

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5225

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellee.

**On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-670(JEB)**

JOINT APPENDIX

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APPEAL,CLOSED,TYPE I-FOIA

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:17-cv-00670-JEB**

ELECTRONIC PRIVACY INFORMATION CENTER v.
INTERNAL REVENUE SERVICE
Assigned to: Judge James E. Boasberg
Case in other court: USCA, 17-05225
Cause: 05:552 Freedom of Information Act

Date Filed: 04/15/2017
Date Terminated: 08/18/2017
Jury Demand: None
Nature of Suit: 895 Freedom of
Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

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Date Filed	#	Docket Text
04/15/2017	<u>1</u>	COMPLAINT against INTERNAL REVENUE SERVICE (Filing fee \$ 400 receipt number 0090-4915840) filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summons U.S. Attorney for the District of Columbia, # <u>3</u> Summons Internal Revenue Service)(Butler, Alan) (Entered: 04/15/2017)
04/15/2017	<u>2</u>	REQUEST FOR SUMMONS TO ISSUE <i>U.S. Attorney General</i> filed by ELECTRONIC PRIVACY INFORMATION CENTER.(Butler, Alan) (Entered: 04/15/2017)
04/15/2017	<u>3</u>	Corporate Disclosure Statement by ELECTRONIC PRIVACY INFORMATION CENTER. (Butler, Alan) (Entered: 04/15/2017)
04/15/2017	<u>4</u>	NOTICE of Appearance by Marc Rotenberg on behalf of ELECTRONIC PRIVACY INFORMATION CENTER (Rotenberg, Marc) (Entered: 04/15/2017)
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04/17/2017	<u>5</u>	SUMMONS (3) Issued Electronically as to INTERNAL REVENUE SERVICE, U.S. Attorney and U.S. Attorney General (Attachment: # <u>1</u> Consent Form)(sb) (Entered: 04/17/2017)
04/24/2017	<u>6</u>	NOTICE of Appearance by Kieran O'Neill Carter on behalf of INTERNAL REVENUE SERVICE (Carter, Kieran) (Entered: 04/24/2017)
04/27/2017	<u>7</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 4/17/2017. Answer due for ALL FEDERAL DEFENDANTS by 5/17/2017. (Butler, Alan) (Entered: 04/27/2017)
04/27/2017	<u>8</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 04/21/2017. (Butler, Alan) (Entered: 04/27/2017)
04/27/2017	<u>9</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. INTERNAL REVENUE SERVICE served on 4/20/2017 (Butler, Alan) (Entered: 04/27/2017)
04/28/2017		NOTICE OF ERROR re <u>7</u> Summons Returned Executed in FOIA as to U.S. Attorney; emailed to butler@epic.org, cc'd 5 associated attorneys -- The PDF file you docketed contained errors: 1. Incorrect document/case, 2. Please refile document, 3. Incorrect return of service attached; Refile affidavit of mailing as to U.S. Attorney as an attachment to an Errata. (znmw,) (Entered: 04/28/2017)
04/28/2017	<u>10</u>	ERRATA by ELECTRONIC PRIVACY INFORMATION CENTER <u>7</u> Summons Returned Executed in FOIA as to U.S. Attorney. (Butler, Alan) (Entered: 04/28/2017)
05/17/2017	<u>11</u>	MOTION for Extension of Time to File Answer re <u>1</u> Complaint, , MOTION for Extension of Time to <i>File Other Pleading Responsive to Complaint</i> by INTERNAL REVENUE SERVICE (Attachments: # <u>1</u> Text of Proposed Order)(Carter, Kieran) (Entered: 05/17/2017)
05/17/2017		MINUTE ORDER: If Plaintiff objects to Defendant's <u>11</u> Motion for Extension, the Court ORDERS that it shall file such opposition by May 22, 2017. Signed by Judge James E. Boasberg on 5/17/17. (lcjeb2) (Entered: 05/17/2017)
05/17/2017		Set/Reset Deadlines: Opposition due by 5/22/2017. (nbn) (Entered: 05/17/2017)
05/18/2017	<u>12</u>	Memorandum in opposition to re <u>11</u> MOTION for Extension of Time to File Answer re <u>1</u> Complaint, MOTION for Extension of Time to <i>File Other Pleading Responsive to Complaint</i> filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Butler, Alan) (Entered: 05/18/2017)
05/19/2017		MINUTE ORDER: The Court ORDERS that Defendant's <u>11</u> Motion is GRANTED IN PART and DENIED IN PART, and it shall file its response to the Complaint by June 12, 2017. Signed by Judge James E. Boasberg on 5/19/17. (lcjeb2) (Entered: 05/19/2017)

05/19/2017		Set/Reset Deadlines: Responses due by 6/12/2017 (nbn) (Entered: 05/19/2017)
06/09/2017	<u>13</u>	NOTICE of Appearance by Megan Eileen Hoffman-Logsdon on behalf of INTERNAL REVENUE SERVICE (Hoffman-Logsdon, Megan) (Entered: 06/09/2017)
06/12/2017	<u>14</u>	MOTION to Dismiss for Lack of Jurisdiction , MOTION to Dismiss <i>for Failure to State a Claim Upon Which Relief Can Be Granted</i> by INTERNAL REVENUE SERVICE (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Declaration of Michael C. Young, # <u>3</u> Exhibit A – February 16, 2017 FOIA Request, # <u>4</u> Exhibit B – March 2, 2017 Letter, # <u>5</u> Exhibit C – March 29, 2017 FOIA Request, # <u>6</u> Exhibit D – April 6, 2017 Letter, # <u>7</u> Text of Proposed Order)(Carter, Kieran) (Entered: 06/12/2017)
06/26/2017	<u>15</u>	Memorandum in opposition to re <u>14</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss <i>for Failure to State a Claim Upon Which Relief Can Be Granted</i> filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Declaration of John Davisson, # <u>2</u> Text of Proposed Order)(Butler, Alan) (Entered: 06/26/2017)
07/03/2017	<u>16</u>	REPLY to opposition to motion re <u>14</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss <i>for Failure to State a Claim Upon Which Relief Can Be Granted</i> filed by INTERNAL REVENUE SERVICE. (Hoffman-Logsdon, Megan) (Entered: 07/03/2017)
08/18/2017	<u>17</u>	ORDER GRANTING Defendant's <u>14</u> Motion to Dismiss. Signed by Judge James E. Boasberg on 8/18/17. (lcjeb2) (Entered: 08/18/2017)
08/18/2017	<u>18</u>	MEMORANDUM OPINION re <u>17</u> Order on Motion to Dismiss. Signed by Judge James E. Boasberg on 8/18/17. (lcjeb2) (Entered: 08/18/2017)
09/29/2017	<u>19</u>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <u>18</u> Memorandum & Opinion, <u>17</u> Order on Motion to Dismiss/Lack of Jurisdiction, by ELECTRONIC PRIVACY INFORMATION CENTER. Filing fee \$ 505, receipt number 0090-5138435. Fee Status: Fee Paid. Parties have been notified. (Rotenberg, Marc) (Entered: 09/29/2017)
10/02/2017	<u>20</u>	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <u>19</u> Notice of Appeal to DC Circuit Court., (znmw) (Entered: 10/02/2017)
10/04/2017		USCA Case Number 17-5225 for <u>19</u> Notice of Appeal to DC Circuit Court, filed by ELECTRONIC PRIVACY INFORMATION CENTER. (zrdj) (Entered: 10/11/2017)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ELECTRONIC PRIVACY
INFORMATION CENTER,**

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

Civil Action No. 17-670 (JEB)

MEMORANDUM OPINION

Like many Americans, Plaintiff Electronic Privacy Information Center wants to see President Donald J. Trump’s personal income-tax returns. To that end, it has sent Defendant Internal Revenue Service two Freedom of Information Act requests, seeking “all of Donald J. Trump’s individual income tax returns for tax years 2010 forward, and other indications of financial relations with the Russian government or Russian businesses.” Each time, the IRS responded that the request was incomplete — and therefore could not be processed — absent President Trump’s consent to release his tax information. EPIC thus brought the present lawsuit to compel disclosure.

In now seeking dismissal, the IRS argues that EPIC cannot initiate a FOIA suit without perfecting its initial request. EPIC retorts that an exception to the consent prerequisite exists via Congress’s Joint Committee on Taxation, which may approve disclosure. Yet, the Committee has not acted, and the IRS has no obligation to request that body to do so. As a result, until President Trump or Congress authorizes release of the tax returns, EPIC (and the rest of the

American public) will remain in the dark. The Court, powerless to offer relief, will thus grant the Motion and dismiss the case.

I. Background

EPIC is a non-profit organization focused on issues relating to privacy and civil liberties and dedicated to the oversight of government activities. See ECF No. 1 (Complaint), ¶ 7. It is, in this case, interested in President Trump’s personal income-tax returns. As Plaintiff puts it, “In the history of the United States, there has never been greater interest in the public release of an individual’s tax records than those of Donald J. Trump.” Id., ¶ 9.

EPIC first requested this information from the IRS on February 16, 2017. See ECF 14-2 (Declaration of Michael C. Young), Exh. A (First FOIA Request). The organization’s letter sought “all of Donald J. Trump’s individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses.” Id. at 1. In support of its request, EPIC cited an ongoing “Congressional investigation and widespread public interest,” a “long-standing tradition of U.S. Presidents” releasing returns, and concern over the President’s possible “financial dealings with a foreign adversary.” Id. at 1-2.

The IRS responded two weeks later, on March 2, 2017. See Young Decl., Exh. B (First FOIA Response). It wrote that the Internal Revenue Code prohibited release of a third party’s return information unless EPIC established in its request that it had the taxpayer’s consent. Id. at 1 (citing I.R.C. § 6103; Treas. Reg. § 601.702(c)(4)-(5)). “Without such authorization,” the IRS wrote, “the request is incomplete and cannot be processed.” Id. The agency proceeded to close EPIC’s request. Id.

On March 29, EPIC replied with another letter, this time both appealing the initial IRS response and renewing its request for disclosure. See Young Decl., Exh. C (Second FOIA

Request). The second request sought substantially the same information: “Donald J. Trump’s tax returns for tax years 2010 forward and any other indications of financial relations with the Russian government or Russian businesses.” Id. at 1. EPIC further alleged, this second time, that it had a right to those documents under § 6103(k)(3) of the Internal Revenue Code. Id. at 1-8. The Court will delve into that section later, but briefly notes here that it allows the Secretary of the Treasury Department (which the IRS is part of), in certain situations, to disclose tax information to correct a public “misstatement of fact” regarding a taxpayer’s return information if Congress’s Joint Committee on Taxation has given permission.

EPIC alleged that Trump had indeed made several misstatements to the public.

Specifically, he had insisted on Twitter (and, in substance, elsewhere):

For the record, I have ZERO investments in Russia.

Russia has never tried to use leverage over me. I HAVE
NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS,
NO NOTHING!

See @realDonaldTrump, Twitter (July 26, 2016, 3:50 PM); id. (Jan. 11, 2017, 4:31 AM).

Believing these assertions to be “directly contradicted” by investigative reporting and a statement by a member of his immediate family, EPIC argued that § 6103(k)(3) gave the IRS “legal authority to make the tax records available in response to a Freedom of Information Act request.” Second FOIA Request at 4-5, 7 (misattributing statement by Donald Trump Jr. to son-in-law and White House advisor Jared Kushner).

On April 4, after a few days passed, one of EPIC’s attorneys and the IRS disclosure manager participated in a telephone call regarding this request. See Compl., ¶ 45; see also ECF No. 15-1 (Declaration of John Davisson), ¶ 5. On that call the Service told the organization that “we’re not going to do a (k)(3)” and that “we’re not exercising (k)(3)” — referring to the § 6103(k)(3) misstatement-of-fact provision. See Compl., ¶ 46; see also Davisson Decl., ¶ 7.

