

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FREEDOM WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 09-2398 (RWR)
)	
BARACK OBAMA, <u>et al.</u> ,)	
)	
Defendants.)	
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MEMORANDUM ORDER

Plaintiff Freedom Watch sued the President of the United States, an entity styled in the complaint as the Obama Health Reform De Facto Advisory Committee, and the unknown non-federal employee members of that committee for alleged violations of the Federal Advisory Committee Act ("FACA"), codified at 5 U.S.C. app. 2.¹ Freedom Watch's claims for advanced notice of committee meetings and a change in the alleged committee's composition were dismissed as moot, and Freedom Watch's claim for minutes of the committee's past meetings is the only one remaining. The parties were ordered to show cause why the government's supplemental memorandum should not be treated as a motion for summary judgment on that claim. The government has responded that its supplemental memorandum should be so treated. Freedom Watch has responded that the supplemental memorandum, and the attached

¹The background of this case is set out fully in Freedom Watch, Inc. v. Obama, 807 F. Supp. 2d 28 (D.D.C. 2011).

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declaration of Kimberely Harris, "omits crucial information solely within the control of the Defendants" and that Freedom Watch is entitled to discovery before facing summary judgment. (Pl.'s Resp. and Renewed Mot. for Discovery ("Pl.'s Resp.") at 1.)

Freedom Watch contends that the Harris declaration "confirmed that groups have met, but does not address either the names of the participants or whether such meetings are continuing." (Id. at 3.) As a preliminary matter, the fact that the Harris Declaration did not address whether meetings continue is of no moment. The May 15, 2012 order found that Freedom Watch had failed to establish an ongoing case or controversy regarding whether the alleged committee still meets and accordingly dismissed as moot the claims for access to meetings and changes in membership, which are premised on the alleged committee's continued existence. The only outstanding claim is that for access to the minutes of alleged past meetings. With regard to that claim, Freedom Watch's contention that the information in the Harris Declaration is sparse has merit. The declaration does not present any reasonably full list of the names of the participants, but only identifies a few examples of attendees and then refers to a website that does not purport to present any comprehensive record of the discussions. (Defs.' Supp. Mem., Declaration of Kimberley Harris ¶ 2.) More significantly, the

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declaration fails to provide enough details to permit an assessment of whether the individuals who participated in the health care reform discussions were asked to render collective advice or produce any other type of collaborative work product. See Citizens for Responsibility & Ethics in Wash. v. Leavitt, 577 F. Supp. 2d 427, 434 (D.D.C. 2008) (noting that "[w]hile [the government's affiant] does not disclose all the facts regarding the performance standard meetings [of the alleged federal advisory committee], [the affiant] does disclose enough facts to establish that the experts who attended the meetings were not asked to render collective advice"). Nor does the declaration provide enough detail to determine the number and formality of meetings or whether the same individuals and entities attended the meetings with regularity. Id. at 432. The record as it stands therefore is insufficient to support summary judgment. Accordingly, it is hereby

ORDERED that the government file by August 13, 2012 a status report addressing whether it proposes to provide further evidentiary support for its supplemental memorandum or to confer with Freedom Watch regarding discovery.

SIGNED this 13th day of July, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge