IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	Civ. Action No. 18-902 (TJK)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully opposes the Motion by Defendant Internal Revenue Service ("IRS") to dismiss EPIC's Complaint. IRS Mot. Dismiss, ECF No. 9. The IRS's failure to process EPIC's FOIA request is contrary to law, the agency's regulations, and even the agency's prior conduct in this specific case. The agency's action is necessarily subject to judicial review.

EPIC's FOIA request for "accepted offers-in-compromise," unlike the vast majority of FOIA requests for tax records, falls within a provision of the Internal Revenue Code that *requires* public disclosure. 26 U.S.C. § 6103(k)(1). For this reason, EPIC had no obligation to provide proof of taxpayer consent as the agency now contends. The IRS ceded this point when it agreed to process EPIC's FOIA request on an expedited basis. Now having failed to make a determination on EPIC's request within the statutory deadline, the IRS claims it has no obligation to process the request. But the IRS has long since waived the argument that EPIC's request was defective, and the agency cannot use that belated claim to defeat judicial review or the plain text of its own regulations.

Even if the IRS could erase its prior conduct in this case, EPIC would still be entitled to judicial review of its FOIA request. EPIC filed a perfected request for records that are subject to disclosure under two different statutes and an Executive Order. *See* § 6103(k)(1); 5 U.S.C. § 552(a)(3)(A); Exec. Order No. 10,386, 17 Fed. Reg. 7,685 (Aug. 22, 1952). IRS regulations do not require proof of consent where, as here, the requested information is freely disclosable—and if they did, those regulations would be unlawful and unreasonable as applied to EPIC's request. Nor can the IRS point to its limited procedures for inspecting offers-in-compromise in person to excuse performance of the agency's entirely separate FOIA obligations.

Because EPIC has plausibly alleged multiple violations of the FOIA and exhausted its administrative remedies, the Court should deny the IRS's Motion to Dismiss. Instead, the Court should order the agency to immediately conduct a reasonable search and to promptly release all nonexempt responsive records.

BACKGROUND

On February 5, 2018, EPIC submitted a FOIA Request to the IRS seeking four categories of tax records related to President Donald J. Trump and his associated businesses. Compl. Ex. 1, ECF No. 1–5. With respect to President Trump, EPIC requested:

> (1) All accepted offers-in-compromise relating to any past or present tax liability of Donald John Trump, the current President of the United States.
>
> (2) All other "return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise" described in Category 1 of this request. Records responsive to Category 2 include, but are not limited to, "income, excess profits, declared value excess profits, capital stock, and estate or gift tax returns for any taxable year," as applicable.

Id. at 1–2 (quoting 26 U.S.C. § 6103(k)(1); Exec. Order No. 10,386, 17 Fed. Reg. at 7,685). "An offer in compromise (OIC) is an agreement between a taxpayer and the Internal Revenue Service

that settles a taxpayer's tax liabilities for less than the full amount owed." Internal Revenue Serv., *Topic Number 204—Offers in Compromise* (Mar. 1, 2018).[1]

EPIC also attached to its FOIA Request a fifteen-page list, labeled Appendix A, of business entities with which President Trump is associated. *Id.* at 9–23. With respect to the business entities identified in Appendix A, EPIC requested:

> (3) All accepted offers-in-compromise relating to any past or present tax liability of any entity identified in Appendix A of this request.
>
> (4) All other "return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise" described in Category 3 of this request. Records responsive to Category 4 include, but are not limited to, "income, excess profits, declared value excess profits, capital stock, and estate or gift tax returns for any taxable year," as applicable.

Id. at 2 (quoting 26 U.S.C. § 6103(k)(1); Exec. Order No. 10,386, 17 Fed. Reg. at 7,685). EPIC emphasized that it sought "*all* of the above records for *all* years regardless of where and in what form the IRS maintains them." *Id*. (emphasis in original). EPIC also explained that the records described may "take the form of a Public Inspection File, an AOIC Masterfile Screen transcript, a TDS transcript, a Form 656, a Form 433, a Form 7249, or any other agency document." *Id.* at 1 (internal citations omitted). EPIC sought "news media" fee status under 5 U.S.C. § 552(4)(A)(ii)(II) and a waiver of all duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii). Compl. Ex. 1 at 6–8.

By letter dated February 8, 2018, IRS Disclosure Manager David Nimmo acknowledged receipt of EPIC's February 5, 2018 FOIA Request. Compl. Ex. 2, ECF No. 1–5. Nimmo stated that the IRS was "granting [EPIC]'s request to waive fees" and "granting [EPIC]'s request for expedited processing." *Id.* "We will search for documents responsive to the request," Nimmo

[1] https://www.irs.gov/taxtopics/tc204.

wrote. *Id.* "The request has priority and we will make every effort to respond as quickly as possible." *Id.*

On March 6, 2018—twenty working days after EPIC filed its FOIA Request—EPIC Counsel John Davisson sent an email to Tax Law Specialist Michael Young asking Young to "advise on when the IRS will complete processing of EPIC's request[.]" Compl. Ex. 3, ECF No. 1–5. Later that day, Young responded to Davisson by email. Compl. Ex. 4, ECF No. 1–5. Young stated that "The IRS is requesting an extension of the due date (through March 30, 2018) to provide a response to your request." *Id*. at 1. EPIC did not consent to such an extension. Young also communicated the IRS's request for an extension by letter dated March 6, 2018. Compl. Ex. 5, ECF No. 1–5. "We have extended the response date to March 30, 2018 when we believe we can provide a final response," Young wrote. *Id.* at 1. Again, EPIC did not consent to such an extension. Compl. ¶ 35, ECF No. 1.

On April 2, 2018—39 working days after EPIC filed its FOIA Request—Davisson sent an email to Young to inquire about the status of EPIC's FOIA Request. Compl. Ex. 6, ECF No. 1–5. Later that day, EPIC received a letter from Young dated March 28, 2018. Compl. Ex. 7, ECF No. 1–5. Young requested on behalf of the IRS "additional time to April 27, 2018." *Id.* at 1. Once again, EPIC did not consent to such an extension. Compl. ¶ 38. The IRS failed to make a determination regarding EPIC's FOIA Request within the time period required by 5 U.S.C. § 552(a)(6)(B).

On April 17, 2018—the 50th working day after the IRS received EPIC's FOIA Request—EPIC filed this suit.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Greenpeace, Inc. v. DHS*, No. CV 17-479 (TJK), 2018 WL 2048876, at *6 (D.D.C. May 1, 2018) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012)). The Federal Rules of Civil Procedure "do not require 'detailed factual allegations' for a claim to survive a motion to dismiss," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Though plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," it is not a "probability requirement." *Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint should be allowed to proceed 'even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

"FOIA reverses the normal burden of proof, requiring the agency, not the plaintiff, to prove that it conducted an adequate search and to justify any exemptions it claims." *Greenpeace*, Inc., No. CV 17-479 (TJK), 2018 WL 2048876, at *9. "At all times, courts must bear in mind

that FOIA mandates a strong presumption in favor of disclosure . . . ." *Citizens for Responsibility & Ethics in Washington v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011)).

ARGUMENT

The IRS's arguments in support of dismissal border on the frivolous, and the Court should reject them in their entirety. EPIC filed a fully compliant FOIA request for offers-in-compromise and related return information pertaining to President Trump and associated businesses, which the IRS was obligated to process. *See* 5 U.S.C. 552(a)(3); 26 C.F.R. § 601.702(c). The IRS admitted as much in its first response. Compl. Ex. 2. ("We are granting your request for expedited processing. We will search for documents responsive to the request."). EPIC constructively exhausted its administrative remedies when the IRS failed to issue a final determination within twenty working days, thereby entitling EPIC to judicial review. *See* 5 U.S.C. §§ 552 (a)(4)(B), (6)(A)(i), (6)(C)(i); 26 C.F.R. §§ 601.702(c)(9), (12)–(13). The IRS also conceded EPIC's right to judicial review in its second response. Compl. Ex. 5 at 1 ("You may file suit after March 6, 2018."). Now—in a misguided effort to evade this Court's jurisdiction—the IRS protests that EPIC's request was never actually perfected, and that judicial review is therefore precluded. This post hoc flip-flop by the IRS is untimely and inconsistent with the law and the agency's own prior acts. EPIC has a right to access the requested records under the FOIA and under § 6103(k)(1); EPIC constructively exhausted its remedies; and EPIC has now properly invoked this Court's jurisdiction.

Even if the IRS could erase the administrative record in this case, there would still be no basis for dismissal: EPIC's FOIA request was perfected upon submission. EPIC's request seeks records that are subject to mandatory public disclosure under three interlocking legal authorities:

the FOIA, 5 U.S.C. § 552(a)(3)(A) (mandating prompt disclosure of non-exempt records reasonably described in a conforming request); a provision of the tax confidentiality and disclosure statute, 26 U.S.C. § 6103(k)(1) (mandating "disclos[ure]" of return information "to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise"); and a presidential order providing for inspection of such records, Exec. Order No. 10,386, 17 Fed. Reg. at 7,685 (requiring that "income, excess profits, declared value excess profits, capital stock, estate or gift tax returns for any taxable" be open "to the extent necessary to permit the inspection of any accepted offer in compromise"). Despite unambiguous directives by both Congress and the President that accepted offers-in-compromise (and certain related return information) are public records, the IRS claims that it can refuse to process a FOIA request for those records unless EPIC satisfies an inapplicable agency regulation requiring authorization for certain tax information requests. The IRS misreads its own FOIA regulations, identifies no statutory basis for applying a proof-of-consent requirement to a § 6103(k)(1) request, and ignores the agency's nondiscretionary disclosure obligations. The Court should deny the IRS's motion and order the agency to identify and release all nonexempt responsive records.

I. EPIC IS ENTITELD TO PROCESSING OF ITS FOIA REQUEST AND DISCLOSURE OF RESPONSIVE RECORDS BECAUSE EPIC CONSTRUCTIVELY EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

EPIC constructively exhausted its administrative remedies in this case, and the Court should accordingly deny the IRS's Motion to Dismiss. EPIC filed suit more than twenty working days after the IRS received EPIC's request (and subsequently granted expedited processing). Compl. Ex. 2. The agency never identified any imperfection with EPIC's request prior to the filing of this suit. The IRS is bound by its earlier decision on EPIC's request and cannot reverse its prior position months later after litigation has already begun.

A. EPIC constructively exhausted its administrative remedies as soon as the IRS violated the FOIA's twenty-day processing requirement.

Under the FOIA, "Any person making a request to any agency for records under [5 U.S.C. § 552(a)(3)] shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions . . . ." 5 U.S.C. § 552(a)(6)(C)(i); *see also Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) ("A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the request within twenty days."); *see also Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990) ("If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit."). Where an agency fails to meet the twenty-day deadline of 5 U.S.C. § 552(6)(A), "the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Greenpeace, Inc. v. DHS*, No. CV 17-479 (TJK), 2018 WL 2048876, at *9 (D.D.C. May 1, 2018) (quoting *Citizens for Responsibility & Ethics in Washington ("CREW") v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013)).

There is no question that EPIC constructively exhausted its administrative remedies, as the timeline in this case plainly demonstrates. *See* Mem. Supp. IRS Mot. Dismiss ("IRS Mem.") 2–3. EPIC filed the FOIA request on February 5, 2018, *see* Compl. Ex. 1, and the IRS received that request on the same day. *See* Compl. Ex. 2. By letter dated February 8, 2018, the IRS acknowledged receipt of EPIC's request, "grant[ed EPIC's] request for expedited processing," and stated that the IRS "will search for documents responsive to the request." *Id.* By letter dated March 6, 2018, the IRS conceded that it was "unable" to complete processing of EPIC's request within the twenty-day period allowed by law and admitted that EPIC "may file suit after March 6, 2018." Compl. Ex. 5 at 1. By letter dated March 28, 2018, the IRS again conceded that it

"need[ed] additional time" to process EPIC's request. Compl. Ex. 7 at 1, ECF No. 1–5. EPIC—having long since exhausted its administrative remedies, 5 U.S.C. § 552(a)(6)(C)(i)—filed its Complaint on April 17, 2018, fifty working days after the IRS received EPIC's request. Compl. ¶ 39. EPIC served the Complaint and summons on the U.S. Attorney on April 24, 2018. ECF No. 5. Given these undisputed facts and the IRS's failure to "adhere to FOIA's explicit timelines," the agency "cannot rely on the administrative exhaustion requirement to keep [EPIC's] case[] from getting into court." *CREW*, 711 F.3d at 189. Dismissal of EPIC's Complaint would therefore be improper.

B. The IRS cannot avoid its decision to accept and process EPIC's request or the agency's failure to adhere to the FOIA's timeline.

The IRS, undeterred by statutory text and D.C. Circuit case law, urges precisely the result the FOIA and *CREW* forbid. The agency contends that EPIC's suit should be barred for failure to exhaust administrative remedies because of a purported defect in EPIC's request that the agency only raised after EPIC filed suit. IRS Mem. 6–7, 10–12. Even though the IRS at first accepted EPIC's request as perfected and agreed to expedite it, Compl. Ex. 2, the agency now refuses to process EPIC's request and argues that its refusal cannot be subject to judicial review. The IRS's argument simply ignores the constructive exhaustion rule in 5 U.S.C. § 552(a)(6)(C)(i) ("shall be deemed to have exhausted") and the D.C. Circuit's decisions in *CREW*, *Judicial Watch*, and *Oglesby*. Moreover, the agency's argument is fatally flawed in at least four other respects.

First, the FOIA mandates that an agency "*shall* process as soon as practicable any request for records to which the agency has granted expedited processing under [5 U.S.C. § 552(a)(6)(E)]." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added); *see also* 26 C.F.R. § 601.702 ("When a requester demonstrates compelling need, a request *shall* be taken out of order and given expedited treatment." (emphasis added)). When the IRS granted expedition to EPIC's

request, *see* Compl. Ex. 2, the agency waived any right to deny processing that it allegedly had before. The language of § 552(a)(6)(E)(iii) does not give agencies the power to revoke a grant of expedited processing, and it certainly does not permit such revocation to be made by agency counsel four months after the fact when a case is already in litigation. *See Edmonds v. FBI,* 417 F.3d 1319, 1323 (D.C. Cir. 2005) (holding that the FOIA "makes the right to expedition judicially enforceable"). Indeed, the only permissible change to an expedition decision occurs when a *denial* of expedited processing is overturned in the requester's favor. *See* 5 U.S.C. 552(a)(6)(E)(iii). ("Agency action to deny or affirm denial of a request for expedited processing pursuant . . . shall be subject to judicial review . . . ."). Because the IRS irrevocably bound itself to process EPIC's request on an expedited basis, the agency's failure make a final determination within twenty days necessarily constitutes constructive exhaustion. *See* 5 U.S.C. §§ 552(a)(6)(C)(i), (a)(6)(E)(iii).

Second, had there been any defect in EPIC's request—which there was not—the IRS was obligated to identify and announce that defect prior to the start of processing. Upon receipt of any request that "does not comply with" the IRS's FOIA regulations, "the IRS *shall promptly* advise the requester in what respect the request . . . is deficient so that it may be resubmitted or amended for consideration in accordance with this section [26 C.F.R. § 601.702]." 26 C.F.R. § 601.702(c)(1)(i) (emphasis added); *accord* 26 C.F.R. § 601.702(c)(4)(i). ("Requesters shall be notified promptly in writing of any requirements which have not been met or any additional requirements to be met."). The IRS gave no such notice to EPIC. To the contrary, the agency explicitly stated that it would process EPIC's request on an expedited basis. *See* Compl. Ex. 2. And as the IRS's FOIA regulations make clear: "*only* requests for records which fully comply with the requirements of this section [26 C.F.R. § 601.702] can be processed in accordance with

this section." 26 C.F.R. § 601.702(c)(4) (emphasis added). The IRS, in deciding that the agency would process EPIC's request, necessarily determined that the request "fully compl[ied]" with the applicable regulations. *Id.* Counsel for the agency may not simply erase that admission months later after litigation has already begun.

This is precisely the conclusion reached by the court in *Goldstein v. IRS*, 174 F. Supp. 3d 38 (D.D.C. 2016). In *Goldstein*, the plaintiff submitted a FOIA request for his deceased father's tax records, which the IRS determined that it would process. *Id.* at 42–43. The plaintiff later filed suit alleging that the IRS had unlawfully failed to disclose all of the requested records. *Id.* at 44. In moving for summary judgment, the IRS reversed its pre-litigation position and argued that the plaintiff's FOIA request had been imperfect all along because the plaintiff did not have a "material interest" in the requested return information. *Id.* at 50 (quoting 26 U.S.C. § 6103(e)(1)(E)). But the court squarely rejected the agency's last-minute attempt to evade judicial review:

> Because the IRS did not notify Plaintiff "in what respect the request" "[was] deficient," he did not have the opportunity to "resubmit[] or amend[]" his request "for consideration." 26 C.F.R. § 601.702(c)(1)(i). Instead, the IRS unilaterally assumed Plaintiff's material interest in seeking the estate's tax records. . . . The IRS cannot now claim that Plaintiff failed to perfect his request when, according to its own regulations, it denied him the opportunity to do so.
>
> The IRS' regulations emphasize the importance of requesters conforming their demands to the IRS' procedures. . . . The IRS should be held to a standard no less rigorous.

Id. at 50–51. So too here: the IRS may not change its position after the fact. The IRS, having "unilaterally assumed" that EPIC's request was perfected, "cannot now claim that [EPIC] failed to perfect [its] request when, according to [the IRS's] own regulations, it denied [EPIC] the opportunity to do so." *Id.* at 51; *see also Bayala v. DHS*, 827 F.3d 31, 36 (D.C. Cir. 2016) ("Nor can Bayala be compelled to administratively exhaust this new agency decision because that

decision was the byproduct of litigation, not of the pre-litigation administrative decision-making process to which FOIA's exhaustion requirement textually applies."); *Jarvis v. Comm'r, Soc. Sec. Admin.*, No. 17-cv-1813-EGS, 2018 WL 1912882, at *3 (D.D.C. Apr. 23, 2018) (rejecting Social Security Administration's exhaustion argument where agency had failed to tell requester about allegedly fatal defect in his request prior to litigation).