Two days later, on April 6, the agency followed up with a written response. See Young Decl., Exh. D (Second FOIA Response). Its letter first informed EPIC that “the Service will not consider an appeal of an incomplete FOIA request that cannot be processed.” Id. at 1. The missive then stated that “§ 6103(k) does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties.” Id. Because EPIC still had not obtained President Trump’s authorization to view his tax information, the IRS again closed the request as incomplete. Id. at 2. The Service added that “any future requests regarding this subject matter will not be processed.” Id.

EPIC subsequently filed this lawsuit. Its Complaint states several causes of action: three FOIA counts alleging that the IRS failed to respond substantively by the statutory deadline, failed to take reasonable steps to release information, and unlawfully withheld agency records; and two APA counts asserting that the Service unlawfully closed the FOIA requests and failed to seek § 6103(k)(3) authorization from the Joint Committee on Taxation to release the tax-return information. See Compl., ¶¶ 54-75. Plaintiff thus requests as relief the disclosure of all responsive, non-exempt tax records. Id., Requested Relief, ¶¶ A-H.

Defendant’s Motion to Dismiss these claims is now ripe.

II. Legal Standard

Because Defendant’s reasons for dismissal properly fall under Federal Rule of Civil Procedure 12(b)(6), the Court sets forth that legal standard. Rule 12(b)(6) permits a Court to dismiss any count of a complaint that fails “to state a claim upon which relief can be granted.” In evaluating the motion, the Court must likewise “treat the complaint’s factual allegations as true and must grant plaintiff ‘the benefit of all inferences that can be derived from the facts alleged.’” Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting

Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)) (citation omitted). The Court need not accept as true, however, “a legal conclusion couched as a factual allegation” or an inference unsupported by facts set forth in the Complaint. Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

This pleading standard is “not meant to impose a great burden upon a plaintiff,” Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005), as a count will survive so long as there is a “‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support the claim.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007) (quoting Dura Pharm., 544 U.S. at 347). While “detailed factual allegations” are not necessary to withstand a dismissal motion, id. at 555, the Complaint still “must contain sufficient factual matter, 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 Twombly, 550 U.S. at 570). In other words, a plaintiff must put forth “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. A complaint may survive even if “‘recovery is very remote and unlikely’” or the veracity of the claims are “doubtful in fact” if the factual matter alleged in the complaint is “enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555-56 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

III. Analysis

At bottom, EPIC wants the IRS to reveal another person’s income-tax returns without his consent. Although those returns happen to belong to President Trump, that fact does not alter the outcome here. What steps a private individual must take to make such a Freedom of Information Act request and whether she can proceed in court is at the heart of any such tax-records dispute.

Answering this question necessitates understanding the principal federal sunshine law — the Freedom of Information Act. Congress enacted FOIA with a “broadly conceived” purpose “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976) (quotations omitted). The Act lets private individuals request records from federal agencies. See 5 U.S.C. § 552(a)(3)(A). But, as with any government workings, some formalities must be followed.

FOIA’s own statutory preliminaries are rather “minimal.” Hinojosa v. Dep’t of Treasury, No. 06-215, 2006 WL 2927095, at *4 (D.D.C. Oct. 11, 2006); accord Dale v. IRS, 238 F. Supp. 2d 99, 103 (D.D.C. 2002). An individual looking for documents need only send an agency a request that (1) “reasonably describes” the records sought and (2) follows “published rules stating the time, place, fees (if any), and procedures to be followed.” 5 U.S.C. § 552(a)(3)(A); see DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754-55 (1989).

It is at this initial juncture, however, that the parties’ positions diverge. Defendant believes that EPIC’s Complaint is doomed because it has not followed the “published rules” — namely, Treasury regulations — on obtaining President Trump’s consent before requesting his confidential tax documents and because the organization cannot bring an Administrative Procedure Act challenge to circumvent the FOIA process. Plaintiff, on the other hand, thinks these procedural requirements are unnecessary to requesting his tax returns.

It is the Government that has the better of the arguments. The Internal Revenue Code and the various Treasury regulations on FOIA well articulate what must happen for the public release of an individual’s private return information. EPIC must either obtain President Trump’s consent to initiate a FOIA request or, as the organization itself suggests, convince Congress’s Joint

Committee on Taxation to sign off on the IRS's disclosure. As neither of these key missing actions can happen in court, Plaintiff's claims must be dismissed.

In spelling out why this is necessarily so, the Court first discusses the FOIA claims before turning to the APA counts, which are closely related.

A. FOIA Claims

Defendant first asks to dismiss the FOIA counts on the ground that EPIC has not even sent a valid request in accordance with various Treasury regulations, which embody the "published rules" that state the "procedures to be followed" when asking for records. See 5 U.S.C. § 552(a)(3)(A). The IRS contends that those rules specify that, in a proper FOIA request, a person seeking another's tax returns must also submit proof of third-party consent to have that information released. Without that consent, there is no FOIA request to investigate, let alone litigate.

Courts often talk about the need to abide by agency procedures as the "exhaustion" requirement. Such "[e]xhaustion of administrative remedies is generally required before filing suit in federal court." Oglesby v. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990). A plaintiff's "failure to comply with an agency's FOIA regulations is the equivalent of a failure to exhaust" and generally subjects the case to dismissal. West v. Jackson, 448 F. Supp. 2d 207, 211 (D.D.C. 2006); see Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (affirming Rule 12(b)(6) dismissal for failure to exhaust); Hinojosa, 2006 WL 2927095, at *4 ("Failure to file a perfected request constitutes failure to exhaust administrative remedies and subjects the requesting party's suit to dismissal."). To "maintain a civil action," a litigant must thus first "properly initiate[]" FOIA's administrative process by following each agency's "published rules" on request procedures. Brown v. FBI, 675 F. Supp. 2d 122, 126 (D.D.C. 2009); see, e.g., Oglesby, 920 F.2d

at 66-67 (requiring litigant to comply with published rules on fees before proceeding); see also Lewis v. DOJ, 733 F. Supp. 2d 97, 107 (D.D.C. 2010); Calhoun v. DOJ, 693 F. Supp. 2d 89, 91 (D.D.C. 2010); Antonelli v. Fed. Bureau of Prisons, 591 F. Supp. 2d 15, 26 (D.D.C. 2008).

These are not mere formalities to be routinely ignored, some unseemly morass of bureaucratic red tape. Rather, “[e]xhaustion has long been required in FOIA cases” as a core component of “orderly procedure and good administration.” Dettmann v. DOJ, 802 F.2d 1472, 1476 n.8 (D.C. Cir. 1986) (quoting United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952)). Complying with the regular process allows an agency “an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.” Oglesby, 920 F.2d at 61. This case underscores the value of exhaustion: where this Court looks at the nation’s internal-revenue system from time to time, the IRS deals with it daily.

The relevant Treasury regulations that EPIC purportedly ran afoul of require some detailing. The Court first discusses them before analyzing the flaws in the organization’s specific requests and whether Internal Revenue Code § 6103(k)(3) serves as an exception.

1. *Treasury Regulations on FOIA Requests*

The IRS’s “published rules” on FOIA procedures can be found in Treasury Regulation § 601.702. See 5 U.S.C. § 552(a)(3)(A); Church of Scientology of Cal. v. IRS (Church of Scientology I), 792 F.2d 146, 150 (D.C. Cir. 1986) (Scalia, J.). The failure to “perfect” a request by following this section is tantamount to a failure to exhaust administrative remedies, and, as discussed, that road typically leads only to dismissal. See, e.g., Hinojosa, 2006 WL 2927095, at *4; Flowers v. IRS, 307 F. Supp. 2d 60, 67 (D.D.C. 2004); Dale, 238 F. Supp. 2d at 103; see also Treas. Reg. § 601.702(c)(1)(i) (labeling compliant request “perfected”).

The Regulation cautions requestors as much. Individuals who do not submit a request that “conforms in every respect with the rules and procedures set forth in this section” risk having their “request or appeal file . . . closed.” Treas. Reg. § 601.702(c)(1)(i). This warning is repeated once more: “Requesters are advised that only requests for records which fully comply with the requirements of this section can be processed in accordance with this section.” Id. § 601.702(c)(4)(i).

One requirement is especially relevant; as it has a few moving parts, the Court reproduces it in full: “The initial request for records must —”

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.

Id. § 601.702(c)(4)(i)(E) (emphases added). To highlight the relevant portions in plain English, if Internal Revenue Code § 6103 “limit[s]” disclosure of the requested information, then the requestor must comply with the further procedural requirements set forth in Treasury Regulation § 601.702(c)(5)(iii).

There is no doubt that § 6103 limits the disclosure of personal tax records. “Returns and return information shall be confidential,” and the IRS may not disclose such records. See I.R.C. § 6103(a); see also Church of Scientology of Cal. v. IRS (Church of Scientology III), 484 U.S. 9, 10 (1987) (“Section 6103 . . . lays down a general rule that ‘returns’ and ‘return information’ as defined therein shall be confidential.”). This “heightened protection [i]s intended . . . to encourage the full, voluntary self-assessment of taxes upon which our internal revenue system largely depends.” Church of Scientology of Cal. v. IRS (Church of Scientology II), 792 F.2d 153, 158-59 (D.C. Cir. 1986) (*en banc*) (Scalia, J.).

As disclosure is limited, the Court now looks to Treasury Regulation § 601.702(c)(5)(iii). That section states, in relevant part: “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.” Id. § 601.702(c)(5)(iii)(C). In other words, a FOIA request seeking records about a third party must furnish evidence of that individual’s consent. See Hull v. IRS, 656 F.3d 1174, 1197 (10th Cir. 2011) (citing Treas. Reg. § 601.702(c)(4)(i)(E), (5)(iii)(C)) (“Indeed, the Treasury regulations require a requester to obtain third party consent before the IRS can process a request for third party return information.”).

As the D.C. Circuit recently held, these upfront procedures are permissible so long as they are “reasonable.” Clemente v. FBI, No. 16-5067, 2017 WL 3443034, at *5 (D.C. Cir. Aug. 11, 2017). “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.” Id. It is not difficult to surmise, however, why the IRS requires FOIA requestors to furnish third-party consent in this case and other similar situations. Before the Service extensively searches for an individual’s return information, which is usually highly guarded, see Church of Scientology II, 792 F.2d at 158-59, it is crucial to know if the requestor maintains a genuine interest or is simply curious. Requiring consent as part of the initial request is the IRS’s way of separating chaff from wheat. Absent this proof, a FOIA request for confidential third-party return information is incomplete, exhaustion is wanting, and litigation is premature. See Reedom v. Soc. Sec. Admin., 192 F. Supp. 3d 116, 122 (D.D.C. 2016); Kalu v. IRS, No. 14-998, 2015 WL 4077756, at *4-5 (D.D.C. July 1, 2015); Dale, 238 F. Supp. 2d at 103.

2. EPIC's FOIA Requests

Indeed, not much about how these rules play out is actually in dispute here. The pertinent facts are few. Plaintiff submitted an initial FOIA request seeking President Trump's personal income-tax returns from 2010 onward and any other indications of financial connections with the Russian government or Russian businesses. See First FOIA Request at 1. (It is unclear where EPIC believes the Service should look for the latter type of information, but it never provided proof of consent from any other individual or entity.) After the IRS closed the initial request for failure to provide the subject's consent, EPIC submitted a second letter, both appealing the first request and making out a second one for the same documents. See Second FOIA Request at 2. As that letter again attached nothing from President Trump, the appeal was rejected and the request again closed.

