THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, *Plaintiff*, vs. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*., *Defendants*.	Case No. 1:17-cv-1485 (ESH)

PLAINTIFF'S SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO COMPEL

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INTRODUCTION

Food and Water Watch ("FWW") respectfully submits this Supplemental Opposition to Defendants' Motion to Dismiss, pursuant to the Court's Order of June 6, 2018, Dkt. No. 26, and Minute Order of August 9, 2018, or, in the alternative, Motion to Compel. This filing is in response to Defendants' Responses to Interrogatories Set Forth in the Court's Order of June 6, 2018 ("Interrogatory Responses"), Dkt. No. 28-1 and Defendants' Supplemental Brief in Support of Defendants' Motion to Dismiss, Dkt. No. 28.

As FWW set forth in its Opposition to Defendants' Motion to Dismiss, Dkt. No. 16 ("Opp."), it has pled more than enough facts to make it plausible that a *de facto* Infrastructure Advisory Council, as described in the Amended Complaint, Dkt. No. 11 ("Am. Compl."), existed and was not in compliance with the Federal Advisory Committee Act, 5 U.S.C. app. 2 ("FACA"). Defendants' Interrogatory Responses—which identify ***thirteen*** meetings of the individuals identified by FWW as members of the Infrastructure Council—make it more plausible still.

In the event that the Court is inclined to grant the Motion to Dismiss, however, FWW respectfully requests that the Court instead compel Defendants to respond sufficiently to the Interrogatories. Defendants' Responses do not comply with either the Court's Order of June 6, 2018 or the Federal Rules of Civil Procedure and therefore require completion.

ARGUMENT[1]

As set forth in FWW's Opposition to Defendants' Motion to Dismiss, FWW has alleged facts that make it more than plausible that the Infrastructure Council existed and provided advice

[1] FWW respectfully refers the Court to the background information, both as to FACA and the relevant factual allegations, set forth in its Opposition to Defendants' Motion to Dismiss at 2-9, rather than repeat that information here.

to the Administration without complying with FACA. *See* Opp. at 11-16.[2] If any doubt remained, Defendants' Interrogatory Responses would resolve it. Although Defendants' Responses are non-compliant with both the Court's Order of June 6, 2018 and the Federal Rules of Civil Procedure, they show—even in their incomplete form—that Defendants unlawfully established a *de facto* Infrastructure Council within the meaning of the FACA, 5 U.S.C. app. 2 § 3(2).

I. THE INTERROGATORY RESPONSES CORROBORATE THE EXISTENCE OF A *DE FACTO* INFRASTRUCTURE ADVISORY COUNCIL.

To start, the Interrogatory Responses confirm and, in fact, shed substantial light on FWW's allegations regarding the establishment of the Infrastructure Council. *See* Opp. at 11-12. President Trump (and possibly others) chose Mr. LeFrak, Mr. Roth, Mr. Harris, and Mr. Ford to participate in the Infrastructure Council. Opp. at 11; Interrogatory Responses at 12. The Council was intended to provide advice on infrastructure policy. Opp at 11; Interrogatory Responses at 12-13. And Mr. LeFrak, Mr. Roth, Mr. Harris, and Mr. Ford had multiple meetings and discussions with White House staff regarding the Council's work. Opp. at 11; Interrogatory Responses at 13-14.

Further, the Interrogatory Responses themselves lend additional support to the conclusion that Defendants established a *de facto* advisory committee subject to FACA's requirements. FACA unquestionably applies if a federal official creates an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose. *See Ass'n of Am. Physicians and Surgeons ("AAPS") v. Clinton,* 997 F.2d 898, 914 (D.C. Cir. 1993). The Interrogatory Responses reinforce FWW's arguments on each of these factors.

[2] Although Defendants move to dismiss the Amended Complaint on various grounds, the crucial question is whether FWW has alleged sufficient facts to state a plausible claim that a *de facto* Infrastructure Council existed. If it has, then FWW has standing, has stated a claim under both the Administrative Procedure Act and the Mandamus Act, and the case is both ripe and not moot.

On the question of organized structure, Defendants have now revealed that Mr. Cordish's reference to "preliminary discussions" in his Declaration meant, in fact, ***thirteen*** meetings or discussions regarding the Infrastructure Council. These meetings, by Defendants' admission, occurred at regular intervals over the course of ***five months***, from late February through late July 2017, both before and after the President issued his Executive Order formally creating the Council. *See* Interrogatory Responses at 13-14. These meetings—***all*** of which included non-government individuals—discussed all aspects of the Council's work: what sectors of infrastructure would be represented in the Council's membership, what its mission would be, what the end product of its work would be, the identification of specific policy issues on which the Council would focus, as well as various logistical issues such as whether it would receive financial support from the White House, whether it would have a dedicated staff, and which federal entity would provide administrative support. *See id.* at 12. The sheer number and the substance of these meetings and discussions go far beyond any reasonable definition of "preliminary discussion"—*e.g.*, the government inquiring whether a private person is interested in and available for participating in an advisory committee—and show instead that Defendants created an "organized structure" as described by *AAPS*. 997 F.2d at 914.

The Interrogatory Responses also show that the government itself fixed the membership of the Infrastructure Council. As Defendants admit, "[t]he President identified Richard LeFrak and Steven Roth as the anticipated leaders of the council once it was formed, and Josh Harris and William E. Ford were also informed that they were potential members of the anticipated council." Interrogatory Responses at 12.[3] In other words, the government "established"—*i.e.*,

[3] Notably, the Interrogatory Responses do not identify who selected Harris and Ford, and whether this was done by the White House or the Department of Transportation ("DOT"). While the Interrogatory Responses note that DOT did not participate in "preliminary discussions" with

"actually formed"—the Council. *Byrd v. E.P.A.*, 174 F.3d 239, 245 (D.C. Cir. 1999) (citing *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 452, 456-57).

What's more, the meeting descriptions reveal that these individuals met frequently while participating in the Council.[4] *See* Interrogatory Responses at 13-14. Indeed, there were at least ***four*** meetings or discussions between all four non-governmental individuals and government staff. *See id*.[5] Another such discussion included their respective staff. *See id*. at 14 (July 6 correspondence). The remaining meetings and discussions included various combinations of the four non-governmental individuals and/or their staff, but no other members of the public. *See id*. Further, there were two government employees—Mr. Cordish and Mr. Gribbin— "directly involved" in the thirteen meetings and discussions described by Defendants. *Id.* at 13. The Interrogatory Responses reveal a consistent committee membership, not the type of "unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other", which is not covered by FACA. *AAPS*, 997 F.2d at 915.

As Defendants admit, the committee members were also brought together for a "specific purpose," *AAPS*, 997 F.2d at 914: to discuss "various aspects of how an infrastructure advisory

advisory committee members, they are—tellingly—silent on whether DOT assisted in the selection of those members. *See* Interrogatory Responses at 12.

[4] Of course, an advisory committee may exist even if it meets only once. *See, e.g., Nat'l Nutritional Foods Ass'n v. Califano,* 603 F.2d 327 (2d Cir. 1979) (holding that a single meeting of five experts specializing in obesity research was subject to FACA).

[5] There may well have been more, although the imprecision of Defendants' descriptions of the April 28, May 12, June 23, and July 27 meetings make it impossible to determine at this point. Moreover, while Interrogatory No. 6 focuses on these individuals, it would have captured any other members of the public who attended Infrastructure Council meetings, as it required the government to "identify any non-government individual who participated." That the same four members—and only those members—met so frequently is striking.

council would be formed and how it would operate once it was formed." Interrogatory Responses at 12.[6] Defendants put all their chips on the fact that the Interrogatory Responses do not reveal any meetings in which "recommendations or advice regarding infrastructure policy was proposed by, or on behalf of, a group or solicited from a group" including non-governmental individuals. *Id.* at 9. Yet there is no requirement that a committee have completed its function of providing advice or recommendations or that its final recommendation be solicited to be considered an advisory committee. To the contrary, FACA defines an advisory committee in terms of intent, not outcome: as one established or utilized "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). Defendants cannot seriously assert that the work being done in February through July of 2017 was not "in the interest of obtaining advice or recommendations for the President," while simultaneously admitting in their Interrogatory Responses that the Council had frequent discussions regarding its mission and infrastructure policy topics of focus, much less the numerous logistical and administrative issues addressed by the non-governmental Council members. As Defendants again admit, this work was done for the purpose of obtaining a report with recommendations on various infrastructure policy issues. Interrogatory Responses at 13.

The same goes for the Council's earlier-than-planned disbandment. *See* Interrogatory Reponses at 14. FACA provides no exception for an advisory committee that is ended before it has completed its work. Quite the opposite: it prohibits any advisory committee meetings

[6] Plaintiff's allegations—which the Interrogatory Responses do not disprove—make it more than plausible that an additional specific purpose was, of course, actual infrastructure policy proposals from Council members. Am. Compl. ¶¶ 28-29, 33, 35-38.

conducted in advance of the filing of a charter, 5 U.S.C. app. 2 § 9(c), regardless of whether the advisory committee ultimately completes its recommendation function. And while the regulations that govern FACA committees provide numerous examples of committees that are not covered by the Act's requirements, there is no such exemption for committee work that precedes the final report or recommendation. *See* 34 C.F.R. § 102-3.40 (identifying eleven such examples). Finally, multiple courts have held that FACA relief is more appropriate before an advisory committee has completed its function, implicitly recognizing that group recommendations need not yet have been provided for FACA to cover an advisory committee. *See, e.g., Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). Defendants have not and cannot identify any authority to the contrary.

In any event, it is now quite clear that the non-government individuals were convened as a group to provide advice on at least the purpose and functioning of the Infrastructure Council itself, even if Defendants dispute whether advice was provided regarding infrastructure policy. Interrogatory Responses at 12-13. Rather than determining the need for and focus of an advisory council on infrastructure within the government before initiating the FACA process, Defendants outsourced all the critical analysis and decision-making regarding the existence, work, and scope of the Council. *See id.* This alone subjects the committee to FACA, which applies to the provision of group advice of all kinds, not just policy advice. *See, e.g., Heartwood v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 34-35 (D.D.C. 2006) (explaining that providing "narrative summaries of scientific information," and not "policy recommendations," is covered by FACA because it "provide[s] the framework, context and information that the [government] will rely on in making policy decisions"); *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1013 (D.D.C. 1994)

(finding "nothing in the statutory language or case law to support the defendants' assertion that FACA should not apply to 'advisory committees' consisting only of technicians who supply the decision-makers with data. To the contrary, several courts have applied FACA in just such circumstances.") (citing *See Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir.1989) (FACA applied to committee to develop microbiological criteria by which the safety and wholesomeness of food could be assessed); *Nat'l Nutritional Foods Ass'n*, 603 F.2d 327 (single meeting of five experts in the field of obesity research was subject to FACA); *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 879 (D. Idaho 2009), *order clarified*, 2009 WL 3806371 (D. Idaho Nov. 9, 2009) (FACA applied where "Committees' contributions (however they may be described) supplied the Forest Service with information used to make subsequent policy decisions").

Putting the final nail in the coffin, the Interrogatory Responses reveal that at least two Infrastructure Council meetings or discussions involving non-government individuals occurred ***after*** July 19, 2017, when the President signed Executive Order 13,805, authorizing the formal creation of a Presidential Advisory Council on Infrastructure in the Department of Commerce. *See* Motion to Dismiss at 3; Interrogatory Responses at 14. Whether or not a *de facto* Council existed before the Executive Order—and it did—there is no reasonable dispute that meetings and discussions with Council members after the Executive Order's issuance fall within the ambit of FACA. Yet Defendants nonetheless utterly failed to comply with FACA's requirements, including the basic prohibition that "[n]o advisory committee shall meet … until an advisory committee charter has been filed…." 5 U.S.C. app. 2 § 9(c).[7] That failure, too, was unlawful.

