IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	)	Case No. 1:18-cv-00902

REPLY IN SUPPORT OF THE INTERNAL REVENUE SERVICE'S MOTION TO DISMISS

The Court of Appeals affirmed the dismissal of EPIC's FOIA complaint in *Electronic Privacy Information Center v. Internal Revenue Service* ("*EPIC I*"), 910 F.3d 1232 (D.C. Cir. 2018) because EPIC requested the exempt returns and return information of a third party taxpayer, which it had no legal right to obtain. The same is true of EPIC's FOIA complaint here and the Court should reach the same result.

In this action, EPIC requests (1) returns and return information of third party taxpayers from non-public files; and (2) taxpayer-specific information (accepted offer in compromise reports, Form 7249) culled from a *non*-taxpayer specific public inspection file. EPIC does not challenge that the requested records are "returns and return information" within the purview of 26 U.S.C. § 6103(a). Nor does EPIC disagree that such information is confidential under Section 6103(a) unless otherwise provided by the Internal Revenue Code.

As the Service showed in its opening brief, under *EPIC I*, it may not confirm the existence of – let alone disclose – either category of records to EPIC unless EPIC is an

organization that has a right to those records by virtue of the taxpayers' consent under 26 U.S.C. § 6103(c) or a qualifying material interest under 26 U.S.C. § 6103(e).

EPIC concedes that it lacks consent or a material interest, but argues that the records it seeks are available to it via the FOIA under 26 U.S.C. § 6103(k)(1), which mandates "return information shall be disclosed to the extent necessary to permit inspection of accepted offers in compromise." EPIC reads this provision as an exception to taxpayer confidentiality that permits any requestor to obtain any taxpayer's accepted offers in compromise *and* related return information for any reason, from public or nonpublic sources, upon written request under the FOIA. According to EPIC, all, or at least some subset, of the records it seeks are exempt under Section 6103(k)(1), and therefore the Service must conduct a search for those records.

EPIC is wrong. Section 6103(k)(1) is not an exception to taxpayer confidentiality that applies to a FOIA request. It does not by its terms confer any rights beyond the right to inspect a non-taxpayer specific file. It does not confer any right to the disclosure of taxpayer-specific return information in response to a FOIA request. And finally, it does not confer by its terms any right to obtain taxpayers' return information from other non-public sources.

EPIC's contrary reading of Section 6103(k)(1) is supported by nothing but straw man arguments, strained discussions of other provisions of the Internal Revenue Code with different language, and constantly-changing explanations of what records, exactly, EPIC has requested. All of those arguments are unavailing.

Section 6103(k)(1) provides a discrete exception to confidentiality for requesters who follow a procedure that EPIC admits *it has not followed*. That procedure, which was within the Secretary of the Treasury's discretion to create, is distinct from FOIA and EPIC cannot rely on it.

Since EPIC's entire cause of action hinges on Section 6103(k)(1), the entire action should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

Argument

EPIC's opposition confirms the merit of the Service's motion. First, EPIC concedes that it lacks consent or a qualifying material interest to obtain the returns or return information of third parties. Second, it concedes that it seeks returns related to any Accepted Offers in Compromise, but offers no colorable legal authority permitting it to obtain returns. And finally, EPIC's arguments as to why Section 6103(k)(1) requires public disclosure without limitation of Accepted Offers in Compromise and related return information all fail because they are contrary to the statute, the Court of Appeals' opinion in *EPIC I*, and common sense. Consistently, this Court has held that even if an Internal Revenue Code provision requires disclosing certain information, such a non-FOIA provision does not prohibit the government from asserting FOIA exemptions to withhold the same information. In short, all of the records that EPIC requests are confidential returns or return information and therefore exempt from disclosure.

