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 Electronic Privacy Information Center's request for records sought the tax returns and return information of a third party individual and many businesses set forth on a 15-page list of names and employer identification numbers on "Appendix A" of the request. In its opening brief, the Service demonstrated that EPIC's complaint should be dismissed because EPIC failed to submit the required third-party taxpayer authorization with its request for third party returns and return information (or show a qualifying material interest with respect to third party returns). As a consequence, EPIC failed to perfect its request and therefore failed to exhaust its administrative remedies before filing suit.

EPIC disagrees, positing several reasons why it exhausted its administrative remedies, each of which is unavailing. First, it argues that its request was perfected because it was "narrowly tailored" to seek only publicly-available return information related to accepted offers in compromise for which no authorization or demonstrated material interest is required under the Service's FOIA rules. Memorandum in Opposition to Motion to Dismiss [Dkt. No. 10]

("Opp'n") at 19. That argument fails as a matter of fact and law: the requests seek returns and return information categorically beyond what is available in the Public Inspection Files. Accordingly, the same rules apply to EPIC's request that would apply to any FOIA request for returns and return information. 26 C.F.R. § 601.702(c)(5)(iii)(B)-(C). As the Service demonstrated in its opening brief, the Service's FOIA rules require that a requester seeking third party returns and return information must show that the requester is a person entitled to obtain the information. 26 C.F.R. § 601.702(c)(5)(iii)(A). A FOIA requester must provide authorization to obtain returns and return information of other taxpayers (or demonstrate a qualifying material interest to obtain returns). 26 C.F.R. § 601.702(c)(5)(iii)(B)-(C). EPIC, admittedly, did not provide authorization or demonstrate a qualifying material interest with its FOIA request. Consequently, as a matter of law, EPIC did not perfect its request. The court should dismiss the complaint for failure to exhaust administrative remedies. *Hidalgo v. FBI*, 344 F.3d 1256, 1257 (D.C. Cir. 2003).

Second, ignoring that EPIC must perfect its request before any legal obligations are imposed upon the Service under FOIA, EPIC argues that the Service should be estopped from seeking dismissal for failure to exhaust. EPIC argues that the Service waived perfection and that EPIC exhausted its administrative remedies as a matter of law. EPIC's estoppel and waiver arguments are contrary to law and should be rejected. *Genesis Health Ventures, Inc. v. Sebelius*, 798 F. Supp. 2d 170, 183–84 (D.D.C. 2011); *see also*, *Hertzberg v. Veneman,* 273 F. Supp. 2d 67, 83 (D.D.C. 2003) (addressing estoppel in the context of a FOIA suit).

Finally, EPIC suggests that if the court agrees that it failed to perfect its requests for third party returns, the requests for third party returns may be "severed" from the complaint, allowing

this litigation to continue. That suggestion has no basis in the law and would serve no practical purpose. Accordingly, the Court need not – and should not – indulge that request.

Argument

I. EPIC'S ARGUMENT THAT IT PERFECTED ITS REQUESTS IS FACTUALLY INACCURATE AND LEGALLY INCORRECT

A. EPIC Must Provide Authorization or Demonstrate a Material Interest to Obtain Tax Returns.

Throughout its opposition, EPIC repeatedly justifies the scope of its requests by claiming that it seeks "only" return information, the disclosure of which is required by section 6103(k)(1) of the Internal Revenue Code (26 U.S.C.). Opp'n at 19; *see also id.* at 24 ("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."). EPIC's request "include[s] . . . estate or gift tax returns" as well as "income, excess profits, declared value excess profits, [and] capital stock." *Id.* at 2. As the Service explained in its opening brief, however, section 6103(b)(1) and (2) define, respectively, returns and return information. Opening Memorandum. [Dkt. No. 9-1] ("Op. Mem.") at 7 n.3. Tax returns are not even mentioned in section 6103(k)(1), the section upon which EPIC exclusively relies. *Id.* at 8. Accordingly, the general rules for obtaining third party tax returns apply: EPIC must provide taxpayer consent or demonstrate a qualifying material interest in the returns. 26 C.F.R. § 601.702(c)(5)(iii)(B)-(C). Again, EPIC did neither, and implicitly concedes that it cannot. *See* Complaint [Dkt. No. 1] ¶ 13.[1]

[1] Indeed, this Court in two successive decisions in *Goldstein*, highlighted that one IRS rule governed the disclosure of returns and another governed the disclosure of return information. *Goldstein v. IRS*, 174 F. Supp. 3d 38, 46 (D.D.C. 2016); *see also Goldstein v. IRS,* 279 F. Supp. 3d 170, 177, 178 (D.D.C. 2017) ("Requests for returns are governed by 26 C.F.R. § 601.702(d), which requires requesters to submit an IRS Form 4506, 'Request for Copy or Transcript of Tax Form'" and "[r]equests for return information are subject to the detailed procedures set forth at 26 C.F.R. § 601.702(c).").

EPIC attempts to avoid the consequence of the separate statutory definitions for returns and return information by claiming that "returns" are a subset of "return information," and, therefore should be "publicly available" under Section 6103(k)(1). Opp'n at 24, 27 (suggesting "returns [are] among the 'return information' that could be disclosed under § 6103(k)(1)"). Congress, however, had a different view. "Returns" and "return information" are not the same thing; they are separately defined in Section 6103 itself. 26 U.S.C. § 6103(b)(1), (2). EPIC's attempt to contort the statutory definitions of returns and return information, if adopted, renders meaningless Congress' decision to define them separately.[2]

B. EPIC Must Provide Authorization to Obtain Return Information

EPIC suggests that its requests for return information are "narrowly tailored" to fit within section 6103(k)(1)'s authorization to disclose accepted offers in compromise in the Public Inspection File. Opp'n at 19. Based on this erroneous premise, EPIC argues it perfected its records request for third party return information. EPIC's erroneous premise – that the third

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[2] EPIC quotes a Senate Report issued when Congress was considering the Tax Reform Act for the proposition that Congress enacted Section 6103(k)(1) to "ensure that certain 'returns or return information should be public as a matter of public policy. . . .'" Opp'n at 22. The quoted passage is elided in a misleading way to suggest that Congress intended Section 6103(k)(1) to include "returns." That is not what the full quote says. Rather, the full quote discussed a number of "miscellaneous disclosures" of which Section 6103(k)(1) was only one. The full quote reads:

> The committee decided that it was necessary to allow the disclosure of returns and return information in certain miscellaneous situations. In most of these situations, disclosure is permitted under present law. In each situation, the committee decided either that the return or return information should be public as a matter of policy, or that the reasons for the limited disclosures outweighed any possible invasion of the taxpayer's privacy which might result from disclosure."

S. Rep. 94-938 at 340. *Compare* 26 U.S.C. § 6103(e)(1)("The *return* of a person shall, upon written request, be open to inspection by or disclosure to….") *with* 26 U.S.C. § 6103(k)(1)("*Return information* shall be disclosed…") (emphasis added).

party return information it requested fits within section 6103(k)(1)'s disclosure provision – is based on two faulty arguments. First, EPIC argues that because the IRS is authorized to disclose information in the Public Inspection File, the Service's procedural FOIA requirements (namely, the requirement that a requester provide taxpayer consent before it may obtain third party return information) need not be followed. Opp'n at 20. Second, EPIC argues that it, not the Service, may decide what return information is "necessary to permit inspection of any accepted offer-in-compromise…" under section 6103(k)(1). Neither argument survives scrutiny.

EPIC's first argument cannot survive scrutiny as a matter of fact or law. EPIC's request is not "narrowly tailored" to request the Public Inspection File. EPIC requested "all other information. . . [to] include, but not limited to, 'income, excess profits, declared value excess profits, [and] capital stock.'" Compl., Ex. 1 [Dkt. 1-5]. Such information is simply not in the Public Inspection File.

EPIC contends that because section 6103(k)(1) permits the Service to disclose certain return information in a Public Inspection File, it need not perfect its request for third party return information related to accepted offers in compromise. Opp'n at 17-19. Section 6103(k)(1) does not, by its plain terms, mandate the disclosure of return information in response to a FOIA request without authorization. Accordingly, EPIC cannot rely on section 6103(k)(1) to show that its records request was perfected when the request did not comply with the Service's FOIA rules. 26 C.F.R. § 601.702(c)(5)(iii).

EPIC's second argument cannot survive scrutiny either. EPIC argues that it may decide what return information is "necessary to permit inspection of any accepted offers-in-compromise . . ." in an attempt to create an eye-of-the-beholder test of necessity. Opp'n at 19-20. Tellingly, EPIC identifies no authority for its bold suggestion that a member of the public may obtain

information that is not in the Public Inspection File because the ***requester*** deems it "necessary" under section 6103(k)(1). There is good reason for the lack of citation: no such authority exists. To the contrary, the Secretary of the Treasury (or his delegate) has the delegated authority to determine necessity and the Secretary (or his delegate) determined the necessary information would be reflected on an abstract, Form 7249.

The Secretary of the Treasury has the delegated authority to determine necessity. The Secretary (or his delegate) determined the necessary information that would be reflected on an abstract of an accepted offer in compromise, which today is the Form 7249. 26 C.F.R. § 601.702(d)(8). As explained below, the authority to decide what information is "necessary" and should, therefore, be disclosed, was given to the Secretary from the onset of the disclosure of accepted offers in compromise through the current day.

Accepted offers in compromise were first required to be made public in 1952 by Executive Order 10386, which provided that such records "shall be open to inspection to the extent necessary to permit the inspection of any accepted offer in compromise," subject to the caveat that "inspection [of such records] shall be subject to the conditions stated in [Treasury Decision 5927]." Treasury Decision 5927, in turn, provided that "the inspection [of such records] shall be subject to such rules, and shall be made only under such circumstances, as the Secretary of the Treasury, or such official as he may designate, shall determine to be in the public interest." T.D. 5927, 1952-2 C.B. 298 (1952).

Consistent with Executive Order 10386 and Treasury Decision 5927, the Service determined "under [what] circumstances" it would make that information available. Specifically, it provided "abstracts" and "attached statements," summarizing the accepted offer in compromise would be available for public inspection. Rev. Rul. 252, 1953-2, 1953 WL 79752

(1953). It never made "returns" available in those public inspection files, nor did it make any of the other return information sought by EPIC available. Next, in 1966, when Congress passed the Freedom of Information Act, the Service published FOIA rules at 26 C.F.R. § 601.702, which tracked the original Treasury Decision and Revenue Ruling, making only "abstracts" and "statements" available for public inspection. 32 F.R. at 16034-35.

When Congress later enacted 26 U.S.C. § 6103(k)(1) as part of the Tax Reform Act of 1976, the Service's FOIA rules were already in place. Importantly, section 6103(k)(1) retained the qualification that disclosure of return information to the public must only be made "to the extent necessary" as determined by the Secretary. The Service continued its practice of disclosing return information on an "abstract" of an accepted offer in compromise in the Public Inspection File. The authority to impose rules and safeguards on the disclosure of taxpayers' information and decide what information the Public Inspection File contains belongs to the Service, not EPIC. *See Church of Scientology of Cal. v. I.R.S.*, 484 U.S. 9, 15 (1987) (recognizing that Service can make disclosures of return information under Section 6103's exceptions "with special safeguards.").

Left with no basis for arguing that third party return information may be disclosed without taxpayer consent because EPIC deems it necessary, EPIC also argues that the Service may nonetheless disclose such return information without consent "as appropriate" in response to a FOIA request. EPIC gins up this argument by cherry-picking the two-word phrase "as appropriate" from the Service's disclosure rules. Opp'n at 19.[3]

[3] EPIC alternately suggests that support for this argument is found in section 6103(k)(1) and Executive Order 10386. Neither section 6103(k)(1) nor Executive Order 10386 contain the phrase "as appropriate" and nothing therein suggests that the IRS may disclose information to EPIC merely because EPIC declares disclosure is necessary. Plaintiff's quotation of section 6103(k)(1) is, like several other of its quotations, highly misleading. The phrase "as appropriate"

EPIC's argument is too-clever-by-half. The Service's disclosure rules state: "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." 26 C.F.R. § 601.702(c)(5)(iii)(C) (emphasis added). The key phrase is that the requester "shall furnish" one of these three authorization documents in order to obtain another taxpayer's return information. That command is mandatory, not conditional. In context, therefore, "as appropriate" pertains to *which type* of disclosure authorization documentation the requester shall submit; not *whether* the requester must submit some form of consent to allow for disclosure of third party return information.

II. EPIC CANNOT PRECLUDE DISMISSAL WITH ESTOPPEL OR WAIVER

In an attempt to save its complaint from dismissal, EPIC next argues that the Court cannot dismiss its complaint even if it failed to perfect. EPIC contends that the Service is estopped from raising EPIC's failure to perfect. Opp'n at 8. It argues that because the Service granted its request for expedited processing, the Service waived its FOIA rule requiring that EPIC provide authorization for third party returns and return information. *Id.* at 9-10. EPIC also argues that because the Service did not timely grant or deny its request, the Service waived the right to claim that EPIC failed to exhaust administrative remedies. *Id.* at 8-9. EPIC's arguments are incorrect as a matter of law.

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does not – as the Opposition implies – appear in section 6103(k)(1). Opp'n at 19 ("To the contrary: § 6103(k)(1) *requires* that such information 'be disclosed to members of the general public' as appropriate."). Nor does "as appropriate" appear in Executive Order 10386, as the Opposition also implies. *Id.* at 19-20 ("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.").

A. Equitable Estoppel Cannot Save the Complaint from Dismissal.

EPIC devotes much of its opposition to suggesting that the complaint cannot be dismissed due to EPIC's failure to perfect its request because communications from Service employees suggest the request would be processed. EPIC claims that the Service accepted its request as perfected when the Service sent a letter to EPIC stating that the Service would "search for documents responsive to the request." Opp'n at 8. Therefore, says EPIC, the Service cannot now claim that EPIC did not perfect its request. Opp'n at 11.

EPIC's claim is one of estoppel. But estoppel will not lie against the government on the merely on the basis of an erroneous communication.

> At a minimum, "[a] party attempting to apply equitable estoppel against the government must show that '(1) there was a definite representation to the party claiming estoppel, (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse, (3) the party's reliance was reasonable[,] and (4) the government engaged in affirmative misconduct.'" *Keating v. Fed. Energy Regulatory Comm'n*, 569 F.3d 427, 434 (D.C.Cir.2009) (quoting *Morris Commc'ns, Inc. v. FCC,* 566 F.3d 184, 191–92 (D.C.Cir.2009)).

Genesis Health Ventures, Inc., 798 F. Supp. 2d at 183–84; *see also*, *Hertzberg,* 273 F. Supp. 2d at 83 (no estoppel in FOIA suit unless traditional elements are met and injustice will result without it).

Even if, for the purposes of argument, the Court assumes that the Service's communications were a definite representation to EPIC that its request was perfected, EPIC cannot show that it relied on those communications to its detriment, or that its reliance was reasonable, or that the Service engaged in affirmative misconduct. EPIC, a frequent FOIA requestor and litigant, is presumed to know the law, including the agency rules providing for perfection. Compl. Ex. 1 [Dkt. No. 1-5 (letter dated Feb. 5, 2018)] at p. 6 (referencing the specific provisions requiring authorization). In this case, those rules required EPIC to provide

authorization to obtain third party returns and return information. EPIC knew it did not provide authorization.[4] EPIC, knowing the rules, could not reasonably rely upon communications that suggested its request would be processed. Moreover, EPIC could not detrimentally rely on the Service's communication since its failure to obtain the consents did not stem from the Service's communications. EPIC, therefore, cannot make out the traditional elements of estoppel.

> In addition, this circuit has recognized that application of equitable estoppel to the government "must be rigid and sparing. The case for estoppel against the government must be compelling"; it requires proof of both the traditional elements of the doctrine as well as "a showing of an injustice ... and lack of undue damage to the public interest." *ATC Petroleum, Inc. v. Sanders,* 860 F.2d at 1111 (quoting *Int'l Org. of Masters, Mates & Pilots v. Brown,* 698 F.2d 536, 551 (D.C.Cir.1983) (internal quotation marks omitted)). With respect to the representations of agency employees, this standard has been interpreted to require that "government agents engage—by commission or omission—in misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result." *Grumman Ohio Corp. v. Dole,* 776 F.2d at 347 (quoting *General Accounting Office v. General Accounting Office Personnel Appeals Board,* 698 F.2d 516, 526 n. 57 (D.C.Cir.1983)).

Hertzberg, 273 F. Supp. 2d at 83. EPIC cannot meet this exacting standard. In this case, weighing against estoppel (assuming EPIC can meet the traditional elements of estoppel, which it cannot) is the confidentiality of tax returns and return information protected by section 6103. *See, e.g., Church of Scientology of Cal.*, 484 U.S. at 16 ("One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than [the Service].").

[4] This case is thus distinguishable from one in which a requester provided what he thought was a valid authorization and the Service fails to inform him of a defect.

B. The Fact that the Service Agreed to Expedited Processing of Plaintiff's Request is Immaterial to the Question of Whether the Request Was Perfected.

The parties agree that the Service granted EPIC expedited processing of its records request. Compl. ¶ 33. EPIC argues that this act constitutes an acknowledgment by the Service that the request was a perfected, valid request. Opp'n at 7. EPIC conflates two separate agency actions: (1) granting expedited processing (under 26 C.F.R. § 601.702(c)(6)) and (2) granting the request itself (under 26 C.F.R. § 601.702(c)(9)(iii)). EPIC's request for expedited processing was granted; its request for records was neither granted nor denied. The Service's decision to grant expedited processing to EPIC has no bearing on whether EPIC's request was perfected.

FOIA acknowledges that some requests may be expedited – *i.e.*, "jump the line" ahead of earlier-submitted FOIA requests. *See, e.g., Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 75-76 (D.D.C. 2006) (expedited processing placed plaintiff's request ahead of others made to agency). FOIA delegates to each agency the ability to develop rules for expedited processing. 5 U.S.C. § 552(a)(6)(E)(i). There is no support in the Service's FOIA rules for the contention that granting a request for expedited processing waives the perfection requirements. Indeed, to the contrary, the Service's FOIA rules distinguish between making a determination with respect to a request for expedited processing and making a determination with respect to the underlying FOIA request.

Under the Service's expedited processing rules, the requester must "submit a statement, certified to be true and correct to the best of his or her knowledge and belief, explaining in detail why there is a compelling need for expedited processing." 26 C.F.R. § 601.702(c)(6)(ii); *see also,* 5 U.S.C. § 552(a)(6)(E)(vi) ("A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief."). The Service must make a

determination whether to expedite the request within 10 days of receiving it. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 26 C.F.R. § 601.702(c)(6)(v). Importantly, the decision whether or not to expedite the request is made "solely" on the certified statement and supporting information initially provided by the requester. 26 C.F.R § 601.702(c)(6)(iv). The determination is not made based on the nature of the records requested, whether the request is perfected, or the merits of the request. In contrast, the processing of the request, as well as the determination to grant or deny the FOIA request itself, is made *afterwards* and separately from the decision to grant expedited processing. 26 C.F.R. § 601.702(c)(9)(ii) (setting forth timeframe for processing request, including separate timeline for expedited requests); *see also,* § 601.702(c)(1)(i) (unperfected requests not subject to time constraints of paragraph (c)(9)).

C. The Service Cannot Waive Taxpayer Protections in Section 6103.

The Service cannot waive taxpayer confidentiality rights under section 6103. Even if EPIC were right about the meaning of the February 8, 2018 letter (it is not), it cannot seriously contend that a statement made by a Service employee waived the taxpayer privacy protections of 26 U.S.C. § 6103. *See Cause of Action v. IRS,* 125 F. Supp. 3d 145, 168 (D.D.C. 2015) (inconsistency in the Service's communications to FOIA plaintiff does not alter the fact that the Service properly withheld third-party taxpayer information); *see also First Heights Bank, F.S.B. v. IRS,* 46 Fed. Cl. 827, 832 (2000) ("The government merely acts as a steward of the [6103] privilege . . . . Defendant's failure to raise the privilege earlier, while unfortunate, will not be construed as a waiver of protections mandated by Congress and designed for the benefit of taxpayers.").

Nonetheless, EPIC counters that, under *Goldstein v. IRS,* 174 F. Supp. 3d 38 (D.D.C. 2016), an agency's determination regarding a FOIA request's perfection is binding on the agency. Opp'n at 11-12. *Goldstein* is inapposite to EPIC's claims. The *Goldstein* court found

that the Service had improperly failed to advise a FOIA requester as to how certain items of his request were imperfect, and that the Service could not, having made a final determination on his request (granting it in part and producing some records) argue that he failed to perfect the request. *Id.* There are two problems with EPIC's attempt to use *Goldstein* to support its argument.

The first problem with EPIC's reliance on *Goldstein* is that, unlike in this case, the *Goldstein* requester received a final agency determination to his FOIA request under 26 C.F.R. § 601.702(c)(9). Specifically, the Service released some, but not all, of the requested records, along with a determination letter from the agency, before he filed suit. *Id.* at 49-51. Here, in contrast, the Service had not yet made a determination as to the sufficiency of, let alone to grant or deny, EPIC's request when EPIC filed suit. Compl. ¶¶ 35, 37. Therefore, the Service had yet to "promptly advise the requester in what respect the request or appeal is deficient so that it may be resubmitted or amended for consideration in accordance with this section." 26 C.F.R. § 601.702(c)(1)(i).

The second insurmountable problem with EPIC's reliance on *Goldstein* is that the *Goldstein* court remanded part of the FOIA request so that the Service could advise the plaintiff in writing how his request was deficient, "thereby giving him an opportunity to perfect the request and exhaust his remedies." *Goldstein*, 174 F. Supp. 3d at 50-51. Here, there is no reason for a similar remand. It is clear, based on allegations in the complaint, that giving EPIC a chance to perfect its request by seeking taxpayer consent would be a futile exercise: EPIC would neither seek nor obtain waivers from the third parties involved, and could not demonstrate a qualifying material interest to obtain the requested tax returns and return information it seeks. Nonetheless, if EPIC desires to engage in such futile actions, the proper course is to remand the matter to the

IRS to allow EPIC to provide waivers or demonstrate a qualifying material interest in response to the perfection notification the Service has already communicated to EPIC.[5]

D. The Service did not Waive Exhaustion and EPIC has not Constructively Exhausted.

EPIC insists that the Service waived the issue of exhaustion of administrative remedies because the Service did not make a determination on EPIC's request within the statutory time frame set out by the FOIA. Opp'n at 8-9. Again, EPIC glosses over the law: requesters bear the burden to perfect. A FOIA requester only exhausts administrative remedies when he makes a perfected request, and EPIC has not done so.

FOIA provides that a requester who has not received a determination on his request may commence a suit twenty business days after his request is received by the agency. 5 U.S.C. § 552(a)(6)(A)(ii). But a FOIA requester whose request does not comply with the agency's FOIA's rules has not exhausted his administrative remedies.[6] Courts have dismissed FOIA claims under this rubric for, variously: failing to provide verification of identity (*Lee v. DOJ*, 235

[5] Like the Court in *Goldstein,* the Court's remand to the Service here would nevertheless amount to the Court's declination of judicial review on the merits, and it would retain jurisdiction merely to ensure the parties complied with its remand order. When the Service in *Goldstein* provided notice of no perfection as to some items of a request, and had not provided notice as to perfection of other request items, the court recognized that failure to exhaust was prudential, and still declined judicial review. *Goldstein*, 174 F.Supp.3d at 57 ("Although Plaintiff correctly points out that the exhaustion requirement is a jurisprudential, rather than jurisdictional doctrine, see Pl.'s Mot. at 13-14, the court finds that in this case, Plaintiff's failure to exhaust precludes judicial review.").