[7] They also happen to have violated the Department of Commerce's internal requirements for appointing advisory committee members. *See* Office of the General Council, *Populating a Federal Advisory Committee (FAC)*, https://ogc.commerce.gov/page/populating-federal-

In sum, Defendants' Interrogatory Responses make it more than plausible—indeed, they definitively establish—that Defendants operated an unlawful Infrastructure Advisory Council.

II. THE INTERROGATORY RESPONSES ARE CONSISTENT WITH THE ALLEGATIONS IN THE COMPLAINT.

The Interrogatory Responses also make the allegations in the Amended Complaint more plausible. The Amended Complaint alleges that the President established and utilized a *de facto* Infrastructure Council, with a fixed membership including the four non-government individuals who are the subject of the Interrogatories, that the Council met at least once, and that it provided group advice and recommendations to the Administration on infrastructure-related matters. *See* Opp. at 11-12. The Interrogatory Responses reinforce these general allegations because they bolster the plausibility of the reasonable inferences and conclusions FWW draws from specific factual allegations.

To wit, the Interrogatory Responses make clear that repeated statements by committee members and government officials regarding the Council's existence were not idle chatter; they were instead based on the Council's actual work. Among other things, LeFrak stated that he was part of a group of "gentlemen on the little unofficial advisory council." *See* Am. Compl. ¶ 27.[8] He made this statement within ten days of the March 22 meeting identified by Defendants, which was attended by all non-governmental members of the Council. The contemporaneous nature of

advisory-committee-fac (last visited Aug. 31, 2018). Consistent with the FACA and GSA's own regulation, Commerce does not allow committee members to participate in the establishing of an advisory committee, and instead requires that Commerce formally solicit them via the Federal Register or the agency's website and thereafter vet and clear them for participation before they are formally nominated and selected by the Secretary. *See id*. The rigorous and transparent process established by these regulations does not permit committee members to participate in the planning and establishment of the very committee on which they are expected to serve.

[8] Citing Interview with Richard LeFrak, CEO, LeFrak Org., Fox Bus. TV, Mar. 23, 2017, http://video.foxbusiness.com/v/5357583541001/?#sp=show-clips.

the statement buttresses the conclusion that LeFrak meant what he said: that he was a member of a *de facto* advisory committee. Interrogatory Responses at 13.

Similarly, Secretary Chao acknowledged—indeed, publicly complimented—the work of the Infrastructure Council and its members on May 1, 2017, *see* Am. Compl. ¶ 29, just as the Council's work was ramping up with increasingly frequent meetings. Specifically, her acknowledgement of the Council's existence came within two weeks of two meetings (April 22, attended by Harris and Ford, and April 28, attended by one or more of the non-governmental members and/or their assistants). And at least two more meetings occurred within the next two weeks (a May 8 conference call including Harris and LeFrak and a May 12 conference call attended by one or more of the non-governmental members and/or their assistants). The fact that the Secretary identified LeFrak, Roth, Harris, and Ford as Council members—correctly, as confirmed by Defendants' Interrogatory Responses—at the same time that significant activity regarding the Council was underway further reinforces the Council's existence.

The sheer number of meetings in the Spring of 2017 involving LeFrak, Roth, Harris, and Ford also lend credence to the various contemporaneous statements, identified in the Amended Complaint, that they had been asked to render advice regarding infrastructure policy. For example, during this time, LeFrak made numerous statements regarding the Council's efforts to provide recommendations to the government, including: "I know the advisory council is working hard to give some suggestions to the government;" *see* Am. Compl. ¶ 35; that the President complained that the infrastructure permitting process is "an underfunded situation … done in a very slow regulatory manner," and asked Council members "to see if there's better ways we can go about it," *see id*. ¶ 36a; and that the Council was "asking them to try" the use of the bankruptcy court arbitration process as a model for how to expedite infrastructure permitting, *see*

id. ¶ 35b. At the same time, the Interrogatory Responses establish that LeFrak and the other non-government members met with the White House at least *seven times* regarding the Council. *See* Interrogatory Responses at 13-14. The White House's significant work and engagement with the non-government employee advisory committee members reinforces the conclusion that the public statements above were not puffery based on isolated conversations with the President or another official, but rather a description of the actual work being done by an active committee.