I. EPIC CONCEDES THAT IT LACKS CONSENT OR A MATERIAL INTEREST TO OBTAIN THE RETURNS AND RETURN INFORMATION OF OTHERS

EPIC concedes that "under most circumstances, return information may not be released by the IRS without proof of the taxpayer's consent or the requester's material interest." Opposition to Motion to Dismiss ("Opp'n") at 11. As in *EPIC I* – EPIC's first unsuccessful attempt to obtain some of the same third-party returns and return information – EPIC concedes that it has not obtained (and cannot obtain) taxpayer consent and that it lacks a statutorily-defined material interest. Instead, it argues that Section 6103(k)(1) "*requires* the disclosure of particular return information, notwithstanding the 'general rule' of confidentiality under Section 6103(a)." *Id.* (emphasis in original). As discussed *infra*, those arguments are all unavailing.

II. SECTION 6103(k)(1) DOES NOT AUTHORIZE THE TYPE OF DISCLOSURE THAT EPIC SEEKS THROUGH FOIA AND THIS LAWSUIT

As the Service showed in its opening brief, EPIC's action fails because all of the returns and return information it requested via the FOIA are "exempt in their entirety" under Exemption 3. *EPIC I*, 910 F.3d at 1239-40. EPIC's Opposition tries to avoid Exemption 3 and Section 6103(a) by invoking Section 6103(k)(1) and attempting to shoehorn all of the records it seeks into that section's coverage. But Section 6103(k)(1) does not apply to the FOIA at all, so it does not provide an exception to confidentiality for the records EPIC requested in the FOIA request at issue. Even if Section 6103(k)(1) were relevant to this action, it does not apply to returns.

A. Section 6103(k)(1) Does Not Apply to FOIA

EPIC argues that § 6103(k)(1) requires the Service to disclose return information via the FOIA. According to EPIC, even if Section 6103(k)(1) empowers the Secretary to create a public inspection process for certain return information separate from FOIA, Section 6103(k)(1) is *also* an "exceptionally broad" exception to confidentiality under the FOIA. Opp'n at 17.

EPIC's suggestion that 6103(k)(1) does double duty as both a narrow affirmative disclosure provision *and* a broad exception to non-disclosure under the FOIA does not stand up to scrutiny. Section 6103(k)(1), by its terms, grants the Secretary the discretion to determine the necessary means of disclosing return information related to Accepted Offers in Compromise. Accordingly, the Secretary created a Public Inspection File and related inspection process. *See* 26 C.F.R. § 601.702(d)(8). EPIC has not followed that process, and indicates that it has no intention of following that process. EPIC's counterarguments for why it need not follow that process all fail.

1. Section 6103(k)(1) Authorizes the Creation of a Public Inspection File and Nothing More

Section 6103(k)(1) authorizes the Service to create a Public Inspection File and to include in that file such return information *as the Service determines is necessary* for the public to inspect accepted offers-in-compromise. The process by which a member of the public may do this is clear: the Service maintains physical public inspection files with abstracts of accepted offers-in-compromise at various service centers around the United States. *See Internal Revenue Manual,* 5.8.8.9. A member of the public who wishes to view these abstracts can make an appointment to look through the public inspection file for them[1].

It does not follow, however, that § 6103(k)(1) allows the Service to release returns and return information via the FOIA. These records are "exempt in their entirety" under Exemption 3 of the FOIA. *EPIC I*, 910 F.3d at 1239-40. The only way by which a third-party may access these records is by using the process established by Treasury for requesting access to the public inspection file.

EPIC's argument that Section 6103(k)(1) is also a blanket exception to confidentiality for FOIA purposes is contrary to the statute's language and history. The discretion to decide what return information is necessary to allow inspection of accepted offers-in-compromise lies with the Secretary. T.D. 5927, 1952-2 C.B. 298 (1952) ("The inspection authorized by. . . this section shall be subject to such rules, and shall be made only under such circumstances, as the Secretary

[1] The Service has recently made changes to the process by which a member of the public may view a public inspection file. As of September 2018, members of the public may request public inspection of accepted offers-in-compromise by submitting a request form by mail or an e-fax number and the Offer in Compromise file number. The Service recently updated the procedure again to allow requests by additional searchable fields, including taxpayer name (*see infra* at 11). However, at the time that EPIC made its FOIA request, and at all times relevant to this case, public inspection of accepted offers-in-compromise was accomplished at the physical service centers described on page 5.

of the Treasury, or such official as he may designate, shall determine to be in the public interest."). Accordingly, the Secretary has determined that § 6103(k)(1)'s public inspection mandate is satisfied by the creation of a public inspection file containing an abstract of an accepted offer in compromise, available at one of seven centers located throughout the United States. EPIC has not argued that the procedure chosen by the Secretary is unreasonable; nor has it even tried to follow this procedure. Instead, it complains that it cannot obtain third-party taxpayer returns and return information via the FOIA.

EPIC says that "Congress neither permitted nor intended such a limitation on § 6103(k)(1), and that "if a member of the public seeks to make *any* type of examination of *any* accepted offer-in-compromise," the Service must both permit inspection of, and hand over, return information EPIC deems necessary to inspect any offer-in-compromise. Opp'n at 18 (emphasis in original).

EPIC's understanding of Section 6103 is backward: Section 6103 is not a statute of disclosure, but rather a statute of non-disclosure, and where Congress has delineated exceptions to that scheme of non-disclosure, it has done so carefully and narrowly. Section 6103 is an exempting statute within the meaning of the FOIA, and records protected under Section 6103(a) are generally exempt from disclosure under the FOIA. *Lehrfeld v. Richardson*, 132 F.3d 1463, 1466 (D.C. Cir. 1998); *see also Shannahan v. IRS*, 672 F.3d 1142, 1145, 1150 (9th Cir. 2012) *and Chamberlain v. Kurtz,* 589 F.2d 827, 840 (5th Cir. 1979). Even if the records EPIC seeks were required to be disclosed outside the FOIA context, they would still be protected from disclosure under the FOIA. *See Vento v. IRS*, 714 F. Supp. 2d 137, 149 n.2 (D.D.C. 2010) (citing *EduCap v. IRS*, No. 07-CV-2106, 2009 WL 416428, at *4 (D.D.C. Feb. 18, 2009) (disclosure

under 26 U.S.C. 7602(c) of names of third parties contacted by Service during examination does not obligate Service to disclose same information under the FOIA)).

Congress need not have written any express limitation on the disclosure of records into Section 6103(k)(1), because Section 6103's blanket rule is non-disclosure of returns and return information. Section 6103(k)(1) is not the wide-open door that EPIC says it is. Instead, (k)(1)'s narrowly drawn exception to non-disclosure gives the Secretary the discretion to determine where and how to allow the public to inspect certain tax return information, as well as what, if any, disclosures are necessary to effect such inspections.

2. EPIC's Arguments that Section 6103(k)(1)'s Use of the Phrase "Public Inspection" Presumes that it Applies to FOIA All Fail

EPIC raises a litany of arguments supposedly supporting its claim that the Section of 6103(k)(1) is an exception to Exemption 3 of the FOIA. Among them, EPIC suggests incorrectly that the Service has asserted that Accepted Offers in Compromise are beyond the FOIA, that the Service's implementation of a new written request process proves that it processes Section 6103(k)(1) information under the FOIA, and that Section 6104 and 6110 illustrate that Congress intended the FOIA to reach Accepted Offers in Compromise. All of these arguments are unpersuasive. The Service addresses each in turn.

a. EPIC's suggestion that the Service has argued that Offers in Compromise are Not Subject to FOIA is wrong

EPIC dedicates most of its brief to knocking down the argument that "(k)(1)'s public 'inspection' requirement should be read to exclude FOIA requests as a permissible means of inspecting records." Opp'n at 17. EPIC offers various reasons why "public inspection" as that term is used in (k)(1) must be read to include "disclose in response to a FOIA request." According to EPIC, this interpretation is required because : (1) the Internal Revenue Code defines "disclosure" as "making known to any person in any manner whatever" (Opp'n at 17);

(2) the word "inspection" actually broadens the meaning of "disclosure" in (k)(1) because the statute defines "inspection" as "*any* examination of a return or return information" (*id.* at 18); and (3) the Treasury Regulations contemplate that accepted offers in compromise may be provided in response to a FOIA request (*id.* at 24-25). EPIC suggests throughout its opposition that the Service has, essentially, taken the position that Accepted Offers in Compromise are not subject to FOIA.