EPIC does not contest that, “[i]n the case of a request for records the disclosure of which is limited by statute or regulations,” including Internal Revenue Code § 6103, the IRS's rules require additional FOIA compliance. See Treas. Reg. § 601.702(c)(4)(i)(E) (referencing § 601.702(c)(5)(iii)); see also Opp. (neglecting to mention § 601.702(c)(4) at all). Nor does the organization question that § 6103(a) designates “returns” or “return information” as confidential, see I.R.C. § 6103(a), or quibble with the IRS's finding that the two underlying FOIA requests seek only that sort of tax information. See Opp. at 9; see also I.R.C. § 6103(b)(1)-(2) (defining “return” and including as “return information” “the nature, source, or amount of his income, . . . assets, [or] liabilities”); cf. Hull, 656 F.3d at 1192 (upholding dismissal of FOIA action but cautioning IRS that not every request will “on its face solely seek[] . . . return information”). Last, EPIC does not contest that, for protected third-party information, Treasury regulations

generally “implement . . . a consent requirement.” Opp. at 7; see also Treas. Reg. § 601.701(c)(5)(iii)(C). President Trump most certainly has not consented.

Without such consent to release otherwise confidential information, the conclusion of this tax syllogism is plain: EPIC simply has not perfected, or completed, its request, and its FOIA claims must therefore be dismissed for failure to exhaust. See Reedom, 192 F. Supp. 3d at 122; Kalu, 2015 WL 4077756, at *4-5; Dale, 238 F. Supp. 2d at 103.

3. *Section 6103(k)(3) as Exception*

Plaintiff rejoins that the game is not yet over, and it invokes a possible exception to this tried-and-true exhaustion bar. See Opp. at 7 (“These provisions simply do not apply here.”). All of its arguments revolve around Internal Revenue Code § 6103(k)(3), which gives the IRS some power to correct misstatements of fact regarding taxes in particular circumstances, so long as Congress’s Joint Committee on Taxation signs off on disclosure first. Because President Trump has allegedly made public misrepresentations about his personal tax information, EPIC argues that § 6103(k)(3) can be summoned to defeat the exhaustion requirement. This Court does not concur.

To start, some background on § 6103(k)(3). While § 6103(a), as discussed above, provides that taxpayer information is confidential and not subject to disclosure, “[s]ubsections (c) through (o) of § 6103 set forth various exceptions to th[at] general rule that returns and return information are confidential and not to be disclosed.” Church of Scientology III, 484 U.S. at 15. These various exceptions allow, for example, disclosure to “congressional committees, the President, state tax officials, and other federal agencies.” Id. Exceedingly few exceptions, however, contemplate disclosure to the public writ large. See, e.g., I.R.C. § 6103(k)(1) (permitting disclosure to “members of the general public . . . to permit inspection of any accepted

offer-in-compromise”), (m)(1) (allowing disclosure of “taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds”).

Each exception, moreover, is of limited scope and subject to “special safeguards.”

Church of Scientology III, 484 U.S. at 15. Section 6103(k)(3) reads:

Disclosure of return information to correct misstatements of fact.
— The [Treasury] Secretary may, but only following approval by the Joint Committee on Taxation [of the U.S. Congress], disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer’s return or any transaction of the taxpayer with the Internal Revenue Service.

Congress passed this subsection in the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a)(1), 90 Stat. 1520, 1667, alongside several other exceptions that “allow the disclosure of tax information for miscellaneous administrative and other purposes.” H.R. Rep No. 94-1515, at 480 (1976) (Conf. Rep.), reprinted in 1976 U.S.C.C.A.N. 4117, 4184-85. Section 6103(k)(3), in particular, appears to contemplate public disclosure to correct misstatements but only for tax-administration purposes and with Congress’s authorization. See I.R.C. § 6103(b)(4) (defining “tax administration”).

This section is a *rara avis*. The Court, in fact, is aware of no instance where it has been successfully invoked, either in the FOIA context or otherwise. In 1981, for example, the Treasury Secretary sought the Joint Committee on Taxation’s approval to disclose information on certain tax protestors to undercut their positions. See 127 Cong. Rec. S22,510 (daily ed. Sept. 30, 1981). Protest leaders had publicly made “sales pitches” that they had successfully evaded taxes, encouraging others to join in undermining the Service’s revenue collection. See Ray Walden, Comment, Render unto Uncle Sam That Which Is Uncle Sam’s: The IRS and Tax Protest Evangelism, 61 Neb. L. Rev. 681, 731 & n.265 (1982). The IRS knew this to be pure

bravado, but its disclosure effort seems to have been stymied by then-first-year Senator Chuck Grassley. See 127 Cong. Rec. S22,510 (statement of Sen. Chuck Grassley) (invoking Griswold v. Connecticut, 381 U.S. 479 (1965) (Douglas, J.)). Then, in 1997, the IRS Commissioner wrote the House Committee on Ways and Means and Senate Committee on Finance to “explore . . . the possibility of using Code section 6103(k)(3) to permit the IRS to correct misstatements of fact regarding” possible bias in the “examinations of tax-exempt organizations,” but it does not appear that the IRS ever requested § 6103(k)(3) approval from the Joint Committee. See Staff of J. Comm. on Taxation, Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters, No. JCS 3-00, at 1 (Mar. 2000); id. at 105, Exh. 1-2 (February 25, 1997, Letter from Commissioner Margaret Milner Richardson). Brief sightings of the section in other opinions, moreover, appear to be errant citations to § 6103(k)(6). See, e.g., Maisano v. United States, 908 F.2d 408, 410-11 (9th Cir. 1990); Spence v. United States, No. 95-0811, 1996 WL 628124, at *3 (D.N.M. July 18, 1996); Tomlinson v. United States, No. 89-1518, 1991 WL 338328, at *2-3 (W.D. Wash. Aug. 20, 1991).

Hoping the past is not prologue, EPIC invokes § 6103(k)(3) here. In considering that section, the Court first assumes without deciding that President Trump’s alleged misrepresentations constitute “misstatements of fact” within the meaning of the statute. See Opp. at 12-16. Because the Government also argues only in a single sentence (without citation) that such disclosure would not further “tax administration purposes,” I.R.C. § 6103(k)(3), the Court next assumes — despite substantial reservations — that releasing President Trump’s tax information would also satisfy that requirement. See Mot. at 17-18; see also Reply at 8 (arguing only that “[m]embers of the public are not in a position to evaluate” whether correction serves “tax administration purposes”). Still remaining, however, is the basic question of how

§ 6103(k)(3) interacts with the IRS’s entirely separate FOIA requirements, especially the one on consent. FOIA’s prerequisites generally carry an “across-the-board” application, regardless of whether individuals invoke § 6103(k)(3) (or any other section) in their request. Maxwell v. Snow, 409 F.3d 354, 357 (D.C. Cir. 2005) (quoting Church of Scientology I, 792 F.2d at 149); see Treas. Reg. § 601.702(c)(4)(i) (providing that all “requests for records” must “fully comply with the requirements of this section”).

Even assuming § 6103(k)(3) could offer a means of negating the IRS’s consent prerequisite under FOIA, the answer here is still straightforward. The plain terms of that section, which require congressional approval, foreclose any relief from the exhaustion barrier. See I.R.C. § 6103(k)(3) (“The Secretary may, but only following approval by the Joint Committee on Taxation, disclose . . . information . . .”). In other words, the central problem is that the Joint Committee on Taxation has not approved the disclosure of President Trump’s tax returns — and, in fact, it does not appear that it has ever exercised this authority in regard to anyone. Without the Committee’s authorization, this potential exception to the consent requirement could not possibly apply, and EPIC’s litigating this case remains premature.

Plaintiff also points to no FOIA provision or case that would obligate the IRS to seek the approval of the Committee or any other congressional body in order to produce records; in fact, the Court discusses whether even the Administrative Procedure Act compels this in Section III.b.2, *infra*. Nor does EPIC provide authority to support its contention that FOIA obligates an agency to produce records that first independently require congressional approval.

Some contrary signals might instead be drawn from United We Stand America, Inc. v. IRS, 359 F.3d 595 (D.C. Cir. 2004). In that case the Joint Committee on Taxation sent the IRS a letter (for a reason unrelated to § 6103(k)(3)), which disclaimed that it “may not be disclosed

without the prior approval of the Joint Committee.” Id. at 597. While the issue there was whether this letter was a record within the IRS’s control and thus subject to FOIA (it was not), the case remains instructive. Nowhere does the D.C. Circuit suggest that the Act required the Service to ask the Committee for that approval — as it very well could have done — so that the letter would become an agency record subject to disclosure. Instead, the court focused on the “congressional intent to control” and not on the steps the IRS might take to lift that control, thereby concluding that the letter was “not subject to FOIA at all.” Id. at 600, 603. This aligns with the general understanding that Congress is insulated from FOIA matters. See Dunnington v. Dep’t of Def., No. 06-925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (“Neither branch of Congress is an executive agency subject to FOIA.”); see also Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) (“[M]embers of Congress are not within the definition of agency under FOIA.”). Here, too, the Court finds no basis in FOIA to require the IRS to seek the Committee’s approval so as to open wider its FOIA doors or to produce records that require such independent approval.

B. APA Claims

Having felled Plaintiff’s FOIA counts, Defendant also seeks to down the two Administrative Procedure Act claims, which are closely tethered to the former ones. One of those APA claims challenges the IRS’s closure of EPIC’s FOIA requests as unlawful agency action. See Compl., ¶¶ 66-70. The second alleges that the Service’s failure to seek § 6103(k)(3) permission from the Joint Committee on Taxation is “agency action unlawfully withheld or unreasonably delayed.” Id., ¶¶ 71-75.

It is not so easy to circumvent FOIA's strictures by bringing other claims that seek the disclosure of agency records. The Court discusses, in turn, why neither of EPIC's APA salvos gets it any closer to obtaining President Trump's return information.

1. *Unlawful Agency Action*

Plaintiff first challenges the "IRS's closure of EPIC's FOIA Request" as unlawful agency action. See Compl., ¶ 67. Defendant responds, however, that the APA precludes such a claim from moving forward when relief under FOIA is available.

This question is not particularly close. The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. There is "little doubt that FOIA offers an 'adequate remedy' within the meaning of section 704," at least when litigants seeks to "gain access to . . . records." Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F.3d 1235, 1245-46 (D.C. Cir. 2017). "[C]ourts in this Circuit have 'uniformly' concluded that" litigants cannot bring "APA claims that seek remedies available under FOIA." Harvey v. Lynch, 123 F. Supp. 3d 3, 7-8 (D.D.C. 2015) (quoting Feinman v. FBI, 713 F. Supp. 2d 70, 76 (D.D.C. 2010)). Although some courts (and Defendant, too) characterize this as an issue that goes to the Court's "jurisdiction" to hear APA claims, the "adequate remedy bar of § 704" is more precisely an issue of "whether there is a cause of action under the APA, not whether there is federal subject matter jurisdiction." Perry Capital LLC v. Mnuchin, No. 14-5243, 2017 WL 3078345, at *21 (D.C. Cir. Feb. 21, 2017)

Critically, the remedies that EPIC seeks here in response to the IRS's closing of its FOIA requests qualify as relief under FOIA. In Plaintiff's own words, it desires the "full processing of its request, . . . the identification of nonexempt responsive documents, and ultimately . . . the release of such records." Opp. at 26; see Compl., Requested Relief, ¶¶ A-D. Of course, the

processing and production of documents is the entire point of FOIA. See CREW, 846 F.3d at 1245-46; see also Feinman, 713 F. Supp. 2d at 76 (finding APA challenges to “agency’s substantive determinations” for releasing documents and issues of “agency procedure” in processing requests were both precluded by FOIA). The Court must therefore dismiss EPIC’s first APA count, as it is properly nestled under FOIA instead.

2. *Action Unlawfully Withheld*

EPIC’s second APA challenge alleges that the IRS’s “fail[ure] to seek permission from the Joint Committee on Taxation to release the records EPIC has requested” qualifies as “agency action unlawfully withheld or unreasonably delayed.” Compl., ¶¶ 72-73. The IRS responds again that there is an adequate remedy under FOIA and also maintains that EPIC has not plausibly alleged that the failure to seek Joint Committee approval under § 6103(k)(3) is agency action unlawfully withheld or unreasonably delayed.

For starters, it is not obvious that FOIA provides an adequate remedy for this APA claim. Generally speaking, no FOIA request can force the IRS or Treasury Secretary to seek the Joint Committee’s permission under § 6103(k)(3). See supra Section III.A.3. As the adequate-remedy ground is not jurisdictional, the Court need not decide if one exists. See Perry Capital, 2017 WL 3078345, at *21. This is because the Service’s second argument clearly carries the day.

The APA permits claims to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). But judicial review of those non-actions is available “only if a federal agency has a ‘ministerial or non-discretionary’ duty amounting to ‘a specific, unequivocal command.’” Anglers Conservation Network v. Pritzker, 809 F.3d 664, 670 (D.C. Cir. 2016) (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55, 63-64 (2004)). Unless a plaintiff has

plausibly asserted that “an agency failed to take a discrete agency action that it is required to take,” S. Utah Wilderness All., 542 U.S. at 64, the Court is without “license to substitute its discretion for that of an agency.” AARP v. EEOC, 823 F.2d 600, 605 (D.C. Cir. 1987). EPIC has not conquered this hurdle.

Section 6103(k)(3) does not mandate the Treasury Secretary to ever seek congressional approval. The provision reads that the “Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer.” I.R.C. § 6103(k)(3). Nothing there says that the Secretary must or shall or even should consult with the Joint Committee. Reading the statute plainly, perhaps the Joint Committee might even give approval without the IRS’s ever requesting it. The sparse historical practice around § 6103(k)(3) likewise underscores that it is indeed a rarely wielded discretionary power, the use of which a litigant cannot compel through the APA. This last count must thus also be dismissed.

* * *

Before wrapping up, the Court notes that it does not reach the parties’ remaining arguments. It does not address Defendant’s final non-jurisdictional contention that EPIC lacks the statutory authorization to bring either APA challenge on the basis that the organization falls outside the “zone of interests.” See Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 319 (D.C. Cir. 2015); Mendoza v. Perez, 754 F.3d 1002, 1016 (D.C. Cir. 2014); see also Mot. at 15-16 (erroneously labeling “zone of interests” test as jurisdictional). Plaintiff’s claims that are absent from the Complaint and raised only in footnotes in its brief are also deemed forfeited. See, e.g., Opp. at 11 n.2; see also CTS Corp. v. EPA, 759 F.3d 52, 64 (D.C. Cir. 2014) (“A footnote is no place to make a substantive legal argument . . . ; hiding an argument there and

then articulating it in only a conclusory fashion results in forfeiture.”); Bazarian Int’l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A., 793 F. Supp. 2d 124, 130 n.3 (D.D.C. 2011) (rejecting claim found in “footnote in [plaintiff’s] opposition” where plaintiff “ha[d] not filed any motion to amend its Complaint”).

IV. Conclusion

What Plaintiff wants in this case is to peer into another person’s income-tax records. Although the Court has no reason to doubt EPIC’s assertion that the return information on this particular individual — President Trump — would be of interest to the public, that fact does not give the organization a viable legal case. Instead, there are two established routes that could offer relief: President Trump may himself agree to this release of information, or, as EPIC suggests, Congress’s Joint Committee on Taxation can authorize disclosure in the appropriate set of circumstances. Absent either of these events, EPIC is premature in bringing this suit.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: August 18, 2017

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ELECTRONIC PRIVACY
INFORMATION CENTER,**

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

Civil Action No. 17-670 (JEB)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court
ORDERS that:

1. Defendant's Motion to Dismiss is GRANTED; and
2. The case is DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: August 18, 2017



ELECTRONIC PRIVACY INFORMATION CENTER

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TO: INTERNAL REVENUE SERVICE

FROM: ELENI KYRIAKIDES

COMPANY:

Electronic Privacy Information Center

DATE:

2/16/17

RECIPIENT'S FAX NUMBER:

877-891-6035

SENDER'S EMAIL:

FOIA@epic.org

RECIPIENT'S TELEPHONE NUMBER:

SENDER'S TELEPHONE NUMBER:

(202) 483-1140

TOTAL NO. OF PAGES INCLUDING COVER:

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COMMENTS:



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VIA FASIMILE

February 16, 2017

IRS FOIA Request
Stop 93A
Post Office Box 621506
Atlanta GA 30362-3006
Fax: 877-891-6035

Dear FOIA Officer,

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Internal Revenue Service ("IRS").

EPIC seeks all of Donald J. Trump's individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses.

Allegations of the President's and his associates' ties to Russia are currently the subject of Congressional investigation and widespread public interest.¹ Weeks into his presidency, undisclosed communications with Russia led to the resignation of National Security Advisor Flynn.² A recent poll by ABCNews shows broad public support for the release of the President's tax returns.³ According to ABC, three-quarters of Americans said he should release his tax returns.⁴ In contrast, during the election season in May "only 64 percent said he should release the returns," and, "in September, 63 percent said he was not justified in withholding them," reported ABC.⁵ The news organization also found "[i]n one key support group for Trump, noncollege-educated white men, 58 percent say he should release the tax returns," and "69 percent in the red states -- those Trump won -- say he should release these records."⁶

¹ Press Release, Sen. Richard Burr, Chairman of the Senate Select Comm. on Intelligence, and Sen. Mark Warner, Vice Chairman, Joint Statement on Comm. Inquiry into Russian Intelligence Activities (Jan. 13, 2017), <https://www.burr.senate.gov/press/releases/joint-statement-on-committee-inquiry-into-russian-intelligence-activities>.

² Letter of Resignation, Michael Flynn, Former Nat'l Sec. Advisor (Feb. 13, 2017), <https://assets.documentcloud.org/documents/3461323/Michael-Flynn-Resignation-Letter.pdf>.

³ Gary Langer, *Public Splits on Trump's Ethics Compliance; Three-Quarters Want Tax Returns Released (POLL)*, ABC News (Jan. 16, 2017), <http://abcnews.go.com/Politics/public-splits-trumps-ethics-compliance-quarters-tax-returns/story?id=44811545>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Nonetheless, going against long-standing tradition of U.S. presidents, the President has refused to publicly release his tax returns to clarify his international ties.⁷

At no time in American history has a stronger claim been presented to the IRS for the public release of private tax records. If the Freedom of Information Act means anything, it means that the American public has the right to know whether records exist in a federal agency that reveal the US president has financial dealings with a foreign adversary.

Against this backdrop of widespread public interest in disclosure, a diminished expectation of privacy for Presidential candidates in the privacy of their tax records, the unique concern of a President's potential business dealings with foreign countries with interests adverse to those of the United States, and the purpose of the FOIA, EPIC seeks public disclosure of the above tax records.

Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(i)(II).

Further, any duplication fees should also be waived because "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," and disclosure "is not primarily in the commercial interest of the requester." § 552(a)(4)(A)(iii).

First, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." § 552(a)(4)(A)(iii). The President's tax records directly concern the operations or activities of the government. They establish President's potential conflicts of interest and dealings with foreign governments. Indeed, the records are of constitutional significance; they are necessary to review the President's compliance with the Emoluments Clause of the U.S. Constitution. U.S. Const. art. 1, § 9, cl. 8. Disclosure of the records will contribute significantly to the public understanding of the President's conflicts of interest because, despite allegations of his close associates' foreign ties, the details of the President's financial dealings with foreign entities are unknown. Thus far, the President has refused to release the records, and Congressional efforts to access the records have stymied due to partisan division.⁸ Nonetheless, three quarters of Americans believe the President should release his tax returns.⁹ Therefore,

⁷ Julie Hirshfeld Davis, *Trump Won't Release His Tax Returns, a Top Aide Says*, N.Y. Times (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html>.

⁸ Naomi Jagoda, *House panel voted against requesting Trump's Tax returns*, Hill (Feb. 14, 2017), <http://thehill.com/policy/finance/319438-house-panel-votes-against-requesting-trumps-tax-returns>.

⁹ Langer, *supra* note 3.

independent disclosure of these records by the IRS is a critical contribution to the public understanding of the President's operations.

Second, as to the "existence and magnitude of the requester's commercial interest... being furthered by the releasable records," EPIC has no commercial interest in the requested records. § 552(a)(4)(A)(iii). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁰

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(A)(i), I will anticipate your determination on our request within twenty working days.

For questions regarding this request I can be contacted at 202-483-1140x111 or FOIA@epic.org.

Respectfully submitted,

Eleni Kyriakides



¹⁰ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.



**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224**

**PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE**

March 2, 2017

Eleni Kyriakides
Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009

Dear Eleni Kyriakides:

This is our final response to your Freedom of Information Act (FOIA) request dated February 16, 2017 that we received on February 16, 2017.

You asked for all of Donald J. Trump's individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses.

The scope of your request extends to documents, to the extent that any exist, that consist of, or contain the tax returns or return information of a third party. Please be advised that such records, to the extent that they exist, would be confidential and may not be disclosed unless specifically authorized by law. Specifically, Internal Revenue Code (IRC) § 6103 prohibits the release of returns and return information unless disclosure is authorized by Title 26.

The Service's FOIA regulations specify that, in order to be processed, all requests that involve the disclosure of records that may be limited by statute or regulation, including requests for documents that are protected by IRC § 6103, must establish the right of the person making the request to the disclosure of the records in question. See 26 C.F.R. § 601.702(c)(4)(i)(E). Specifically, when a person is requesting records pertaining to other persons or businesses, "the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate." See 26 C.F.R. § 601.702(c)(5)(iii)(C). Without such authorization, the request is incomplete and cannot be processed. See 26 C.F.R. § 601.702(c)(4). Only fully compliant requests can be processed.

Because of the foregoing, we are closing your request as incomplete with no further action.

JA 000029

If you have any questions please call me at 949-575-6406 or write to: Internal Revenue Service, Disclosure Office 13, PO Box 621506, Stop 211, Atlanta, GA 30362. Please refer to case number F17048-0017.

Sincerely,

A handwritten signature in blue ink that reads "Michael C. Young". The signature is written in a cursive style with a long horizontal flourish at the end.

Michael C Young
Tax Law Specialist
Badge No. 1000436696
Disclosure Office 13

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SERVICE**

FROM: JOHN DAVISSON

COMPANY:

Electronic Privacy Information Center

DATE:

3/29/17

RECIPIENT'S FAX NUMBER:

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VIA FAX

March 29, 2017

IRS FOIA Request
Stop 93A
Post Office Box 621506
Atlanta GA 30362-3006
Fax: 877-891-6035

Re: Case Number F17048-0017

This letter constitutes an appeal and renewed request for disclosure of President Donald J. Trump's tax returns under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The FOIA request at issue was submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Internal Revenue Service ("IRS") on February 16, 2017 ("EPIC FOIA Request").

The EPIC FOIA Request sought Donald J. Trump's tax returns for tax years 2010 forward and any other indications of financial relations with the Russian government or Russian businesses.

In a letter from Michael C. Young dated March 2, 2017, the IRS stated that the agency was closing the EPIC FOIA Request. Mr. Young claimed that 26 C.F.R. § 601.702(c) applied.

EPIC hereby renews the request and seeks to make clear EPIC's "right to access such records" under the relevant statute as required by IRS regulations.¹ Specifically, EPIC has the right to these records "to correct . . . misstatement[s] of fact" pursuant to 26 U.S.C. § 6103(k)(3).

The Commissioner should move promptly to obtain permission from the Joint Commission on Taxation to release the records EPIC has requested.

EPIC's Right to Access the President's Tax Returns Pursuant to § 6103(k)(3)

Section 6103(k)(3) gives the IRS discretion to release certain tax return information with the permission of the Joint Committee on Taxation ("JCT"). The provision permits the disclosure of tax records to correct a "misstatement of fact."² As the Senate Finance Committee explained at the time the provision was adopted, "*the committee decided either that return information*

¹ 26 C.F.R. § 601.702(c)(5)(iii)(A). The relevant statutory provision is 26 U.S.C. § 6103.

² Two courts have mentioned the provision in passing—both in the context of property lien disclosures—and referred to the broad discretion granted under the section. *See Maisano v. United States*, 908 F.2d 408, 410 (9th Cir. 1990) (per curiam); *Carlson v. United States*, No. 94-924, 1995 WL 687110, at *2 (D. Hawaii Sept. 22, 1995).

should be public as a matter of policy, or that the reasons for the limited disclosures involved outweighed any possible invasion of the taxpayer's privacy which might result from disclosure."³

Section 6103(k)(3) has been invoked in cases raising matters of substantial public interest. The Commissioner has previously requested permission from the JCT to disclose tax return information to address public outrage over perceived unfairness in tax administration. For example, in 1997 the IRS Commissioner "requested the opportunity to explore with [JCT] Chairman Archer and Chairman Roth the possibility of using Code section 6103(k)(3) to permit the IRS to correct misstatements of fact regarding examinations of tax-exempt organizations."⁴ Commissioner Richardson explained "unfounded reports erode public confidence in the integrity of the IRS, thereby undermining the self-assessment compliance system."⁵ The IRS put forward a similar proposal in 1981 to correct misstatements by tax protestors "either that we are letting them get away with not filing or that we are harassing them."⁶

The Release of the Trump Tax Records Satisfies the Requirements of § 6103(k)(3)

At no time in American history has a stronger claim been presented to the IRS for the public release of tax records to "correct . . . misstatement[s] of fact."⁷ If the Freedom of Information Act means anything, it means that the American public has the right to know whether records exist in a federal agency which reveal that the U.S. president has financial dealings with a foreign adversary.⁸

Allegations of the President's business relations with Russia and the Russian government are the focus of numerous Congressional investigations and widespread public interest.⁹ Today Sen. Ron Wyden (D-OR) urged the Senate Intelligence Committee to review the President's financial ties to Russia.¹⁰ "Efforts to understand these relationships and to separate fact from

³ S. Rep. 94-938 at 340 (S. REP. 94-938, 340, 1976 U.S.C.C.A.N. 3438, 3770) (emphasis added).

⁴ Joint Committee on Taxation, Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters, No. JCS-3-00, at 1 (2000).

⁵ Letter from Margaret Milner Richardson, Commissioner, Internal Revenue Service, to Hon. William V. Roth, Jr., Chairman, Senate Committee on Finance (Feb. 25, 1997).

⁶ IRS News Release, *Commissioner Egger's Remarks on Abusive Tax Shelters*, No. IR-81-122, 1981 WL 176410 (Oct. 6, 1981).

⁷ 26 U.S.C. § 6103(k)(3).

⁸ *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

⁹ Press Release, Sen. Richard Burr, Chairman of the Senate Select Comm. on Intelligence, and Sen. Mark Warner, Vice Chairman, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), <https://www.burr.senate.gov/press/releases/joint-statement-on-committee-inquiry-into-russian-intelligence-activities>.

¹⁰ Dustin Volz, *Russia probe should focus on Trump financial ties: senator*, Reuters (Mar. 29 2017), <http://www.reuters.com/article/us-usa-trump-russia-finances-idUSKBN1701XO>.

speculation have been hampered by the opacity of the finances of President Trump and his associates,” Senator Wyden wrote.

Financial ties to Russia have already led to the resignation of the President’s National Security Advisor.¹¹ Mr. Flynn, a key advisor for President Trump during the campaign, was paid more than \$33,750 by Russia’s state-run broadcaster RT for a speech he gave in Moscow in December 2015.¹² After the election, White House senior adviser and Trump’s son-in-law Jared Kushner met with Sergey Gorkov, a Russian banker appointed by Russian President Vladimir Putin.¹³ Mr. Kushner had previously stated, “Russians make up a pretty disproportionate cross-section of a lot of our assets. . . . We see a lot of money pouring in from Russia.”¹⁴

Donald Trump’s failure to release his tax returns is unprecedented and directly against the long-standing tradition of candidates for the U.S. presidency.¹⁵ He was the first major party presidential candidate in 40 years not to make his returns available for public review.¹⁶ Though he initially promised to release his tax information, Trump withdrew this commitment after his election.¹⁷

The contents of the President’s tax returns are of enormous interest to Americans. The American public favors release of the President’s tax records. More than 1 million people have signed a petition urging the federal government to “[i]mmediately release Donald Trump’s full tax returns, with all information needed to verify emoluments clause compliance.”¹⁸ According to a ABCNews poll, three-quarters of Americans said he should release his returns.¹⁹ ABC also found that “[i]n one key support group for Trump, noncollege-educated white men, 58 percent say he should release the tax returns” and that “69 percent in the red states—those Trump won—

¹¹ Letter of Resignation of Michael Flynn, Frmr. Nat’l Sec. Advisor (Feb. 13, 2017), <https://assets.documentcloud.org/documents/3461323/Michael-Flynn-Resignation-Letter.pdf>.

¹² Jim Sciutto & Ryan Browne, *Former top Trump aide Flynn paid over \$30,000 by Russian TV, top House Dem says*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/16/politics/michael-flynn-payments-rt-russia-tv/>.

¹³ Jo Becker et al., *Senate Committee to Question Jared Kushner Over Meetings With Russians*, N.Y. Times (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/us/politics/senate-jared-kushner-russia.html>.

¹⁴ *Id.*

¹⁵ Julie Hirschfeld Davis, *Trump Won’t Release His Tax Returns, a Top Aide Says*, N.Y. Times (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ A.D., *Immediately release Donald Trump’s full tax returns, with all information needed to verify emoluments clause compliance.*, We the People (Jan. 20, 2017), <https://petitions.whitehouse.gov/petition/immediately-release-donald-trumps-full-tax-returns-all-information-needed-verify-emoluments-clause-compliance>.

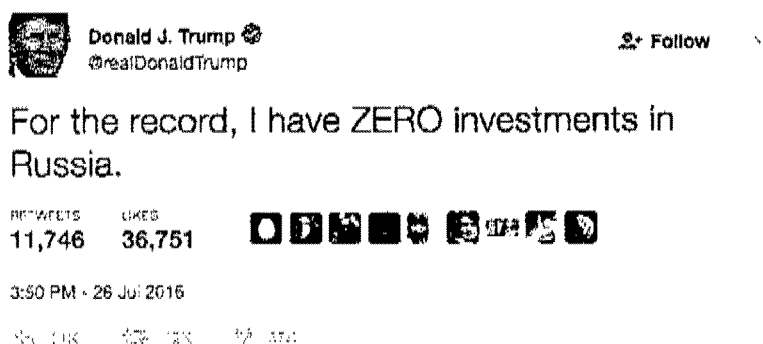
¹⁹ Gary Langer, *Public Splits on Trump’s Ethics Compliance; Three-Quarters Want Tax Returns Released (POLL)*, ABC News (Jan. 16, 2017), <http://abcnews.go.com/Politics/public-splits-trumps-ethics-compliance-quarters-tax-returns/story?id=44811545>.

say he should release these records.”²⁰ However, the White House has refused to make these records available.

Fortunately, the IRS has the legal authority to make the tax records available in response to a Freedom of Information Act request.²¹

Release of the Records is Necessary to Correct Public Misstatements

During the 2016 presidential campaign, candidate Donald J. Trump, his opponents, and members of the media made numerous and conflicting material statements regarding the candidate’s business ties to Russia. In July 2016, Donald J. Trump stated on Twitter: “For the record, I have ZERO investments in Russia.”²²



Trump later expanded on this claim in an interview, stating that he had “no relationship to Russia whatsoever” and “no debts” in the country.²³

Yet these sweeping statements were directly contradicted by the investigative reporting of major news outlets. “Since the 1980s, Trump and his family members have made numerous trips to Moscow in search of business opportunities, and they have relied on Russian investors to buy their properties around the world,” the *Washington Post* reported, detailing Trump’s “30-year history of business with Russia.”²⁴ *CBS News* noted that “[w]hile the Republican presidential nominee has denied any ties to Russia, his connections to the country and its

²⁰ *Id.*

²¹ 5 U.S.C. § 552; 26 U.S.C. § 6103(k)(3).

²² @realDonaldTrump, Twitter (July 26, 2016 6:50 PM), <https://twitter.com/realdonaldtrump/status/758071952498159616?lang=en>.

²³ *This Week' Transcript: Donald Trump, Vice President Joe Biden, and Ret. Gen. John Allen*, ABC News (July 31, 2016), <http://abcnews.go.com/Politics/week-transcript-donald-trump-vice-president-joe-biden/story?id=41020870>.

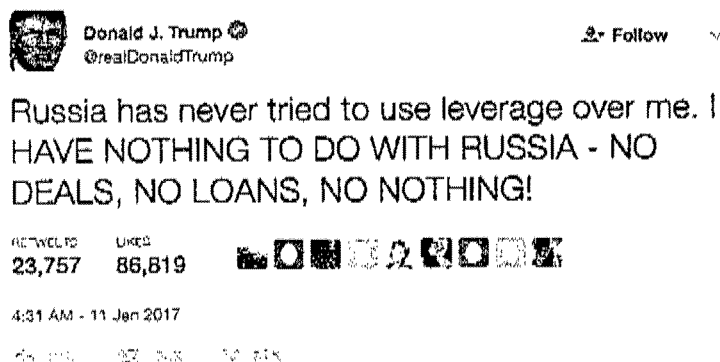
²⁴ Tom Hamburger et al., *Inside Trump's financial ties to Russia and his unusual flattery of Vladimir Putin*, Wash. Post (June 17, 2016) (emphasis added), https://www.washingtonpost.com/politics/inside-trumps-financial-ties-to-russia-and-his-unusual-flattery-of-vladimir-putin/2016/06/17/dbdcaac8-31a6-11e6-8ff7-7b6c1998b7a0_story.html.

president go back years.”²⁵ And *Time*, explicitly refuting Trump’s denial of Russian financial ties, reported:

But the real truth is that, as major banks in America stopped lending him money following his many bankruptcies, *the Trump organization was forced to seek financing from non-traditional institutions. Several had direct ties to Russian financial interests in ways that have raised eyebrows.* What’s more, several of Trump’s senior advisors have business ties to Russia or its satellite politicians.²⁶

Democratic nominee Hillary Clinton made similar assertions about Trump’s financial ties to Russia. Speaking at the September 26 presidential debate, Clinton observed that “we don’t know all of his business dealings, but we have been told through investigative reporting that he owes about \$650 million to Wall Street and foreign banks.”²⁷ A Clinton campaign ad was more explicit still: “American policy on Russia is in direct conflict with Trump’s bottom line. No more excuses, Donald. Release your hidden tax returns.”²⁸

Following the election, the President, current members of Congress, and members of the media have continued to make conflicting material statements regarding the President’s financial interests and ties to the Russian government. “Russia has never tried to use leverage over me. I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING!” Trump tweeted on January 11.²⁹



²⁵ *Despite denial, Trump's connections to Russia go back years*, CBS News (July 29, 2016), <http://www.cbsnews.com/news/election-2016-donald-trump-ties-to-russia-go-back-years-dnc-email-hack/>.

²⁶ Jeff Nesbit, *Donald Trump's Many, Many, Many, Many Ties to Russia*, *Time* (Aug. 15, 2016) (emphasis added), <http://time.com/4433880/donald-trump-ties-to-russia/>.

²⁷ Aaron Blake, *The first Trump-Clinton presidential debate transcript, annotated*, *Wash. Post* (Sept. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/>.

²⁸ Hillary Clinton, *Investigation*, YouTube (Sept. 24, 2016), <https://www.youtube.com/watch?v=DV3AKxUg560>.

²⁹ @realDonaldTrump, Twitter (Jan. 11, 2017 7:31 AM), <https://twitter.com/realdonaldtrump/status/819159806489591809?lang=en>.