Further, Defendants' representation that no group advice or recommendation was made in any meeting proves little. *See* Interrogatory Responses at 9-10. Even if taken at face value, the absence of group advice or recommendation does not, as discussed above, insulate an advisory committee from FACA. And Defendants' representation cannot be taken at face value given that the Interrogatory Responses are incomplete, and do not even purport to provide a complete list of meetings or the topics discussed at those meetings. *See infra* pages 12-19. Indeed, Defendants' response excludes meetings that are matters of public record. For example, the Responses fail to identify the formal March 8, 2017 meeting on infrastructure policy described in the Amended Complaint, which included known members of the Infrastructure Council as well as the Secretary of Transportation, the President, and others, and focused on identifying what Press Secretary Sean Spicer characterized as "regulatory roadblocks that have been killing projects before they've even begun." *See* Am. Compl. ¶ 33b.[9] Moreover, Defendants' response to

[9] *See Press Briefing by Press Secretary Sean Spicer*, The White House, Mar. 8, 2017, https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-030817/. Spicer explained that "[b]y looking at infrastructure from a businessperson's perspective, as the President and these executives do, we can restore respect for the taxpayer dollar and make the best investment." *Id*. Defendants' Responses similarly fail to identify a meeting between LeFrak and President Trump regarding infrastructure—specifically, the construction of a border wall—that occurred in February 2017. *See* Am. Compl. ¶ 33a. Finally, the Responses omit a June 2017 meeting regarding an infrastructure speech. *See id*. ¶ 33c.

Interrogatory No. 1, which states that they "identified no meeting at which a group recommendation or group advice regarding infrastructure policy was proposed," Interrogatory Responses at 10, leaves open the distinct possibility that recommendations or advice from the Council were provided in an informal way, consistent with LeFrak's characterization of an unofficial group hard at work, and not recorded in an email or other written record that would be revealed by any searches Defendants performed in responding to the Interrogatories.

The government's response to Interrogatory No. 8 is similarly unpersuasive. This Interrogatory inquired whether any "[n]on-government individual [had] the right to vote on or veto any recommendation, advice, or report associated with these 'preliminary discussions.'" Interrogatory Responses at 15. Defendants dodge a response to this yes or no question, stating only that the Interrogatory is not applicable because no such group recommendation, advice, or report regarding infrastructure policy was identified. *Id*. But it does not answer whether the non-governmental committee members would have had such a "vote or veto" had a group recommendation advice or report been issued before the advisory committee was prematurely ended, nor address the possibility that recommendations were provided informally.

Furthermore, *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc), the origin of the "vote or veto" phrase, does not require specific allegations that advisory committee members held a vote or veto in order to withstand a motion to dismiss. The *Cheney* court itself suggested that allegations that non-governmental committee members "fully participated" in non-public committee meetings "as if they were members of the [committee], and, in fact, were members of the [committee]" are sufficient—so long as they are not contradicted by other allegations or statements—and need not include specific allegations that the non-governmental individuals had a right to vote on or veto committee decisions. *Id*. at 729; *see also Ctr. for Biological Diversity v.*

Tidwell, 239 F. Supp. 3d 213, 224 (D.D.C. 2017) ("[E]ven [in *Cheney*], the D.C. Circuit appears to have left open the possibility that de facto participation in an advisory committee by non-federal employees" brings the advisory committee within the ambit of FACA."); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 35 (D.D.C. 2011) (in light of *Cheney*, allegations "that individuals not employed by the federal government fully participated in and were members of the committee" were sufficient to withstand a motion to dismiss).

For these reasons, Plaintiff has stated plausible allegations that a *de facto* advisory committee existed, yet failed to comply with FACA. The Motion to Dismiss should be denied.

III. IN THE ALTERNATIVE, THE COURT SHOULD COMPEL DEFENDANTS TO SUFFICIENTLY RESPOND TO THE INTERROGATORIES.

The Complaint's allegations—on their own, and especially once supplemented by Defendants' (deficient) Interrogatory Responses—are more than enough to overcome Defendants' motion to dismiss. If the Court disagrees, however, it should instead compel Defendants to provide a sufficient response to the Interrogatories.[10] Defendants' responses are deficient in three respects. ***First***, Defendants failed to conduct a reasonable inquiry for information responsive to the Interrogatories, limiting their efforts to written records and ambiguously-described "consultation" attempts with the former government employees at the heart of this case. ***Second***, Defendants' responses are each evasive and/or incomplete, likely because the inquiry conducted by Defendants was not designed to reveal all responsive information. And ***third***, Defendants failed to verify their Responses by attesting to their

[10] Pursuant to Local Civil Rule 7(m), counsel for Plaintiff conferred with counsel for Defendants regarding their inadequate responses on August 8, 2018. *See* Letter from Karianne M. Jones et al. to Kathryn L. Wyer (Aug. 8, 2018) (attached as Exhibit A). On August 20, 2018, counsel for Defendants notified counsel for Plaintiffs that they would not supplement their responses. *See* Letter from Kathryn L. Wyer to Karianne M. Jones et al. (Aug. 20, 2018) (attached as Exhibit B).

accuracy—again, likely because there is little reason to think that Defendants' responses contain all responsive information. At a minimum, the Court should not grant Defendants' motion to dismiss until these deficiencies are cured.[11]

1. Defendants failed to undertake a reasonable inquiry before responding to Plaintiff's interrogatories.

Under Rule 26(g)(1), an attorney of record for a party must attest that their discovery responses are correct based on the attorney's "knowledge, information, and belief formed after a reasonable inquiry." A party's duty to respond to interrogatories is therefore satisfied only "if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances." *Johnson v. BAE Sys., Inc.*, 307 F.R.D. 220, 224 (D.D.C. 2013) (quoting Fed. R. Civ. P. 26, Advisory Committee Note, 1983 Amendment); *see also Siser N. Am., Inc. v. Herika G. Inc.*, 325 F.R.D. 200, 208 (E.D. Mich. 2018) (same). If a responding party is unable to provide complete answers, the party "should so state under oath and should set forth in detail the efforts made to obtain the information." *Nat'l Fire Ins. Co. of Hartford v. Jose Trucking Corp.*, 264 F.R.D. 233, 238 (W.D.N.C. 2010).

Defendants' description of their inquiry does not meet these standards. Defendants do not explain what investigation they undertook beyond a search of email and calendar records and "consult[ing]" with Mr. Gribbin and Mr. Cordish, qualified with the caveat that access to these individuals "has been limited." *See* Interrogatory Responses at 9, 11. They offer virtually no details about the nature of that "consultation" or their efforts to review electronic records. For example, they do not explain whether they asked Mr. Gribbin and Mr. Cordish if either retained

[11] In their responses, Defendants raised several general objections to discovery requests directed to the President of the United States and his advisors, or to information subject to the presidential communications privilege. While Plaintiff does not waive any arguments in this regard, the Court need not resolve these issues given that significant additional work is necessary by Defendants to provide a reasonable response to Plaintiff's Interrogatories.

(and reviewed) records of communications upon leaving government employment or communicated with council members (or their staff) via non-government email, text or messaging apps. As another example, in responding to Interrogatory No. 6, Defendants explain that "Department of Commerce staff met with staff of the four identified potential council members to discuss the anticipated administrative support as well as FACA's requirements," but did not consult with Commerce or search its records in order to respond to the Interrogatory, relying solely on Mr. Gribbin's recollections. *See id*. at 13; Exhibit B at 2. These gaps make it impossible to assess whether Defendants' inquiry was reasonable.

Given this insufficient detail, Defendants' boilerplate conclusion that additional efforts would be disproportionately burdensome, especially when balanced against their likely benefit, is insufficient. "[T]he objecting party must make a specific, detailed showing of how the interrogatory is burdensome" (*Pederson v. Preston*, 250 F.R.D. 61, 65 (D.D.C. 2008) (quotation omitted))—not simply assert that they don't think it's worth the effort. The Court should compel Defendants to supplement their responses by providing a more fulsome description of their inquiry and by making the requisite detailed showing of why further efforts would be overly burdensome, if in fact they are.