The primary problem with EPIC's line of attack is that it is a straw man. The Service never argued that a requestor may not obtain an accepted offer in compromise by means of a FOIA request. Any individual can obtain an accepted offer in compromise via the FOIA if he or she is the taxpayer, submits a consent, or establishes a material interest, just like any other return information. In fact, that is the only way to obtain Accepted Offers in Compromise that are greater than a year old. The Internal Revenue Manual says as much. The Service's argument (as discussed *supra* at 4-6) is not that FOIA is inapplicable to a request for records contained in the Public Inspection File, but instead that Section 6103(k)(1) is not an exception to confidentiality for a FOIA request.

EPIC attempts to address this point by arguing that the statutory definition of "inspection" is broad enough to encompass "filing a FOIA request" under Section 6103(k)(1). Opp'n at 18. EPIC's reading of (k)(1) is strained. EPIC is correct that "disclosure" is defined as any manner of "making [return information] known" and that "inspection" is defined in Section 6103 to include "any examination." 26 U.S.C. § 6103(b)(7)-(8). But EPIC ignores the fact that, as a matter of statutory construction (and, frankly, syntax) *both* terms are limited in Section 6103(k)(1) by the phrase "to the extent necessary." The Service's mandate to disclose return information does not contemplate "making" that information "known" in every possible way.

Rather, it may only disclose "to the extent necessary to permit inspection." As discussed *supra* at 5, the Service has concluded that the "necessary" manner of disclosure under Section 6103(k)(1) is to disclose selected return information from non-public files[2] onto an Accepted Offer in Compromise Report (an abstract of the accepted Offer in Compromise) and to make those abstracts available in the Public Inspection File.

EPIC next argues that the Treasury Regulations show that the right to "inspect" is nearly limitless because "members of the public have the right to 'copy' and retain records from the Public Inspection Files and to carry out their examination of those records elsewhere." Opp'n at 24. According to EPIC, if "the 'inspection' provided for in (k)(1) were limited solely to in-office viewings, the Service's copying policy" would amount to a "wrongful disclosure" under 26 U.S.C. § 7213. *Id.* This is nonsensical for two reasons. First, the very regulation on which EPIC relies contemplates, by its terms, an *in-person inspection of the Public Inspection File* "in the location designated [by the Service]." 26 C.F.R. § 601.702(d)(8). It does not even suggest any other kind of inspection. Second, the wrongful disclosure statute only allows the recipients of wrongfully disclosed returns return information to be punished extent they "willfully . . . print or publish [that information] in any manner not provided by law." 26 U.S.C. § 7213(a)(3). The

[2] EPIC's suggestion that Section 6103(k)(1) reaches non-public taxpayer-specific files is also wrong (as noted *supra*), as is its reading of *Smart-Tek*. Even if Accepted Offers in Compromise *also* existed in a taxpayer's individual master account file with the Service, they would be unavailable to any member of the public without consent or a material interest. The Court in *Smart-Tek* confirmed that. 344 F. Supp. 3d 1166, 1173-74 (S.D. Cal. 2018) (return information from third parties' files requires consent and "plaintiff failed to obtain such consent here."). The court held only that, to the extent other taxpayers' names were disclosed on public-facing notices of federal tax lien and appeared in the requester's *own file*, it was "no longer privileged under § 6103." The Court expressly noted that, nonetheless, "those taxpayers' other return information remains protected." *Id.* at 1174.

fact that members of the public are permitted to inspect *and* to copy the abstracts is the very reason that the wrongful disclosure statute is immaterial.