Indeed, this case is even more straightforward than *Goldstein*. Because the *Goldstein* court faced the question of whether the plaintiff had *actually*—rather than constructively—exhausted administrative remedies, the court ordered remand and gave the plaintiff an additional opportunity to exhaust his remedies in fact. *Id.* at 51. But Congress, in declaring that a plaintiff "*shall* be deemed to have exhausted his administrative remedies" as soon as an agency violates the FOIA's deadlines, has established that remand is not appropriate in cases of constructive exhaustion. 5 U.S.C. § 552(a)(6)(C)(i) (emphasis added). The court in *Goldstein* made clear that the IRS may not rewrite history or base its exhaustion arguments on a backdated claim of imperfection that the agency did not, in fact, identify or inform the requester of at the time. *See Goldstein*, 174 F. Supp. 3d at 51. The twenty-day clock began to run the day the IRS received EPIC's FOIA request, a fact which the agency acknowledged when it agreed to process the request. There is nothing the IRS could do on remand to satisfy its original March 6 deadline, which has long since passed.

Third, the IRS expressly conceded—twice in the same document—that EPIC had the right to bring this lawsuit and that the matter was ripe for judicial review. As the IRS wrote in its letter dated March 6, 2018:

> We are unable to provide a response to your request by March 6, 2018, which is the 20 business day period allowed by law. . . .

> You may file suit if you do not agree to an extension beyond March 6, 2018. Your suit may be filed in the U.S. District Court:
>
> - Where you reside or have your principal place of business
> - Where the records are located, or
> - In the District of Columbia
>
> You may file suit after March 6, 2018. Your complaint will be treated according to the Federal Rules of Civil Procedure applicable to actions against an agency of the United States.

Compl. Ex. 5 at 1. EPIC, in filing suit, reasonably relied on the IRS's representation that judicial review would be available. The IRS cannot credibly argue that EPIC should not have done *exactly what the agency said it could do*. Indeed the D.C. Circuit has held that an agency's representation that judicial review is available to a FOIA requester serves to satisfy the exhaustion requirement, even where the requester fails to fully comply with the agency's FOIA procedures. *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004) (holding that "the policies underlying the exhaustion requirement [were] served" where a requester "availed himself of the right to seek judicial review as the CIA told him he could," even though his administrative appeal was four years late).

Fourth, the IRS implies, in conflict with the agency's prior statements, that its obligation to process EPIC's FOIA request was never actually triggered because of previously unidentified imperfections in EPIC's request. In support of this theory, the agency cites to *Dale v. IRS*, 238 F. Supp. 2d 99 (D.D.C. 2002), and *EPIC v. IRS (EPIC I)*, 261 F. Supp. 3d 1 (D.D.C. 2017). IRS Mem. 6. But the agency conspicuously ignores the key difference between these cases and the instant suit. In both *Dale* and *EPIC I*, the IRS promptly notified the plaintiff, well before litigation began, that that the agency believed the plaintiff's request to be noncompliant and suggested how the plaintiff could cure the alleged defect. That stands in marked (and dispositive)

contrast to this case, wherein the IRS accepted EPIC's request as perfected, granted expedited processing, and only deviated from that course once litigation was underway.

In *Dale*, the IRS promptly notified the plaintiff that his request contained four defects. *Dale*, 238 F. Supp. 2d at 101–02. When the plaintiff filed suit eight months later, the Court dismissed the case on exhaustion grounds, reasoning that the IRS had correctly identified critical flaws in the plaintiff's request and that the plaintiff had failed to address them. In *EPIC I*, which is currently on appeal to the D.C. Circuit, *EPIC v. IRS*, No. 17-5225 (D.C. Cir. docketed Oct. 4, 2017), the IRS promptly notified EPIC of its belief that EPIC's request was imperfect and could not be processed. *EPIC I*, 261 F. Supp. 3d at 4. Although EPIC vigorously disputes that conclusion, the facts of *EPIC I* are sharply different from the instant case, where the agency failed to identify any defects before facing suit and affirmatively committed to processing EPIC's request. Other FOIA cases that were dismissed on exhaustion grounds are similarly distinguishable. *See Reedom v. Soc. Sec. Admin*., 192 F. Supp. 3d 116, 118 (D.D.C. 2016) (requester was promptly notified, before litigation, of numerous defects in his requests); *Strunk v. U.S. Dep't of State*, 693 F. Supp. 2d 112, 114 (D.D.C. 2010) (requester was promptly notified, before litigation, of failure to submit privacy waiver with request); *Flowers v. IRS*, 307 F. Supp. 2d 60, 63 (D.D.C. 2004) (requester was promptly notified, before litigation, of defects in his request).

In sum, to accept the IRS's exhaustion arguments is to conclude that an agency may first deem a FOIA request conforming and agree to process it on an expedited basis (expressly representing that judicial review is available); then fail to make a final determination on the request within the time allowed by law; and finally reverse position after the requester files suit to argue that the FOIA request was non-conforming all along. The IRS contends that it should be

rewarded for its belated about-face by escaping both judicial review *and* any obligation to process the FOIA request. This would create a Kafkaesque nightmare for FOIA requesters and for reviewing courts.

It is not hard to imagine the absurd consequences of accepting the IRS's position. Agencies would have no incentive to assess the adequacy of FOIA requests upon receipt. They could decide to reject requests months or years after submission based on minor defects or other trivial "perfection" issues. *See, e.g.*, 26 C.F.R. § 601.702(c)(4)(i)(A) (requiring FOIA requests to be signed). This would place a requester in the position of not knowing whether her FOIA request would ever be processed, even after an agency had expressly agreed to processing. It would render expedited processing determinations largely meaningless and freely revocable at an agency's discretion. *Contra* 5 U.S.C. § 552(a)(6)(E)(iii). It would lure many FOIA requesters into good-faith litigation based on agency statements, only to discover that the agency had reversed its position at the last minute. And it would doubtless result in longer wait times for FOIA requesters, who could be forced refile their requests well after the date of submission thanks to the agency's careless screening. This cannot possibly be the result Congress intended when it enacted the FOIA.

As a final matter, the IRS refers in a footnote to an April 25, 2018 letter—sent after the filing of this suit, *see* Compl. ¶ 39, and after the Complaint was served on the Government, *see* ECF No. 5—in which the IRS attempted to revoke its admission that EPIC had filed a conforming FOIA request. *See* IRS Mem. 3 n.1. As the IRS correctly concedes, this letter is not before the Court and has no bearing on the instant Motion. *See id.* But even if the IRS's April 25 letter were in the record, the letter would be irrelevant to EPIC's exhaustion of administrative remedies. This Court was entitled to exercise jurisdiction as soon as the IRS failed to comply

with the twenty-day statutory deadline of 5 U.S.C. § 552(a)(6)(A), rendering EPIC's remedies constructively exhausted. *See* 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i); Compl. Ex. 5 at 1. EPIC properly invoked that jurisdiction on April 17, 2018, *see* Compl. ¶ 39, and the Court "retains jurisdiction of a FOIA case" until it is "convinced that the agency has released all nonexempt material." *Nw. Univ. v. U.S. Dep't of Agric.*, 403 F. Supp. 2d 83, 86 (D.D.C. 2005) (citing *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982)). The IRS may not unilaterally withdraw a case from judicial review simply by sending a letter to EPIC expressing a belated change of position. Nor will the April 25 letter help the IRS on a motion for summary judgment any more than it does on the instant Motion.

II. EPIC IS ENTITLED TO PROCESSING OF ITS FOIA REQUEST AND DISCLOSURE OF RESPONSIVE RECORDS BECAUSE EPIC FILED A PERFECTED REQUEST.

Even if the IRS had not conceded the sufficiency of EPIC's FOIA request, the agency would still be obligated to process it because EPIC's request was perfected.

A. EPIC's request conformed in every respect with the IRS's FOIA rules.

EPIC constructively exhausted its administrative remedies by submitting a fully conforming FOIA request that the IRS failed to process within the allowable timeframe. *See* 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i). EPIC's request was in writing and signed by the requester. *See* 26 C.F.R. §§ 601.702(c)(4)(i)(A); Compl. Ex. 1 at 8. The request stated that it was made pursuant to the FOIA, and it was properly addressed to the Headquarters Disclosure Office. *See* 26 C.F.R. § 601.702(c)(4)(i)(B)–(C); Compl. Ex. 1 at 1. The request reasonably described the records sought and the basis for disclosure under 26 U.S.C. § 6103(k)(1). *See* 26 C.F.R. §§ 601.702(c)(4)(i)(D), (5)(i); Compl. Ex. 1 at 1–2. The request set forth EPIC's address at which to be notified of the IRS's determination, stated that EPIC wished to have copies of the records

furnished without first inspecting them, and included a request for a fee waiver. *See* 26 C.F.R. §§ 601.702(c)(4)(i)(F)–(H); Compl. Ex. 1 at 1–2, 7 n.57. Finally, the request identified EPIC as a news media requester and explained that EPIC would post any responsive records on its website for public inspection. 26 C.F.R. §§ 601.702(c)(4)(i)(G), (f)(3)(ii)(A); Compl. Ex. 1 at 6–8.

The IRS contends, however, that EPIC's request was non-conforming due to a single alleged defect: the lack of accompanying "authorization from the taxpayer in the form of 'power of attorney, Privacy Act consent, or tax information authorization. . . .'"[2] IRS Mem. 8 (quoting 26 C.F.R. § 601.702(c)(5)(iii)). The omission that the IRS cites is irrelevant to the processing of the FOIA request that is now before this Court. It is true that many FOIA requests submitted to the IRS—such as requests seeking the disclosure of tax records under 26 U.S.C. § 6103(c)—are subject to this proof-of-consent requirement. *See, e.g.*, Internal Revenue Serv., *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2017* at 3 (April 12, 2018) (showing 12,265 disclosures under § 6103(c) in 2017).[3] Given the very low frequency of § 6103(k)(1) FOIA requests and disclosures, it is perhaps unsurprising that the IRS is confused as to how to process EPIC's request. *See* Treasury Inspector Gen. for Tax Admin., *Letter Report: Procedures to Protect Taxpayer Information at Offer in Compromise Public Inspection File Locations Should Be Enhanced* 6 (March 28, 2016) (noting that the IRS's in-person inspection sites for offers-in-compromise "recalled receiving one or two visitors per year, while other sites recalled having no visitors over the past several years"). But the IRS is wrong to posit that taxpayer authorization is required for disclosure of records under § 6103(k)(1). In its zeal to rid itself of EPIC's FOIA request, the IRS ignores the text of 26 U.S.C.

[2] Presumably, in the IRS's view, separate proof of consent would be required from each of the business entities and the individual to whom EPIC's request pertains.
[3] https://www.jct.gov/publications.html?func=download&id=5088&chk=5088&no_html=1.

§ 6103(k)(1) and overlooks the interplay between that provision and the agency's FOIA regulations. When the both authorities are read together, it is clear that EPIC's request is *not* subject to § 601.702(c)(5)(iii)'s consent rule and was thus perfected upon submission.

The IRS points to two provisions in the agency's FOIA regulations. First, 26 C.F.R. § 601.702(c)(4)(i)(E) instructs that FOIA requests for certain sensitive records must comply with 26 C.F.R. § 601.702(c)(5)(iii):

> In the case of a request for *records the disclosure of which is limited by statute or regulations* (as, for example, the Privacy Act of 1974 (5 U.S.C. 552a) or section 6103 and the regulations thereunder), establish the identity and the right of the person making the request to the disclosure of the records in accordance with paragraph (c)(5)(iii) of this section;

§ 601.702(c)(4)(i)(E) (emphasis added). Section 601.702(c)(5)(iii) then describes the specific conditions for requesting those same records:

> Statutory or regulatory restrictions. (A) In the case of *records containing information with respect to particular persons the disclosure of which is limited by statute or regulations*, persons making requests shall establish their identity and right to access to such records. . . .
>
> (C) In the case of an attorney-in-fact, or other person requesting records on behalf of or pertaining to other persons, the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate. In the case of a corporation, if the requester has the authority to legally bind the corporation under applicable state law, such as its corporate president or chief executive officer, then a written statement or tax information authorization certifying as to that person's authority to make a request on behalf of the corporation shall be sufficient. . . .

§ 601.702(c)(5)(iii) (emphasis added). Notably, in order for these regulations to apply to some or all of EPIC's FOIA request, the request would have to target records or information "the disclosure of which is limited by statute or regulations." § 601.702(c)(4)(i)(E); *accord* § 601.702(c)(5)(iii). But the request does not concern such records, so these regulations are inapplicable.