2. Defendants' individual responses are evasive and/or incomplete.

Reflecting Defendants' failure to conduct a reasonable inquiry, Defendants' individual responses are each evasive and/or incomplete.

Interrogatories 1-5

INTERROGATORY NO. 1: Between January and August 2017, did any meeting occur involving non-government individuals[12] and government employees or only nongovernment individuals, in which recommendations or advice regarding infrastructure policy was proposed

[12] "Non-government individuals" is defined as Richard LeFrak, Steven Roth, Joshua Harris, and/or Bill Ford.

by, or on behalf of, a group or solicited from a group including two or more non-government individuals for the President, Secretary Chao, the Deputy Transportation Secretary, or persons from the White House, the Office of American Innovation, or the Department of Transportation's political appointees, including acting officials, and their staff.

INTERROGATORY NO. 2: If so, identify the dates of those meetings and all nongovernment participants.

INTERROGATORY NO. 3: If so, did any non-government individual have the right to vote or veto any drafted or proposed recommendation, advice, or report?

INTERROGATORY NO. 4: If so, did any non-government individual in fact vote on or veto any recommendation or draft any portion of a final or preliminary committee report?

INTERROGATORY NO. 5: Was any recommendation, advice, or report regarding infrastructure policy drafted, proposed, or issued by, or on behalf of, the group as a result of these meetings?

In response to Interrogatories 1-5, Defendants rely on the same flawed assumption: that it would be "unduly burdensome" to require them to "go beyond review of calendar records and e-mail" in identifying meetings at which recommendations were provided, because "if group recommendations or advice had been provided … , there would be some written reference to such recommendations or advice." Interrogatory Responses at 9-10. The crux of FWW's allegations is that Defendants operated an informal *de facto* advisory committee, in which written records (like meeting minutes required by FACA) may not have been created. While Defendants claim to have asked Mr. Gribbin and Mr. Cordish "about any group advice to the government," they do not identify or describe the specific questions that were asked. *Id.* at 10. Moreover, as explained above, it is not even clear that Defendants' search of written records is complete, given that Defendants apparently did not even ask whether Mr. Gribbin and Mr. Cordish possessed responsive records in their personal email and calendar records, nor consult with the Department of Commerce to obtain any responsive information. Without addressing these relatively easy and simple steps, Defendants cannot claim that Interrogatories 1-5 are

unduly burdensome, let alone mount the "specific, detailed showing" of undue burden required by the federal rules. *Pederson*, 250 F.R.D. at 65.

Interrogatory 6

INTERROGATORY NO. 6: Explain what the "preliminary discussions" that Reed Cordish referred to in ¶ 5 of his Declaration involved. Did they consist of meetings, conference calls, or some other form of communication? State the dates of any discussions, identify any non-government individual who participated, and summarize what was discussed during these "preliminary discussions."

To the extent Defendants' response to this Interrogatory is based on the same review of written records and ambiguously-defined "consultation" with Mr. Gribbin and Mr. Cordish, it falls prey to the same deficiencies described above. Leaving those aside, Defendants' response fails to fully provide the information called for by the Interrogatory, and is therefore incomplete and/or evasive. Most importantly, the response provides a general, omnibus summary of the topics involved at the meetings, rather than the topics involved at *each* meeting, as required by the Interrogatory. Even that sweeping summary admits that these thirteen supposedly "preliminary" meetings "identified specific infrastructure policy issues," although it asserts that "such discussion was for the purpose of identifying topics that would be listed as areas of focus." Interrogatory Responses at 12. Defendants' vague response raises more questions than it answers.

Moreover, Defendants failed to provide required details regarding these meetings on multiple occasions. Two of the meeting descriptions do not have specific dates (*e.g.*, "Mid- to late-May 2017" and "May 2017") and in one instance the nature of the communication is not even identified (*e.g.*, May 2017, "communications took place…"). *Id.* at 14. Seven of them use general descriptions of attendees (*e.g.*, "one or more of the four non-government individuals identified in footnote 1 and/or their staff assistants"), and none clarify whether the list of

attendees is exclusive. *Id.* Thus, Defendants' responses do not provide the information needed to fully assess the activities of the alleged *de facto* advisory committee.