EPIC also cites to 26 C.F.R. §§ 601.702(d)(4), (d)(5), and (f)(7) as supposed proof that "open to public inspection" means "available by FOIA request." Opp'n at 25. These regulations do not help EPIC either. Section (d)(4) and (d)(5) relate to the copying of applications for tax exempt status and supporting documents under Section 6104 of the Code. As discussed *infra at* 13-14*,* the language of Section 6104 does not mirror Section 6103(k)(1). Similarly, subsection (f)(7) relates to inspections under 26 U.S.C. § 6110, which (as also discussed *infra*) set out its own, *non-FOIA*, disclosure regime. And, EPIC contradicts itself when it goes to great pains in its brief to differentiate Section 6103(k)(1) from Section 6110.

Finally, EPIC cites to 26 C.F.R. § 601.702(b)(1)(iii) which provides that "for records required to be made available for public inspection and copying pursuant to 5 U.S.C.§ 552(a)(2) . . . the IRS shall make such records available on the Internet within one year after such records are created." Opp'n at 25. EPIC posits that "if allowing the world at large to download records of the IRS's website constitutes 'public inspection' in the agency's view, that phrase certainly encompasses the disclosure of documents to a FOIA requester." *Id*.

EPIC's contention again supports the Service's position instead of its own. Unlike Section 6103(k)(1), 5 U.S.C. § 552(a)(2) is a provision of the FOIA itself that requires agencies to make certain information "available for public inspection," in an electronic reading room. Importantly, the very next section of the FOIA makes clear that members of the public must obtain those records *from the reading room*, rather than through a FOIA "request for records." 5 U.S.C. § 552(a)(3)(A) ("Except with respect to records made available [in the electronic reading room] . . . each agency, upon any request for records . . . shall make the records promptly

available to the person."). An agency is therefore not required to respond to a FOIA request for reading room materials. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 70 (D.C. Cir. 1990) (*citing Tax Analysts v. DOJ*, 845 F.2d 1060, 1066-67 (D.C. Cir. 1988)).

b. Form 15086 is immaterial because it relates to a non-FOIA disclosure procedure for the Public Inspection File that was not in place when EPIC made its FOIA request

EPIC dramatically asserts that the Service's publishing of a written form (Form 15086) for requests to view the Public Inspection File is "a death knell" for the Service's motion. Opp'n at 15. That is so, EPIC says, because Form 15086 permits a requester to identify an Accepted Offer in Compromise by "number, name [and/or] state" and allows them to obtain copies of the requested abstracts of Accepted Officers in Compromise by fax or mail. Opp'n at 10, 15. These two facts apparently are offered in support of EPIC's argument that it may seek the Public Inspection File and information *not* in the Public Inspection File. Far from supporting EPIC's position, Form 15086 actually contradicts it.

At the outset, EPIC glosses over the fact that Form 15086 did not exist when EPIC made its FOIA request in February, 2018, nor did the process of responding to such Form 15086 requests by mail or fax. Rather, the form and process were put in place in September 2018. And EPIC has not – to the Service's knowledge – availed itself of this new procedure, much as it did not make any attempt before filing this case to follow the procedure in place at that time, by inspecting the public inspection files at field offices.

EPIC's reliance on Form 15086 does not help its case. EPIC asserts on page after page of its brief that Section 6103(k)(1) does not authorize a disclosure regime separate from FOIA, and that (even if it did) EPIC need not follow that procedure. Yet Form 15086 – if nothing else – makes clear what the Service has said all along in this case: Section 6103(k)(1) permits inspection of the public inspection file separate from the FOIA. The form itself, tellingly, does

not mention FOIA and is not even directed to the Service's FOIA Disclosure Office. EPIC's attempt to use a form and a procedure as evidence that it need not fill out the form or the follow the procedure is nonsensical in the extreme.

Moreover, EPIC does not even try to explain why the Form 15086 – which relates to disclosure of the Public Inspection File itself – somehow proves that EPIC may obtain information "regardless of where and in what form the IRS maintains them" (Dkt. No. 1-5, p. 2) without following the standard FOIA requirements. There is no conceivable reason why it would. Again, EPIC is arguing about the availability of the Public Inspection File while ignoring the fact that it has not even attempted to inspect that file and has requested nonpublic files as well.