There are also two relevant provisions of the tax confidentiality and disclosure statute at issue. Section 6103(a) establishes a "[g]eneral rule" that "[r]eturns and return information shall be confidential" and imposes a duty of nondisclosure on persons authorized to handle such records, subject to "except[ions] as authorized by this title." § 6103(a). Although the IRS would have the Court believe that this *general* rule of confidentiality is entirely without exception—and that no requester can ever access return information without proof of consent or a material interest—that characterization ignores the controlling provision in this case. *See* IRS Mem. 3, 5. Section 6103(k)(1) creates an exception for a particular subset of tax return information:

> **(1) Disclosure of accepted offers-in-compromise**
> Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

§ 6103(k)(1). In other words, § 6103(k)(1) dictates that disclosure of return information is *not* "limited by statute" to the extent that disclosure is "necessary to permit the inspection" of an accepted offer-in-compromise. To the contrary: § 6103(k)(1) *requires* that such information be "be disclosed to members of the general public" as appropriate. *Id.* A FOIA request for records described by § 6103(k)(1) is therefore unaffected by agency regulations that only apply where disclosure of the records "is limited by statute or regulations." § 601.702(c)(4)(i)(E); *accord* § 601.702(c)(5)(iii).

For exactly this reason, EPIC's FOIA does not implicate the regulations in 26 C.F.R. §§ 601.702(c)(4)(i)(E) and (c)(5)(iii). EPIC's request is narrowly tailored to track the language of § 6103(k)(1), calling only for "accepted offers-in-compromise" and "return information . . . necessary to permit inspection of [those] accepted offer[s]-in-compromise." Compl. Ex. 1 at 1–2 (quoting § 6103(k)(1)). EPIC's request mentions some specific IRS forms and documents that might satisfy these conditions, and the request invokes the language of Executive Order 10,386

to propose some types of return information that could be releasable under § 6103(k)(1) "as appropriate." Compl. Ex. 1 at 1–2 (citing Exec. Order No. 10,386, 17 Fed. Reg. at 7,685). As the IRS acknowledges in the Internal Revenue Manual, I.R.M. 5.8.8.9(2), Executive Order 10,386 independently mandates that "income, excess profits, declared value excess profits, capital stock, estate or gift tax returns for any taxable year shall be open to inspection to the extent necessary to permit the inspection of any accepted offer in compromise . . . ." Exec. Order No. 10,386, 17 Fed. Reg. at 7,685. Nevertheless, the controlling language of EPIC's request is drawn directly from § 6103(k)(1); any records not covered by § 6103(k)(1) are also not demanded in EPIC's request. *See* Compl. Ex. 1 at 1–2.[4]

Because EPIC's request asks strictly for records, the disclosure of which is *not* limited by statute or regulations, §§ 601.702(c)(4)(i)(E) and (c)(5)(iii) are by definition inapplicable to the request. EPIC was under no obligation to provide "authorization from the taxpayer[s] in the form of 'power of attorney, Privacy Act consent, or tax information authorization.'" IRS Mem. 8 (quoting 26 C.F.R. § 601.702(c)(5)(iii)(C)). The IRS's recent refusal to process EPIC's FOIA request on these grounds is therefore meritless, and EPIC's administrative remedies were properly exhausted when the agency failed to timely process EPIC's perfected request.

Moreover, even if §§ 601.702(c)(4)(i)(E) and (c)(5)(iii) did apply to EPIC's request, the request would still be fully compliant. The requirement to provide proof of consent for the release of certain return information carries an important qualifier: "the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, *as*

[4] Even if certain records (or portions of records) responsive to EPIC's request did fall outside the ambit of § 6103(k)(1), the consequence would be that the IRS could seek to withhold those records as exempt from disclosure. But potential future exemption claims do not provide any basis do dismiss a current FOIA suit.

appropriate." § 601.702(c)(5)(iii)(C) (emphasis added). As the D.C. Circuit has explained, a requirement that a party "shall" do something "as appropriate" means "only to the extent appropriate." *Consumer Fed'n of Am. & Pub. Citizen v. HHS*, 83 F.3d 1497, 1503 (D.C. Cir. 1996) (emphasis added). To conclude otherwise "would violate a basic canon of . . . construction by treating the two words ['as appropriate'] as surplusage." *Id.*; *see also Gardebring v. Jenkins*, 485 U.S. 415, 426–27 (1988) (holding that regulation which required information to be delivered in "written form, and orally as appropriate" meant only "that such information may be transmitted orally" (emphasis added)).

Thus, even if § 601.702(c)(5)(iii)(C) applied to requests like EPIC's, the words "as appropriate" would harmonize the agency's FOIA rules with the few parts of § 6103 that permit disclosure of return information "to the public at large." *Church of Scientology of Cal. v. IRS* (*Church of Scientology I)*, 792 F.2d 146, 149 (D.C. Cir. 1986) (Scalia, J.) (citing §§ 6103(k)(1), (k)(3), (m)(1)), *aff'd*, 484 U.S. 9 (1987). For example, it is plainly inappropriate to require "a properly executed power of attorney, Privacy Act consent, or tax information authorization" with respect to a provision that, like § 6103(k)(1), requires nonconsensual disclosure of information to the public. § 601.702(c)(5)(iii)(C). The IRS's FOIA regulations thus pose no bar to the perfection of EPIC's request or its entitlement to processing and judicial review.

Finally, the IRS spends a substantial portion of its brief arguing that EPIC failed to identify a "material interest" that would be affected by disclosure of the requested records. 26 U.S.C. § 6103(e). IRS Mem. 1–3, 8–10. Though the IRS variously attributes this phrase to parts of 26 C.F.R. § 601.702(c), IRS Mem. 3, 8, it is specific to § 6103(e)—a statutory provision that is not at issue in this case. EPIC seeks records that are subject to disclosure under § 6103(k)(1) and does not argue that any other provision of § 6103 applies to its request.

B. If the IRS's rules could be read to require proof of consent for § 6103(k)(1) FOIA requests, those rules would violate Congress's express command to disclose return information.

Even if IRS FOIA regulations did purport to require proof of taxpayer consent for a § 6101(k)(1) FOIA request, such a rule would directly conflict with the statute and be unlawful as applied to EPIC's request. Section 6103(k)(1)—particularly when read together with the FOIA, Executive Order 10,386, Treasury Regulations, and the Internal Revenue Manual—reflects an unambiguous policy that offers-in-compromise and associated return information shall be public records. The agency may not subvert Congress's judgment by inventing a proof-of-consent requirement where none exists.

Section 6103(k)(1) was one of several provisions in the Tax Reform Act of 1976 that Congress enacted to ensure that certain "returns or return information should be public as a matter of policy . . . ." S. Rep. No. 94-938, at 340 (1976). According to the Treasury Inspector General for Tax Administration:

> The reason OICs [offers-in-compromise] are available for public inspection goes back several decades. In the early 1950s, an IRS employee was indicted for taking bribes from taxpayers seeking to compromise their outstanding tax liabilities. A congressional investigation revealed that the IRS had accepted offers with generous terms from racketeers and politically connected individuals. In response to these scandals, on August 20, 1952, President Truman issued Executive Order 10386 directing the IRS to open for public inspection any accepted OIC. The Internal Revenue Code permits public inspection and copying of accepted OIC case files.

Treasury Inspector Gen. for Tax Admin., *supra*, at 2. As one tax official wrote of § 6103(k)(1), "Presumably, the public policy behind the federal exemption from confidentiality of return information is a Congressional belief that the compromise of tax liabilities is affected with significant public interest, to the extent that all taxpayers are affected by such a compromise." Larry Mednick, OIP Opinion Letter No. 89-3, 1989 WL 406076, at *6 (Nov. 3, 1989).

The IRS, in furtherance of § 6103(k)(1), has set up two separate mechanisms for the public to obtain offers-in-compromise and the relevant return information. First, for a year after a given taxpayer's offer-in-compromise is accepted by the IRS, the taxpayer's Form 7249 ("Offer Acceptance Report") and associated "sanitized account transcript" is made available for public inspection at a geographically corresponding IRS field office. 26 C.F.R. § 601.702(d)(8); *see* Treasury Inspector Gen. for Tax Admin., *supra*, at 2. Members of the public are permitted to copy and retain these documents; however, the "inspection file" at each IRS office only contains records specific to that IRS region, and only records that are a year or less old. *See* IRM 11.3.11.8 ¶ 2; § 601.702(d)(8); Treasury Inspector Gen. for Tax Admin., *supra*, at 3 (listing the ten IRS offices in which such files can be accessed). Second—contrary to the representations made in the IRS's Motion—it is IRS policy that requests for offers-in-compromise and associated return information may be made in pursuant to the FOIA. *See* IRM 11.3.11.8 ¶ 4 ("Requests for copies of Form 7249 . . . where no personal inspection is involved, should be in writing and processed in accordance with IRM 11.3.13, *Disclosure of Official Information—Freedom of Information Act.*"); IRM 11.3.11.8 ¶ 5 ("Requests to inspect Forms 7249 . . . [where] more than one year has elapsed since acceptance should be in writing and processed in accordance with IRM 11.3.13, *Freedom of Information Act*.").

Given the text, history, and longstanding agency interpretations of § 6103(k)(1), the IRS has no basis to demand that EPIC provide proof of taxpayer consent in order to request records under (k)(1). Indeed, it is not even clear which statute the IRS relies on to impose this requirement. *Compare* IRS Mem. 5 (proof-of-consent requirement "execute[s] section 6103's 'basic rule of confidentiality'" (quoting *Aronson v. IRS*, 973 F.2d 962, 964 (1st Cir.)), *with* IRS Mem. 3 ("Under FOIA, someone other than the taxpayer cannot obtain returns or return

information unless he provides authorization from the taxpayer . . . ."). If the agency contends that § 6103 provides the statutory basis, that argument cannot be squared with (1) the mandatory disclosure language of § 6103(k)(1) ("shall be disclosed to members of the general public"); or (2) the fact that the IRS allows people to personally view and photocopy offers-in-compromise under the same very statute, but without any proof of taxpayer consent. *See* § 601.702(d)(8). And the IRS certainly cannot claim that the FOIA provides a basis for the consent rule: the FOIA imposes no such requirement on requestors of non-Privacy Act records, and the statute creates a presumption of disclosure. Moreover, "[a]n agency's procedures for conducting a [FOIA] search for responsive records must be reasonable. An agency thus of course cannot impose requirements on requesters that take on the character of a shell game, imposing unwarranted burdens on requesters without apparent justification." *Clemente v. FBI*, 867 F.3d 111, 119 (D.C. Cir. 2017) (internal citation omitted). The IRS may not impose an arbitrary proof-of-consent requirement to withhold offer-in-compromise records that are required to be made publicly available.

C. The existence of an alternate, in-person procedure for accessing offers-in-compromise does not negate the IRS's FOIA disclosure obligations.

The IRS also presents a curious—and unprecedented—argument that 26 U.S.C. § 6103(k)(1) does not permit the *disclosure* of tax return information through the FOIA because it only authorizes limited *inspection* of the records. IRS Mem. 9–10. This is a particularly surprising claim because the IRS has said otherwise in its guidance documents. The Internal Revenue Manual, in interpreting § 6103(k)(1), expressly states that written requests for offers-in-compromise will be processed under the FOIA. *See* IRM 11.3.11.8 ¶ 4 ("Requests for copies of Form 7249 available under [26 C.F.R. § 601.702(d)(8)], where no personal inspection is involved, should be in writing and processed in accordance with IRM 11.3.13, *Disclosure of Official Information - Freedom of Information Act.*"); *accord* IRM 11.3.11.8 ¶ 5; *see also Title*

26–Internal Revenue–Chapter 1, Subchapter h, Part 601.702–Statement of Procedural Rules–Final Rule, 1987 WL 960112, at *2 (I.R.S. Oct. 9, 1987) (observing that § 6103(k)(1) "authorizes full disclosure of accepted offers in compromise").

The IRS's argument also finds no support in case law. The D.C. Circuit has repeatedly rejected the notion that the disclosure provisions of § 6103 supersede or negate the FOIA's procedures. As the Court held in *Church of Scientology I*:

> The two statutes [FOIA and § 6103] seem to us entirely harmonious; indeed, they seem to us quite literally made for each other: Section 6103 prohibits the disclosure of certain IRS information (with exceptions for many recipients); and FOIA, which requires all agencies, including the IRS, to provide nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption.

