] gets vetted, through the consensus process, through the DACSC and the DAC, before any final recommendations are sent to the FAA. "). While the complaint alleges that DAC subgroups reported on their work or discussed their recommendations at DAC meetings that were attended by FAA officials, *see* Complaint ¶¶ 63, 68-69, 74-75, 85-87, that does not mean that the subgroups directly advised or made recommendations to the FAA, nor does it suggest there was no further deliberation on subgroup recommendations by the DAC at those meetings. There are no allegations that DAC subgroup reports and recommendations were transmitted directly to the FAA, or that the DAC was "merely 'rubber stamping' the [subgroups'] recommendations with little or no independent consideration." *National Anti-Hunger Coalition*, 711 F.2d at 1075-76.

Accordingly, the complaint fails to state a claim that the DAC subgroups were subject to FACA's procedural requirements.

2. The "preparatory" and "administrative" materials of the subgroups need not be disclosed under Federal Advisory Committee Act requirements.

EPIC seeks access to staff meetings, and such documents as early drafts that did not mature to the point of being presented to the DAC for consideration and vetting. FACA does not require defendants to provide such access. See In re Cheney, 406 F.3d at 730 (distinguishing between a committee's efforts to "gather information" and to "bring a collective judgment to bear "); *see also Nat'l Anti-Hunger Coal.*, 557 F. Supp. at 529 ("[S]urely Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations. "); 41 C.F.R. § 102-3.160 (explicitly excluding "preparatory work" and "administrative work" from disclosure requirements).

The complaint alleges that the DAC subgroups met during the periods of time between public DAC meetings, and that they "engag[ed] in official Committee business" during that time. Compl. ¶¶ 59–61, 65–67, 71–73, 79–81, 89–91. In essence, the DAC subgroups provided "the staff work" for the DAC, working in between DAC meetings to prepare for the next DAC meeting. Compl. Ex. 6 at 1. This is precisely the type of "preparatory" and "administrative" material that the FACA regulations exempt from disclosure requirements, *see* 41 C.F.R. § 102-3.160, and which fall outside the ambit of FACA, *see id.*; *see also Nat'l Anti–Hunger Coal.*, 557 F. Supp. at 529 ("The [Federal Advisory Committee] Act does not cover groups performing staff functions such as those performed by the so-called task forces. ").

D. The Drone Advisory Committee and RTCA Advisory Committee are not proper defendants, and should be dismissed

Even if an APA claim were somehow cognizable against the FAA based on the allegations in the complaint, EPIC cannot bring APA claims against named defendants RTCA Advisory Committee and the DAC. The Court should dismiss any existing claims against those defendants.[14]

First, the APA provides judicial review only of "agency action." 5 U.S.C. § 702. The APA does not provide a basis for suing the advisory committees themselves for alleged failure to comply with FACA § 10, as an "entity cannot be at once both an advisory committee and an agency." *Freedom Watch, Inc.*, 807 F. Supp. 2d at 33; *see also Meyer v. Bush*, 981 F.2d 1288, 1290, 1297 (D.C. Cir. 1993) (holding that a task force without "'substantial independent authority' to direct executive branch officials" could not be considered an "agency" for Freedom of Information Act purposes); *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (interpreting the APA's definition of "agency" as "confer[ring] agency status on any administrative unit with substantial independent authority in the exercise of specific functions "); *Wash. Legal Found. v. Am. Bar Ass'n Standing Comm. on Fed. Judiciary*, 648 F. Supp. 1353, 1359 (D.D.C. 1986) (advisory committees are not proper defendants for

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[14] Defendants move to dismiss the claims against RTCA Advisory Committee notwithstanding the "stipulation of dismissal" that EPIC filed on June 25, 2018, which purported to conditionally dismiss EPIC's claims against RTCA Advisory Committee. Dkt. No. 13. The stipulation invoked Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, *see* Dkt. No. 13 at 1, but it did not actually comply with that rule. Rule 41(a)(1)(A) provides two avenues by which a plaintiff may voluntarily dismiss its claims without obtaining a court order. Either the plaintiff may file "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment," Fed. R. Civ. P. 41(a)(1)(A)(i), or the plaintiff may file "a stipulation of dismissal signed by all parties who have appeared," *id.* 41(a)(1)(A)(ii). The purported stipulation filed by EPIC, Dkt. No. 13, was not signed by all parties who have appeared in this action, *see id.*, and therefore it did not operate to voluntarily dismiss the claims against RTCA Advisory Committee. *See* Fed. R. Civ. P. 41(a)(1).

complaints alleging violations of FACA). The DAC and RTCA Advisory Committee acted solely in an advisory capacity, and therefore cannot be considered separate agencies under the APA. *See Soucie*, 448 F.2d at 1073.

Second, the RTCA Advisory Committee and its components—including the DAC—ceased operating as a federal advisory committee on May 29, 2018, when the RTCA Advisory Committee charter was terminated. Because the RTCA Advisory Committee and the DAC (as then constituted) no longer exist, EPIC's claims against those entities are moot. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 375 (2004) (noting that the district court dismissed FACA-related claims against the National Energy Policy Development Group because it "had been dissolved" and "could not be sued as a defendant "); *see also Miccosukee Tribe of Indians v. S. Everglades Restoration All.*, 304 F.3d 1076, 1081 (11th Cir. 2002) (affirming on mootness grounds dismissal of a FACA claim against an advisory committee and its former executive director because the committee no longer existed and therefore "no meaningful relief" was available to the plaintiff as to those defendants).

Conclusion

For all the foregoing reasons, defendants respectfully request that the Court dismiss the complaint.

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Respectfully submitted,

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