In the end, the only thing that Form 15086 proves (and then, only for a future case, rather than this one given the timing of its publication) is that the Service's position is correct. A member of the public with no other right to return information related to accepted offers in compromise may: (1) fill out a non-FOIA form and follow a non-FOIA procedure to obtain an abstract from the Public Inspection File; and (2) may only obtain the public inspection file's contents and nothing else.

c. 26 U.S.C. § 6103(f)(4)(A), § 6104 and 6110 are inapposite

In arguing that all FOIA requesters should be able to receive third-party taxpayer records under Section 6103(k)(1), EPIC compares Section 6103(k)(1) to 26 U.S.C. §§ 6103(f)(4)(A), 6104 and 6110, all of which contemplate disclosures to the public and some sort of "inspection." Opp'n at 19-22. But that is all those provisions have in common with Section 6103(k)(1). Section 6103(f)(4)(A), by its terms, contains a far broader "inspection" provision than Section 6103(k)(1). Similarly, Section 6104's disclosure mandate is far broader than Section 6103(k)(1)'s. And finally, Section 6110 is its own separate disclosure scheme outside of

the FOIA. None of these provisions have similar language to Section 6103(k)(1); they are all red herrings.

EPIC first argues that 6103 "gives no hint that inspection must occur at an IRS Office." Opp'n at 19. EPIC premises this argument first on another provision of Section 6103 – Section 6103(f)(4)(A) – which allows congressional committees the power to "inspect returns and return information at such time and in such manner as may be determined by the committee chairman or committee chief of staff." Opp'n at 19. This argument is a textual dead end. Section 6103(k)(1) does not, like Section 6103(f)(4)(A), allow for inspection "at such time and in such manner" as a member of the public desires. The fact that Congress included such broad language in Section 6103(f)(4)(A) but not in Section 6103(k)(1) proves the Service's point, not EPIC's.

EPIC next suggests that Section 6103(k)(1) is like 26 U.S.C. § 6104. Opp'n at 20-21. Section 6104 requires the Service to allow public inspection of certain taxpayer records at the Service's national office. But EPIC's reliance on Section 6104 is misplaced. Crucially, Section 6104 requires that such records "shall be open to public inspection." EPIC says that, because the records contemplated by Section 6104 are available via the FOIA, so too must taxpayer records under Section 6103(k)(1) be available via the FOIA, to any requester, without qualification. Pl. Opp. at 20-21.

In making this argument, EPIC fatally ignores differences in the language of the two statutes. Section 6104 says that records "shall be open to public inspection." Congress did not qualify that mandate in any way. EPIC is correct in noting that the D.C. Circuit has found that § 6104 is "'an exception to the exception from the general disclosure rule offered by FOIA Exemption 3 and I.R.C. § 6103.'" Opp'n at 21 (quoting *Tax Analysts v. IRS,* 214 F.3d 179, 183

(D.C. Cir. 2000). But compare Section 6104's commandment that those records "*shall be open* to public inspection" with Section 6103(k)(1)'s far more qualified language: "Return information shall be disclosed to the public *to the extent necessary* to permit inspection of any accepted offer-in-compromise."

Again, Section 6103(k)(1) grants the Secretary the discretion to determine the extent of disclosure necessary. The Secretary has accordingly determined that Section 6103(k)(1)'s limited public inspection and disclosure mandate is satisfied by the creation and maintenance of public inspection files at the Service's regional offices, which any member of the public may visit in order to inspect abstracts of accepted offers-in-compromise. It does not follow that such records would be freely available to a FOIA requester without a showing that the FOIA requester is entitled to those records by virtue of a qualifying material interest or consent from the taxpayer to receive the records.

EPIC next argues that Section 6103(k)(1) is *not* like 26 U.S.C. § 6110, which is a comprehensive disclosure scheme that duplicates and displaces the provisions of the FOIA. Opp'n at 22-23. On that point, EPIC is right: the Service has never contended that the Section 6103(k)(1) is such a comprehensive scheme that the provisions of the FOIA do not apply to any request for Accepted Offers in Compromise. In fact, the Service's entire point is that the FOIA *does* apply to Accepted Offers in Compromise, to include FOIA Exemption 3.