Church of Scientology I, 792 F.2d at 149; *accord Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005); *Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997). There is no basis to conclude that § 6103(k)(1) is exempt from the rule of *Church of Scientology I* and its progeny. Quite the opposite: *Church of Scientology I* specifically singled out § 6103(k)(1) when it dismissed the argument that the IRS renews today:

> It would be another matter if § 6103 established some rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access to IRS documents. But it does not. The entirety of its "comprehensive" detail relates to exceptions from the prohibition of disclosure-and even all of these, with three minor exceptions, *see § 6103(k)(1)*, (3); § 6103(m)(1), pertain to disclosure to specified private individuals (e.g., the taxpayer to whom the information relates) or government officials, rather than to the public at large.

Church of Scientology I, 792 F.2d at 149 (emphasis added). Although nothing in § 6103(k)(1) prevents the IRS from providing additional channels through which to access offers-in-compromise, the mere existence of an in-person viewing procedure does not preclude or limit the interoperability of § 6103(k)(1) and the FOIA.

The IRS's attempt to distinguish "public inspection" from "disclosure" required under the FOIA is an argument without any statutory or policy justification. IRS Mem. 9–10. The statute defines "inspection" as "*any* examination of a return or return information." § 6103(b)(7) (emphasis added). This broad definition easily includes the type of examination that FOIA requesters undertake upon the delivery of requested records. There is no indication that the "examination" or "inspection" of records must be in person or that it must end with the interested party surrendering the records in question. In fact, the IRS's regulations on "Publication, public inspection, and specific requests for records" repeatedly use the phrases "available for public inspection" and "open for public inspection" to describe records that can be obtained by written request. §§ 601.702, (d). In one instance, the regulations even speak of records being "available for public inspection and copying from the IRS Web site at www.eforms.irs.gov." §§ 601.702(d)(3). If allowing the world at large to download records off the IRS's website constitutes "public inspection" in the agency's view, that phrase certainly encompasses the disclosure of documents to an individual FOIA requester. The IRS already permits in-person visitors to make photocopies of the offers-in-compromise that they inspect, *see* § 601.702(d)(8), which goes well beyond the constrained reading of "public inspection" that the agency asks the Court to adopt for the purposes of § 6103(k)(1).

Finally, the IRS's in-person inspection procedure is wholly inadequate to satisfy EPIC's request or the agency's disclosure obligations under § 6103(k)(1). Even if EPIC were willing to fly to each of the ten IRS offices where in-person inspection of offers-in-compromise is permitted—a true "shell game" by the agency, *Clemente*, 867 F.3d at 119—EPIC could not obtain records that are more than a year old. *See* § 601.702(d)(8) (capping record retention for public inspection files at a year). EPIC's request, which sought responsive records from all years

and in all forms, is thus impossible to fulfill through the alternate process urged by the IRS. The agency's argument would put pre-2017 offers-in-compromise permanently beyond the public's reach, creating an arbitrary temporal cutoff found nowhere in the text of § 6103(k)(1). The IRS should not be allowed to construe its disclosure obligations so narrowly.

D. Even if EPIC's request extended to records that fell outside of 6103(k)(1), those portions of EPIC's request would be severable.

Although the IRS faults EPIC's for listing "returns" among the "return information" that could be disclosed under § 6103(k)(1), this argument does little to salvage the agency's Motion. As explained above, EPIC's list of possible return information disclosable under § 6103(k)(1) comes from Executive Order 10,386, which mandates that "income, excess profits, declared value excess profits, capital stock, estate or gift tax returns for any taxable year shall be open to inspection to the extent necessary to permit the inspection of any accepted offer in compromise . . . ." Exec. Order No. 10,386, 17 Fed. Reg. at 7,685. But even if this Order were not in force, EPIC limited its request to the return information "necessary to permit inspection" of the requested offers-in-compromise; "returns" were only requested "as appropriate" to satisfy the language of § 6103(k)(1). And if the IRS had identified, in the course of processing EPIC's request, some subset of records (or portions of records) that were not subject to disclosure, EPIC would still have exhausted its remedies with respect to the rest of the request. *Dettmann v. DOJ*, 802 F.2d 1472, 1477 (D.C. Cir. 1986). ("It is likewise clear that a plaintiff may have exhausted administrative remedies with respect to one aspect of a FOIA request-and thus properly seek judicial review regarding that request-and yet not have exhausted her remedies with respect to another aspect of a FOIA request.").

III. EPIC HAS PLAUSIBLY STATED TWO FOIA CLAIMS ENTITLING IT TO RELIEF.

Because EPIC perfected its request, EPIC was entitled to processing. By refusing to process EPIC's request, the IRS violated the FOIA in two respects.

First, the IRS failed to comply with statutory deadlines (Count I). EPIC filed a perfected FOIA request for offers-in-compromise and related return information pertaining to President Trump and associated businesses. Compl. ¶¶ 21–31. The IRS accepted EPIC's request and granted it expedited processing. Compl. Ex. 2. The IRS then failed to issue a determination on that request within the prescribed period, rendering EPIC's remedies constructively exhausted. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i); Compl. ¶¶ 40–42. As relief, EPIC is entitled to a determination on its request. 5 U.S.C. § 552(a)(6)(A)(i); Compl. p. 12 ("Requested Relief").

Second, the IRS is unlawfully withholding agency records (Count II). EPIC filed a perfected FOIA request for offers-in-compromise and related return information pertaining to President Trump and his businesses. Compl. ¶¶ 21–31. The IRS accepted EPIC's request and granted expedited processing. Compl. Ex. 2. The IRS failed to disclose any of the requested records within the prescribed period, rendering EPIC's remedies constructively exhausted. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i); Compl. ¶¶ 40–42. As relief, EPIC is entitled to release of nonexempt responsive records. 5 U.S.C. § 552(a)(3)(A); Compl. p. 12 ("Requested Relief").

EPIC has plausibly alleged facts necessary to prove both of these violations and that EPIC is entitled to relief in each instance. Thus, the IRS's Motion to Dismiss should be denied.

CONCLUSION

For the above reasons, the Court should deny the IRS's Motion to Dismiss EPIC's Complaint. Instead, the Court should order the agency to immediately conduct a reasonable search and to promptly release all nonexempt responsive records.

Respectfully Submitted,

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