Interrogatories 7-8

INTERROGATORY NO. 7: Was any recommendation, advice, or report regarding infrastructure policy drafted, proposed, or issued by, or on behalf of, the group as a result of these "preliminary discussions"?

INTERROGATORY NO. 8: Did any non-government individual have the right to vote on or veto any recommendation, advice, or report associated with these "preliminary discussions"?

Defendants' responses to Interrogatories 7 and 8 contain the same fundamental deficiencies already identified. Defendants aver that no written recommendation, advice, or report of the type envisioned by the Interrogatories was "identified" (*Id.* at 14-15)—not that no such recommendation, advice, or report, whether oral or written, *exists*. Because Defendants did not conduct a reasonable inquiry to respond to the Interrogatories, these responses are incomplete. In particular, to the extent that Defendants undertook a search limited to written records, that search is equally unreasonable, and Defendants' responses require supplementation.

3. By their own admission, Defendants failed to verify their responses.

Finally, Defendants' failure to undertake a reasonable inquiry and to provide complete answers to the Interrogatories is made plain by their patently insufficient verification of the Responses, a requirement of Federal Rule of Civil Procedure 33. Under Rule 33(b)(5), "[t]he person who makes the answers must sign them." And the person who signs them "must have a basis for signing the responses and for thereby stating on behalf of the [party] that the responses are accurate." *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1482 (D.C. Cir. 1995); *see also Sorrell v. District of Columbia*, 252 F.R.D. 37, 43 (D.D.C. 2008) ("defendant's answers must be signed by the party upon whom they were served … who attests to their truth …") (citation omitted); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 221-22

(E.D. Pa. 2008) (purpose of signature required by Fed. R. Civ. P. 33(b)(5) is "[t]o verify the truthfulness of the answers"). "Th[e] [33(b)(5)] requirement is critical." *Walls v. Paulson,* 250 F.R.D. 48, 52 (D.D.C. 2008).

By his own admission, Charles Herndon, the Director of White House Information Technology, was incapable of verifying Defendants' responses. To the contrary, Mr. Herndon stated that "[t]he White House cannot warrant the complete accuracy of these interrogatory responses" due to Mr. Gribbin's and Mr. Cordish's departures from the White House. *See* Interrogatory Responses at 16. Mr. Herndon explained that the "White House Office undertook a process to ensure the accuracy of these interrogatory responses to the best of their ability by consulting with Mr. Gribbin and Mr. Cordish, as well as searching and reviewing relevant records." *Id.* But Rule 33(b)(5) requires verification, not a "process." Moreover, Mr. Herndon provided only the barest description of the "process," omitting essential details like how the White House Office consulted with Mr. Gribbin and Mr. Cordish, how it reviewed records, why those steps were reasonable, or even who in the White House Office undertook them.[13] Before asserting that their responses make no difference, Defendants should at least be compelled to respond to the Interrogatories in a manner that permits that to provide legally sufficient verification of those responses.

[13] When asked to appropriately verify their responses, Defendants demurred on the ground that "[a] party is not required to warrant the accuracy of information obtained from individuals outside the party's control." Exhibit B at 5. Not so: as the case Defendants cite makes plain, the information must have been "received solely from third persons." *Alexander v. F.B.I.,* 192 F.R.D. 50, 52 (D.D.C. 2000). Mr. Herndon, however, attested that much of the relevant information is contained in records possessed by the White House Office. As for information in the control of Mr. Gribbin and Mr. Cordish, Mr. Herndon does not explain why that information—presumably, Mr. Gribbin's and Mr. Cordish's electronic records and individual recollections—is necessarily not "readily available" to the White House Office.

CONCLUSION

For the reasons set forth above, FWW respectfully requests that the Court deny Defendants' motion to dismiss, or, in the alternative, compel Defendants to provide complete responses to the Interrogatories set forth in the Court's Order of June 6, 2018.

Dated: August 31, 2018

Respectfully submitted,

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