[6] This Court, in partially denying the Service's motion to dismiss, recently decided in *Middle East Forum v. Dep't of Treasury*, No. 17-2010 (JDB), 2018 WL 3243978 (D.D.C. July 3, 2018), that the Service was required to search for records other than returns and return information, and thus not protected by section 6103, concerning a third party. *Id.* at *5. That case is factually distinguishable because in that case, the court determined that the requester clarified, as part of the administrative process, that its request included information other than returns or return information.

F.R.D. 274, 286 (W.D. Pa. 2006)); failing to reasonably describe the records sought (*Dale v. IRS*, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002)); failing to pay necessary fees (*McLaughlin v. DOJ,* 598 F. Supp. 2d 62, 66 (D.D.C. 2009)); and most notably, failing to submit authorization for third-party return information (*Elec. Privacy Info. Ctr. v. IRS,* 261 F. Supp. 3d 1, 9 (D.D.C. 2017)). EPIC's failure to provide the proper authorization doomed its request. Without it, EPIC never constructively exhausted its administrative remedies, and its complaint should be dismissed on that ground.

III. EPIC CANNOT SAVE ITS COMPLAINT BY SEVERING PARTS

EPIC finally suggests that, even if this Court determines that "some subset of records" is not subject to disclosure, "EPIC would still have exhausted its remedies with respect to the rest of the request." Opp'n at 27. Specifically, EPIC suggests that, because it only requested "returns . . . 'as appropriate'," the Court could sever the request for returns from the remainder of its request and dismiss only that portion of the request.

EPIC thus suggests that only the request for returns is unperfected. EPIC is incorrect. As demonstrated in our opening brief and above, EPIC did not perfect its request for "all other return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise" as "includ[ing]" such returns. Opp'n at 2. As we explained, third party return information requires authorization and EPIC has not provided that authorization. EPIC has not identified any other basis on which to sever some portion of its complaint or its records requests. Since EPIC's suggestion does not cure the defects in its complaint, the Court should deny the request to sever and dismiss the complaint.

Moreover, severance is not appropriate here. "The Court may ... sever any claim against a party" that is misjoined. Fed. R .Civ. P. 21; *Abuhouran v. Nicklin*, 764 F. Supp. 2d 130, 133 (D.D.C. 2011) (FOIA claim misjoined with claims alleging mistreatment in prison).

"[S]everance of claims under Rule 21 results in the creation of separate actions." *In re Brand–Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1376 (J.P.M.L. 2003); *Spaeth v. Michigan State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 56 (D.D.C. 2012). EPIC is not seeking the creation of two FOIA suits, nor would that result serve justice or judicial economy. Rather, EPIC volunteers to dismiss the request for tax returns from its complaint. Since partial dismissal will not save the balance of the complaint from dismissal, the Court should look past this suggestion and dismiss the entire complaint.[7]

[7] The only case that EPIC cites in support of its severance argument is *Dettman v. DOJ*, 802 F.2d 1472 (D.C. Cir. 1986), which in no way supports the severability doctrine that EPIC seeks here. In *Dettman*, the requester raised an objection to the FBI's search practices to the Court of Appeals that she had not raised at the administrative level. *Id.* at 1477. The Court of Appeals held that her failure to raise that objection (which was the sole ground for her appeal) constituted a failure to exhaust her administrative remedies, irrespective of the fact that she had exhausted her remedies as to other claims she had raised before the district court. *Id.* That is markedly different from the position that EPIC is in at the pleading stage.

Conclusion

For the foregoing reasons and those set forth in our opening brief, the Court should dismiss EPIC's complaint.

Dated: July 10, 2018

Respectfully submitted,

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