On February 16, the President reiterated in a nationally televised press conference: “I can tell you, speaking for myself, I own nothing in Russia. I have no loans in Russia. I don’t have any deals in Russia.”³⁰

Yet three separate investigations—one by the Federal Bureau of Investigation,³¹ one by the House Intelligence Committee,³² and one by the Senate Intelligence Committee³³—are poised to examine those very claims, possibly to include subpoenas of Trump’s tax returns.³⁴ Sen. Chris Murphy (D-CT) asserted last month that Trump’s tax returns “could shed light on Trump’s ‘bizarre positioning’ towards Russia” and alleged “either that the Russians have something on Trump, or that there are financial ties that are requiring Trump to behave this way or perhaps the Russians helped him in the election and this is sort of a quid pro quo.”³⁵ And news organizations continue to contradict the President’s claims about his financial dealings.³⁶ “I believe Trump’s tax returns are key evidence in the investigations into the extent of Russian

³⁰ Zeeshan Aleem, *Fact-checking Trump's claim that he has no business ties to Russia*, Vox (Feb. 17, 2017), <http://www.vox.com/world/2017/2/17/14622504/trump-russia-business-ties-fact-check>.

³¹ *Comey Confirms Russian Investigation, FBI Seeks Delay in EPIC FOIA Case*, EPIC (Mar. 21, 2017), <https://epic.org/2017/03/comey-confirms-russian-investi.html>.

³² *EPIC Urges House Intelligence Committee to Investigate Russian Interference With US Election*, EPIC (Mar. 20, 2017), <https://epic.org/2017/03/epic-urges-house-intelligence-.html>.

³³ *Senate Intelligence Committee Presses FBI to Reveal Russia Investigation*, EPIC (Jan. 16, 2017), <https://epic.org/2017/01/senate-intelligence-committee.html>.

³⁴ *'This Week' Transcript 3-12-17*, ABC News (Mar. 12, 2017), <http://abcnews.go.com/Politics/week-transcript-17-mick-mulvaney-sen-tom-cotton/story?id=46066756> (“If the evidence leads in that direction, then his tax returns will be pertinent to our investigation.”); Steve Mistler, *Collins Open to Requesting Trump's Tax Returns for Russia Probe*, Maine Public (Feb. 22, 2017), <http://mainepublic.org/post/collins-open-requesting-trumps-tax-returns-russia-probe#stream/0> (“Collins was asked during the Maine Public call in program Maine Calling if she would support subpoenaing the president's tax returns. . . . ‘If it's necessary to get the answers then I suspect we would.’”).

³⁵ Mallory Shelbourne, *Dem senator: Trump tax returns could explain his Russia position*, The Hill (Feb. 15, 2017), <http://thehill.com/homenews/senate/319615-murphy-trump-tax-returns-may-shed-light-on-his-russia-position>.

³⁶ *E.g.*, Jonathan Chait, *What We Already Know About Trump's Ties to Russia Amounts to Treachery to the Republic*, N.Y. Mag. (Mar. 3, 2017), <http://nymag.com/daily/intelligencer/2017/03/trumps-ties-to-russia-amount-to-treachery-to-the-republic.html> (“While Donald Trump has kept hidden his own financial ties to Russia, enough public evidence has emerged to suggest they are extensive.”); Philip Bump, *The web of relationships between Team Trump and Russia*, Wash. Post (Mar. 3, 2017) (“Trump’s connections to Russian business interests are murky, thanks to his decision not to release his tax returns during the campaign.”).

interference in the election and should be made public or at least provided to Congress," wrote one commentator.³⁷

Most significantly, Donald Trump's statements that he "has ZERO investments in Russia" and that he has "NOTHING TO DO WITH RUSSIA – NO DEALS, NO LOANS, NO NOTHING" are specifically contested by the statement of his son-in law and White House senior advisor, who stated that "Russians make up a pretty disproportionate cross-section of a lot of our assets. . . . We see a lot of money pouring in from Russia."³⁸

Public release of Donald J. Trump's tax returns is necessary to resolve these contradictory claims—at least some of which must constitute "misstatement[s] of fact."³⁹

Release of the Records Serves Vital Tax Administration Purposes

Disclosure of Donald Trump's tax returns would also serve tax administration purposes by dispelling or confirming alarming allegations made about the IRS's fair application of the tax code. The President has claimed that he "unfairly get[s] audited by the I.R.S. almost every single year"⁴⁰ and has accused the agency of targeting him for both religious and political reasons:

"I'm always audited by the IRS, which I think is very unfair—I don't know, maybe because of religion, maybe because of something else, maybe because I'm doing this,⁴¹ although this is just recently," Trump said in an interview with CNN's Chris Cuomo immediately following the 10th GOP debate on Thursday night.

Cuomo cut in: "What do you mean religion?"

"Well, maybe because of the fact that I'm a strong Christian, and I feel strongly about it and maybe there's a bias," Trump said.

Cuomo cut in again: "You think you can get audited for being a strong Christian?"

³⁷ Ted Slowik, *Are Trump's tax returns key to investigations into Russian involvement?*, Daily Southtown (Mar. 27, 2017), <http://www.chicagotribune.com/suburbs/daily-southtown/opinion/cta-slowik-trump-taxes-st-0217-20170216-story.html>.

³⁸ Becker et al., *supra* note 13.

³⁹ 26 U.S.C. § 6103(k)(3).

⁴⁰ @realDonaldTrump, Twitter (Feb. 27, 2016),

<https://twitter.com/realDonaldTrump/status/703598661419167744> ("I unfairly get audited by the I.R.S. almost every single year. I have rich friends who never get audited. I wonder why?").

⁴¹ "This" as in Mr. Trump's presidential campaign.

"Well, you see what's happened," Trump said. "You have many religious groups that are complaining about that. They've been complaining about it for a long time."⁴²

Others have questioned whether the IRS is unfairly deferential toward President Trump and other wealthy taxpayers. In a *Forbes* article titled "Do Wealthy People Like Trump Have Easier IRS Audits?," tax attorney Robert W. Wood reported that Trump and other big earners appear to elude IRS auditors at higher rates than regular earners. "[S]tatistics might be read to suggest that wealthy individuals often outdo even this elite wing of the IRS [the IRS Wealth Squad]," Wood wrote. "[I]n a significant percentage of the audits it handles, the IRS Wealth Squad walks away without a single dollar."

In order to maintain public confidence in the agency's equitable administration of the tax code, the IRS must exercise its power under § 6103(k)(3) to release Donald Trump's returns.

Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes.⁴³ Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed.⁴⁴

Further, any duplication fees should also be waived as "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and disclosure "is not primarily in the commercial interest of the requester."⁴⁵

First, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."⁴⁶ The President's tax records directly concern the operations or activities of the government. They establish President's potential conflicts of interest and dealings with foreign governments. Indeed, the records are of constitutional significance; they are necessary to review the President's compliance with the Emoluments Clause of the U.S. Constitution.⁴⁷ Disclosure of the records will contribute significantly to the public understanding of the President's conflicts of interest because, despite allegations of his close associates' foreign ties, the details of the President's financial dealings with foreign entities are unknown. Thus far, the President has refused to release the records, and Congressional efforts to access the records have stymied due

⁴² Jenna Johnson, *Donald Trump says IRS audits could be tied to being a 'strong Christian'*, Wash. Post (Feb. 26, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/26/donald-trump-says-irs-audits-could-be-tied-to-being-a-strong-christian/>.

⁴³ *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003).

⁴⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁴⁵ § 552(a)(4)(A)(iii).

⁴⁶ § 552(a)(4)(A)(iii).

⁴⁷ U.S. Const. art. 1, § 9, cl. 8.

to partisan division.⁴⁸ Nonetheless, three quarters of Americans believe the President should release his tax returns.⁴⁹ Therefore, independent disclosure of these records by the IRS is a critical contribution to the public understanding of the President's operations.

Second, as to the "existence and magnitude of the requester's commercial interest . . . being furthered by the releasable records," EPIC has no commercial interest in the requested records.⁵⁰ EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.⁵¹

For these reasons, a fee waiver should be granted.

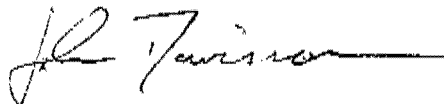
Conclusion

There has never been a stronger claim to release tax records under the FOIA, in accordance with §6103(k)(3), than EPIC's request for the release of Donald J. Trump's tax records. The public interest in release of this information could not be greater.

As provided in 5 U.S.C. § 552(a)(6)(A)(i), I will anticipate your determination on our request within twenty working days.

For questions regarding this request I can be contacted at 202-483-1140x111 or FOIA@epic.org.

Respectfully submitted,



John Davisson
EPIC Fellow

⁴⁸ Naomi Jagoda, *House panel voted against requesting Trump's Tax returns*, The Hill (Feb. 14, 2017), <http://thehill.com/policy/finance/319438-house-panel-votes-against-requesting-trumps-tax-returns>.

⁴⁹ Langer, *supra* note 19.

⁵⁰ § 552(a)(4)(A)(iii).

⁵¹ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.



**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224**

**PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE**

April 6, 2017

John Davisson
Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009

Dear John Davisson:

This is our final response to your letter dated March 29, 2017 on behalf of the Electronic Privacy Information Center ("EPIC") that we received on March 29, 2017.

In your letter, you request an appeal of our response, dated March 2, 2017, to a prior Freedom of Information Act (FOIA) request that was submitted on February 16, 2017 on behalf of EPIC. Please be advised that the Service will not consider an appeal of an incomplete FOIA request that cannot be processed due to the inability of the requester to establish a right to the disclosure of the records requested.

In your letter, you also ask to renew EPIC's prior FOIA request submitted on February 16, 2017 for "all of Donald J. Trump's individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses." Your letter cites Internal Revenue Code (IRC) § 6103(k)(3) as the authority for EPIC's right to the disclosure of the records in question.

The scope of your request extends to documents, to the extent that any exist, that consist of, or contain the tax returns or return information of a third party. Please be advised that such records, to the extent that they exist, would be confidential and may not be disclosed unless specifically authorized by law. Specifically, Internal Revenue Code (IRC) § 6103 prohibits the release of returns and return information unless disclosure is authorized by Title 26.

IRC § 6103(k)(3) does not afford any rights to requesters under the FOIA to the disclosure of tax returns or return information of third parties.

The Service's FOIA regulations specify that, in order to be processed, all requests that involve the disclosure of records that may be limited by statute or regulation, including requests for documents that are protected by IRC § 6103, must establish the right of the person making the request to the disclosure of the records in question. See 26 C.F.R. § 601.702(c)(4)(i)(E). Specifically, when a person is requesting records pertaining to other

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persons or businesses, "the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate." See 26 C.F.R. § 601.702(c)(5)(iii)(C). Without such authorization, the request is incomplete and cannot be processed. See 26 C.F.R. § 601.702(c)(4). Only fully compliant requests can be processed.

Because of the foregoing, we are closing your request as incomplete with no further action. Please be advised that any future requests regarding this subject matter will not be processed.

If you would like to discuss our response, you may contact me, the FOIA Public Liaison, at 949-575-6328, or write to Internal Revenue Service, Disclosure Office 13, 24000 Avila Road, M/S 2201, Laguna Niguel, CA 92677. Please refer to case number F17089-0037.

Sincerely,

A handwritten signature in black ink that reads "David Nimmo". The signature is written in a cursive, flowing style.

David Nimmo
Disclosure Manager
Disclosure Office 13

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)
ELECTRONIC PRIVACY)
INFORMATION CENTER)
1718 Connecticut Avenue, N.W.)
Suite 200)
Washington, D.C. 20009,)
)
Plaintiff,)
)
v.)
)
INTERNAL REVENUE SERVICE)
1111 Constitution Avenue, N.W.)
Washington, D.C. 20224)
)
Defendant.)
)

Civil Action No. 17-670

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706, for injunctive and other appropriate relief to secure the release of agency records requested by Plaintiff Electronic Privacy Information Center (“EPIC”) from Defendant Internal Revenue Service (“IRS”).