This is a straw man argument, and the Court should treat it accordingly. The Service has explicitly recognized FOIA's application to Accepted Offers in Compromise and that such records can be requested under the FOIA. The point that the Service made in its moving papers, and which EPIC attempts to circumvent, is that in order to receive those records, a requester must have the proper authorization or the necessary material interest. EPIC has never contended

that it has authorization to receive the requested returns and return information or that it has a material interest that would allow it to receive those records. Instead, it demands that the Service release third-party tax returns and return information to it, via the FOIA, without the necessary authorization or demonstrated material interest. EPIC's attempts to invoke 26 U.S.C. §§ 6103(f)(4)(A), 6104, and 6110 to justify that demand are nonsensical and without support in the law.

B. EPIC Cannot Obtain Returns Under Section 6103(k)(1)

Whatever type of disclosure Section 6103(k)(1) permits, it does not permit the disclosure of tax returns. The statute is unambiguous on that point: it only permits the disclosure of "return information necessary to permit public inspection." 26 U.S.C. § 6103(k)(1). "Returns" and "return information" are separately defined within Section 6103 (IRS Op. Mem. at 8 n.6), and the Secretary has sole authority to determine what "return information" is "necessary" to permit inspection.

EPIC responds that "'returns' are a specific subset of 'return information' – not a distinct category" because the term "'return information' is meant to cover all possible appearances of sensitive taxpayer information in IRS records not to create separate classes of records." Opp'n at 36. EPIC points to Section 6103(c) in support of this argument, noting that the "return information shall not be disclosed" even with consent "if the Secretary determines that such disclosure would seriously impair Federal tax administration." *Id.* at 37. According to EPIC, "presumably Congress intended to prohibit ill-advised disclosures of both return information and returns, even though the text of 6103(c) only mentions 'return information.'" *Id.*

EPIC's argument is off the mark. There is no indication that Congress intended to subsume "returns" into "return information." To the contrary, Congress has left no ambiguity in Section 6103 between returns and return information. Indeed, Congress gave each a separate

definition. 26 U.S.C. § 6103(b)(1) (returns) and (2) (return information). And, Congress did not include "return" within the description of information that makes up "return information."

Further, Congress distinguished the disclosure of returns and return information when it wanted the information treated differently. For example, Section 6103(e) ("Disclosure to persons having material interest") authorizes the disclosure of only returns to various groups of people with a demonstrated material interest. *See* IRS Op. Mem. at 8 n.5 (listing material interest categories). The only provision of Section 6103(e) that authorizes the Service to disclose return information is Section 6103(e)(7), which *permits* the discretionary disclosure of return information *in addition* to a return itself "to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair federal tax administration." That disparate treatment of "returns" and "return information" for disclosure purposes totally undercuts EPIC's argument. Relevant to this case, Congress permits the disclosure to a Public Inspection File of return information, but § 6103(k)(1) does not mention returns.

These provisions show that the Service's authority to disclose return information is extremely limited, whereas its authority to withhold return information is extremely broad. To that end, even if EPIC were right that "return information" could be read to include "returns," the Service still has the statutory authority to determine whether the disclosure of returns is "necessary." It is undisputed that no returns are included in the Public Inspection File, so that determination has already been made and EPIC raises no legal claim challenging it. Accordingly, EPIC cannot obtain returns under Section 6103(k)(1).

Conclusion

For the reasons stated in the Service's opening brief and reply, the Court should dismiss this action under *EPIC I* for failure to state a claim under the FOIA.

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Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ Ryan O. McMonagle
RYAN O. MCMONAGLE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044
202-307-1355 (v)
202-514-6866 (f)
Ryan.McMonagle@usdoj.gov

/s/ Megan E. Hoffman-Logsdon
MEGAN E. HOFFMAN-LOGSDON
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227, Ben Franklin Station
Washington, D.C. 20044
202 616-3342 (v)
202 514-6866 (f)
Megan.E.Hoffman-Logsdon@usdoj.gov

Of Counsel:

JESSIE K. LIU
United States Attorney