2. EPIC challenges the IRS’s refusal to process EPIC’s FOIA Request for President Donald J. Trump’s individual income tax returns and the agency’s failure to release any responsive records.

3. There has never been a stronger claim to release tax returns “to correct misstatements of fact” than EPIC’s FOIA request, now pending before the agency, for Donald J. Trump’s tax returns. 26 U.S.C. § 6103(k). The public interest in disclosure of this information could not be greater.

4. This complaint presents unique facts that would not apply to the release of any other tax returns for any other taxpayer.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(c)(i), 5 U.S.C. § 702, and 5 U.S.C. § 704. This Court has personal jurisdiction over Defendant IRS.

6. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 703, and 28 U.S.C. § 1391.

Parties

7. Plaintiff EPIC is a nonprofit organization incorporated in Washington, D.C. and established in 1994 to focus public attention on emerging privacy and civil liberties issues. Central to EPIC's mission is oversight and analysis of government activities. EPIC's Advisory Board includes distinguished experts in law, technology, public policy, and cybersecurity. EPIC routinely disseminates information to the public through the EPIC website, the EPIC Alert, and various other news organizations. EPIC is a representative of the news media. *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC is uniquely situated to assess the competing interests of privacy protection and public access for the release of taxpayer records and has determined that, in these circumstances, it is appropriate to seek the public release of the tax records of Donald J. Trump.

8. Defendant IRS is a federal agency within the meaning of the FOIA, 5 U.S.C. § 552(f)(1), and the APA, 5 U.S.C. § 701. Defendant IRS is headquartered in Washington, D.C.

Facts

Donald J. Trump's Tax Records Are a Matter of Unique Importance and Public Interest

9. In the history of the United States, there has never been greater interest in the public release of an individual's tax records than those of Donald J. Trump.
10. The release of Donald J. Trump's tax returns would help determine whether statements regarding his business relations with Russia and the Russian government¹ are correct or not correct.
11. Donald J. Trump's failure to release his tax returns is unprecedented and goes against the long-standing tradition of candidates for the U.S. presidency.²
12. The public favors the release of the President's tax records. According to an *ABC News* poll, three-quarters of Americans said he should release his returns.³
13. More than 1 million people have signed a petition urging the federal government to "[i]mmediately release Donald J. Trump's full tax returns, with all information needed to verify emoluments clause compliance."⁴
14. Financial ties to Russia have already implicated the President's former National Security Advisor.⁵ Mr. Flynn, a key advisor for President Trump during the campaign, was paid more

¹ E.g., Jeff Nesbit, *Donald Trump's Many, Many, Many, Many Ties to Russia*, Time (Aug. 15, 2016), <http://time.com/4433880/donald-trump-ties-to-russia/> ("As major banks in America stopped lending him money following his many bankruptcies, the Trump organization was forced to seek financing from non-traditional institutions. Several had direct ties to Russian financial interests in ways that have raised eyebrows. What's more, several of Trump's senior advisors have business ties to Russia or its satellite politicians.").

² Julie Hirschfeld Davis, *Trump Won't Release His Tax Returns, a Top Aide Says*, N.Y. Times (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html>.

³ Gary Langer, *Public Splits on Trump's Ethics Compliance; Three-Quarters Want Tax Returns Released (POLL)*, ABC News (Jan. 16, 2017), <http://abcnews.go.com/Politics/public-splits-trumps-ethics-compliance-quarters-tax-returns/story?id=44811545>.

⁴ A.D., *Immediately release Donald Trump's full tax returns, with all information needed to verify emoluments clause compliance.*, We the People (Jan. 20, 2017), <https://petitions.whitehouse.gov/petition/immediately-release-donald-trumps-full-tax-returns-all-information-needed-verify-emoluments-clause-compliance>.

than \$33,750 by Russia's state-run broadcaster RT for a speech he gave in Moscow in December 2015.⁶

15. White House senior adviser and Trump son-in-law Jared Kushner met in December 2016 with Sergey Gorkov, a Russian banker appointed by Russian President Vladimir Putin.⁷

16. Senator Ron Wyden (D-OR) stated recently, “Efforts to understand these relationships and to separate fact from speculation have been hampered by the opacity of the finances of President Trump and his associates.”⁸

Factual Misstatements Abound Regarding Donald J. Trump’s Taxes and Russian Ties

17. Many individuals, including the President, have published conflicting statements of fact about the contents of Donald J. Trump’s tax returns. At least some of these statements of fact must necessarily be false because they are contradictory.

18. In July 2016, Trump stated on Twitter: “For the record, I have ZERO investments in Russia.”⁹ Days later, Trump stated in an interview that he had “no relationship to Russia whatsoever” and “no debts” in the country.¹⁰

19. However, the *Washington Post* reported that “[s]ince the 1980s, Trump and his family members have made numerous trips to Moscow in search of business opportunities, and they

⁵ Letter of Resignation of Michael Flynn, Frmr. Nat’l Sec. Advisor (Feb. 13, 2017), <https://assets.documentcloud.org/documents/3461323/Michael-Flynn-Resignation-Letter.pdf>.

⁶ Jim Sciutto & Ryan Browne, *Former top Trump aide Flynn paid over \$30,000 by Russian TV, top House Dem says*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/16/politics/michael-flynn-payments-rt-russia-tv/>.

⁷ Jo Becker et al., *Senate Committee to Question Jared Kushner Over Meetings With Russians*, N.Y. Times (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/us/politics/senate-jared-kushner-russia.html>.

⁸ Dustin Volz, *Russia probe should focus on Trump financial ties: senator*, Reuters (Mar. 29 2017), <http://www.reuters.com/article/us-usa-trump-russia-finances-idUSKBN1701XO>.

⁹ @realDonaldTrump, Twitter (July 26, 2016 6:50 PM), <https://twitter.com/realdonaldtrump/status/758071952498159616?lang=en>.

¹⁰ *This Week Transcript: Donald Trump, Vice President Joe Biden, and Ret. Gen. John Allen*, ABC News (July 31, 2016), <http://abcnews.go.com/Politics/week-transcript-donald-trump-vice-president-joe-biden/story?id=41020870>.

have relied on Russian investors to buy their properties around the world.”¹¹ *CBS News* reported that “[w]hile the Republican presidential nominee has denied any ties to Russia, his connections to the country and its president go back years.”¹²

20. Democratic nominee Hillary Clinton made similar assertions about Trump’s financial ties to Russia. Speaking at the September 26, 2016 presidential debate, Clinton observed that “we don’t know all of his business dealings, but we have been told through investigative reporting that he owes about \$650 million to Wall Street and foreign banks.”¹³ A Clinton campaign ad was more explicit still: “American policy on Russia is in direct conflict with Trump’s bottom line. No more excuses, Donald. Release your hidden tax returns.”¹⁴

21. Following the election, public figures—including President Trump—have continued to make conflicting statements of fact regarding the President’s financial interests and ties to the Russian government.

22. On January 11, 2017, President Trump tweeted: "Russia has never tried to use leverage over me. I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING!"¹⁵ On February 16, 2017, the President reiterated in a nationally televised press

¹¹ Tom Hamburger et al., *Inside Trump’s financial ties to Russia and his unusual flattery of Vladimir Putin*, Wash. Post (June 17, 2016) (emphasis added), https://www.washingtonpost.com/politics/inside-trumps-financial-ties-to-russia-and-his-unusual-flattery-of-vladimir-putin/2016/06/17/dbdcaac8-31a6-11e6-8ff7-7b6c1998b7a0_story.html.

¹² *Despite denial, Trump’s connections to Russia go back years*, CBS News (July 29, 2016), <http://www.cbsnews.com/news/election-2016-donald-trump-ties-to-russia-go-back-years-dnc-email-hack/>.

¹³ Aaron Blake, *The first Trump-Clinton presidential debate transcript, annotated*, Wash. Post (Sept. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/>.

¹⁴ Hillary Clinton, *Investigation*, YouTube (Sept. 24, 2016), <https://www.youtube.com/watch?v=DV3AKxUg560>.

¹⁵ @realDonaldTrump, Twitter (Jan. 11, 2017 7:31 AM), <https://twitter.com/realdonaldtrump/status/819159806489591809?lang=en>.

conference: “I can tell you, speaking for myself, I own nothing in Russia. I have no loans in Russia. I don't have any deals in Russia.”¹⁶

23. Three separate investigations—one by the Federal Bureau of Investigation,¹⁷ one by the House Intelligence Committee,¹⁸ and one by the Senate Intelligence Committee¹⁹—are poised to examine President Trump’s business connections to Russia.²⁰

24. Sen. Chris Murphy (D-CT) asserted that President Trump’s tax returns “could shed light on Trump’s ‘bizarre positioning’ towards Russia” and alleged “either that the Russians have something on Trump, or that there are financial ties that are requiring Trump to behave this way or perhaps the Russians helped him in the election and this is sort of a quid pro quo.”²¹

25. News reports continue to contradict the President’s factual claims about his financial dealings.²² “I believe Trump’s tax returns are key evidence in the investigations into the extent of

¹⁶ Zeeshan Aleem, *Fact-checking Trump's claim that he has no business ties to Russia*, Vox (Feb. 17, 2017), <http://www.vox.com/world/2017/2/17/14622504/trump-russia-business-ties-fact-check>.

¹⁷ *Comey Confirms Russian Investigation, FBI Seeks Delay in EPIC FOIA Case*, EPIC (Mar. 21, 2017), <https://epic.org/2017/03/comey-confirms-russian-investi.html>.

¹⁸ *EPIC Urges House Intelligence Committee to Investigate Russian Interference With US Election*, EPIC (Mar. 20, 2017), <https://epic.org/2017/03/epic-urges-house-intelligence-.html>.

¹⁹ *Senate Intelligence Committee Presses FBI to Reveal Russia Investigation*, EPIC (Jan. 16, 2017), <https://epic.org/2017/01/senate-intelligence-committee.html>.

²⁰ *This Week' Transcript 3-12-17*, ABC News (Mar. 12, 2017), <http://abcnews.go.com/Politics/week-transcript-17-mick-mulvaney-sen-tom-cotton/story?id=46066756> (“If the evidence leads in that direction, then his tax returns will be pertinent to our investigation.”); Steve Mistler, *Collins Open to Requesting Trump's Tax Returns for Russia Probe*, Maine Public (Feb. 22, 2017), <http://mainepublic.org/post/collins-open-requesting-trumps-tax-returns-russia-probe#stream/0> (“Collins was asked during the Maine Public call in program Maine Calling if she would support subpoenaing the president's tax returns. . . . ‘If it's necessary to get the answers then I suspect we would.’”).

²¹ Mallory Shelbourne, *Dem senator: Trump tax returns could explain his Russia position*, The Hill (Feb. 15, 2017), <http://thehill.com/homenews/senate/319615-murphy-trump-tax-returns-may-shed-light-on-his-russia-position>.

²² E.g., Jonathan Chait, *What We Already Know About Trump's Ties to Russia Amounts to Treachery to the Republic*, N.Y. Mag. (Mar. 3, 2017), <http://nymag.com/daily/intelligencer/2017/03/trumps-ties-to-russia-amount-to-treachery-to-the-republic.html> (“While Donald Trump has kept hidden his own financial ties to Russia, enough

Russian interference in the election and should be made public or at least provided to Congress,” one commentator wrote.²³

26. President Trump’s statements that he “has ZERO investments in Russia” and that he has “NOTHING TO DO WITH RUSSIA” have been contradicted most notably by Jared Kushner. In 2008, Kushner stated that “Russians make up a pretty disproportionate cross-section of a lot of our assets. . . . We see a lot of money pouring in from Russia.”²⁴

The Integrity and Fairness of the IRS is Under Attack

27. Donald J. Trump, media commentators, and many members of the public have attacked the integrity of IRS in recent months, alleging religious discrimination, political bias, and economic favoritism in the agency’s administration of the tax code.

28. President Trump has claimed that he “unfairly get[s] audited by the I.R.S. almost every single year”²⁵ and has accused the agency of targeting him for both religious and political reasons. In a February 2016 CNN interview, Trump stated: "I'm always audited by the IRS, which I think is very unfair—I don't know, maybe because of religion, maybe because of

public evidence has emerged to suggest they are extensive.”); Philip Bump, *The web of relationships between Team Trump and Russia*, Wash. Post (Mar. 3, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/03/03/the-web-of-relationships-between-team-trump-and-russia/> (“Trump’s connections to Russian business interests are murky, thanks to his decision not to release his tax returns during the campaign.”).

²³ Ted Slowik, *Are Trump's tax returns key to investigations into Russian involvement?*, Daily Southtown (Mar. 27, 2017), <http://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-sta-slowik-trump-taxes-st-0217-20170216-story.html>.

²⁴ Becker et al., *supra*.

²⁵ @realDonaldTrump, Twitter (Feb. 27, 2016), <https://twitter.com/realDonaldTrump/status/703598661419167744> (“I unfairly get audited by the I.R.S. almost every single year. I have rich friends who never get audited. I wonder why?”).

something else.” Trump added that the IRS may target him “because of the fact that I’m a strong Christian, and I feel strongly about it and maybe there’s a bias.”²⁶

29. Others have questioned whether the IRS is unfairly deferential toward President Trump and other wealthy taxpayers. In a *Forbes* article titled “Do Wealthy People Like Trump Have Easier IRS Audits?,” tax attorney Robert W. Wood reported that Trump and other big earners appear to elude IRS auditors at higher rates than regular earners. “[S]tatistics might be read to suggest that wealthy individuals often outdo even this elite wing of the IRS [the IRS Wealth Squad],” Wood wrote. “[I]n a significant percentage of the audits it handles, the IRS Wealth Squad walks away without a single dollar.”

30. Still others have announced their intention to “withhold[] payment until Trump releases his own tax returns, since they believe the documents would prove that he’s not fit to be president.”²⁷

The IRS is Authorized by Law to Release Tax Records to Correct Misstatements of Fact

31. In the aftermath of President Nixon’s resignation, Congress enacted the Tax Reform Act of 1976 to strengthen the accountability of the IRS. Senator Weicker (R-CT) described the law as a “legislative remedy to the flaws of Government exposed by the chain of abuses we call Watergate.”²⁸

²⁶ Jenna Johnson, *Donald Trump says IRS audits could be tied to being a ‘strong Christian’*, Wash. Post (Feb. 26, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/26/donald-trump-says-irs-audits-could-be-tied-to-being-a-strong-christian/>.

²⁷ Aric Jenkins, *Some Americans Are Refusing to Pay Their Taxes in Protest of President Trump*, Money (Feb. 17, 2017), <http://time.com/money/4671774/federal-taxes-protest-president-donald-trump/>.

²⁸ 122 Cong. Rec. 24,013 (statement of Sen. Weicker).

32. To ensure the “integrity and fairness [of the IRS] in administering the tax laws,”²⁹ § 6103(k)(3) permits the IRS Commissioner to “disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.” The provision requires the Commissioner to obtain the approval of the Joint Committee on Taxation.

33. Section 6103(k)(3) provides the IRS with an “extremely important” authority “to protect itself and the tax system[.]”³⁰ As Sen. Chuck Grassley (R-IA) has explained, certain “type[s] of factual misstatements should trigger disclosure of return information” under § 6103(k)(3) if they are of a sufficient “degree of seriousness.”³¹

34. The IRS has approached the Joint Committee on Taxation about the § 6103(k)(3) authority in at least two other matters. In 1997, the IRS Commissioner “requested the opportunity to explore with Chairman Archer and Chairman Roth the possibility of using Code section 6103(k)(3) to permit the IRS to correct misstatements of fact regarding examinations of tax-exempt organizations.”³² Commissioner Richardson explained that “unfounded reports erode public confidence in the integrity of the IRS, thereby undermining the self-assessment compliance system.”³³ The IRS put forward a similar proposal in 1981 to correct misstatements

²⁹ *Confidentiality of Tax Return Information: Hearing Before the Comm. on Ways and Means, 94th Cong. 22–23 (1976)* (statement of Donald C. Alexander, Commissioner of Internal Revenue).

³⁰ *Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways and Means, 94th Cong. 22–23 (1976)* (statement of Donald C. Alexander, Commissioner of Internal Revenue).

³¹ 127 Cong. Rec. 22,510 (statement of Sen. Grassley).

³² Joint Committee on Taxation, Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters, No. JCS-3-00, at 1 (2000).

³³ Letter from Margaret Milner Richardson, Commissioner, Internal Revenue Service, to Hon. William V. Roth, Jr., Chairman, Senate Committee on Finance (Feb. 25, 1997).

by tax protestors that the IRS was “letting them get away with not filing or that [the IRS was] harassing them.”³⁴

35. To date, no court has made a determination about the scope of § 6103(k)(3) authority.

EPIC’s FOIA Request

36. On February 16, 2017, EPIC submitted a FOIA request (“EPIC’s FOIA Request”) to the Internal Revenue Service.

37. EPIC’s FOIA Request sought “all of Donald J. Trump’s individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses.”

38. 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).

39. In a letter dated March 2, 2017 (“March 2 IRS Letter”), Tax Law Specialist Michael Young acknowledged receipt of EPIC’s FOIA Request on behalf of the IRS.

40. The March 2 IRS Letter, which was labeled as a “final response,” stated that the IRS was “closing [EPIC’s] request as incomplete with no further action.”

41. On March 29, 2017, EPIC submitted an appeal and renewed FOIA request (“EPIC’s FOIA Appeal”) to the IRS.

42. EPIC’s FOIA Appeal renewed EPIC’s request for “Donald J. Trump’s tax returns for tax years 2010 forward and any other indications of financial relations with the Russian government or Russian businesses.”

³⁴ IRS News Release, *Commissioner Egger’s Remarks on Abusive Tax Shelters*, No. IR-81-122, 1981 WL 176410 (Oct. 6, 1981).

43. EPIC's FOIA Appeal explained EPIC's right to access such records under 26 U.S.C. § 6103(k)(3) and urged the IRS Commissioner to "move promptly to obtain permission from the Joint Commission on Taxation to release the records EPIC has requested."

44. EPIC renewed its request for "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).

45. On April 4, 2017, EPIC attorney John Davisson and IRS Disclosure Manager David Nimmo conducted a phone conference regarding EPIC's FOIA Appeal.

46. During the phone conference, Nimmo stated that the IRS was closing EPIC's FOIA request as incomplete. Nimmo further stated that "we're not going to do a (k)(3)" and that "we're not exercising (k)(3)."

47. In a letter dated April 6, 2017 ("April 6 IRS Letter"), Nimmo acknowledged receipt of EPIC's Appeal and Renewed FOIA Request on behalf of the IRS.

48. The April 6 IRS Letter, which was labeled as a "final response," stated that the IRS would not consider EPIC's appeal because EPIC's FOIA Request was "incomplete."

49. The letter also stated that the IRS was "closing [EPIC's] request as incomplete with no further action" and that "any future request regarding this subject matter will not be processed."

EPIC's Exhaustion of Administrative Remedies

50. Today is the 58th day since the IRS received EPIC's FOIA Request.

51. Both the March 2 IRS Letter and the April 6 IRS Letter indicated that the agency was "closing" EPIC's request "with no further action."

52. The IRS has failed to make a determination regarding EPIC's FOIA Request within the time period required by 5 U.S.C. § 552(a)(6)(B).

53. EPIC has exhausted all administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

Count I

Violation of FOIA: Failure to Comply with Statutory Deadlines

54. Plaintiff asserts and incorporates by reference paragraphs 1–53.
55. Defendant IRS has failed to make a determination regarding EPIC’s request for 58 days and has thus violated the deadline under 5 U.S.C. § 552(a)(6)(B).
56. Plaintiff has exhausted all applicable administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).
57. Plaintiff is entitled to injunctive relief with respect to an agency determination on EPIC’s FOIA Request.

Count II

Violation of FOIA: Failure to Take Reasonable Steps to Release Nonexempt Information

58. Plaintiff asserts and incorporates by reference paragraphs 1–53.
59. Defendant IRS has failed to take reasonable steps necessary to release all nonexempt information requested by Plaintiff.
60. Plaintiff has exhausted all applicable administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).
61. Plaintiff is entitled to injunctive relief with respect to any reasonable agency steps necessary to secure the release and disclosure of the information requested.

Count III

Violation of FOIA: Unlawful Withholding of Agency Records

62. Plaintiff asserts and incorporates by reference paragraphs 1–53.
63. Defendant IRS has wrongfully withheld agency records requested by Plaintiff.

64. Plaintiff has exhausted all applicable administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

65. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested records.

Count IV

Violation of APA: Unlawful Agency Action

66. Plaintiff asserts and incorporates by reference paragraphs 1–53.

67. Defendant IRS’s closure of EPIC’s FOIA Request is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c).

68. The IRS’s closure of EPIC’s FOIA Request is a final agency action within the meaning of 5 U.S.C. § 704.

69. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by the IRS’s action.

70. Plaintiff has exhausted all applicable administrative remedies.

Count V

Violation of APA: Agency Action Unlawfully Withheld

71. Plaintiff asserts and incorporates by reference paragraphs 1–53.

72. Defendant IRS has failed to seek permission from the Joint Commission on Taxation to release the records EPIC has requested.

73. Defendant’s failure constitutes agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1).

74. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by the IRS's unlawful withholding of this action.

75. Plaintiff has exhausted all applicable administrative remedies.

Requested Relief

WHEREFORE, Plaintiff requests that this Court:

- A. Hold unlawful and set aside the IRS's rejection of EPIC's FOIA Request;
- B. Order Defendant to immediately conduct a reasonable search for all responsive records;
- C. Order Defendant to take all reasonable steps possible to release nonexempt records;
- D. Order Defendant to disclose to Plaintiff all responsive, non-exempt records;
- E. Order Defendant to produce the records sought without the assessment of search fees;
- F. Order Defendant to grant EPIC's request for a fee waiver;
- G. Award EPIC costs and reasonable attorney's fees incurred in this action; and
- H. Grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Alan Butler _____

Alan Butler, D.C. Bar # 1012128
EPIC Senior Counsel

Marc Rotenberg, D.C. Bar # 422825
EPIC President and Executive Director

ELECTRONIC PRIVACY
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(202) 483-1248 (facsimile)

Dated: April 15, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,)	
)	Case No. 1:17-cv-00670-JEB
Plaintiff,)	
)	
v.)	
)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant.)	
_____)	

DECLARATION OF MICHAEL C. YOUNG

I, MICHAEL C. YOUNG, being of legal age and pursuant to the provisions of 28 U.S.C. § 1746(2), declare as follows:

1. I am a Government Information Specialist employed by the Internal Revenue Service (“the Service”), in the office of Government Liaison, Disclosure & Safeguards. I have been in the Laguna Niguel, California Disclosure Office since September 20, 2015. I have been employed by the Service in various positions since July of 2001.

2. My responsibilities as a Government Information Specialist include the processing of Freedom of Information Act (“FOIA”) requests submitted to the Service. The processing of FOIA requests include determining whether the request complies with the applicable statute and regulations, evaluating the request to determine whether the requested records fall under the Disclosure Office’s jurisdiction, directing and coordinating searches for responsive documents, reviewing responsive documents for applicable FOIA exemptions and other discretionary disclosure provisions, and preparing correspondence and draft final responses to requesters. The duties of a Government Information Specialist require knowledge of the applicable statutes,

regulations, and procedures governing requests for information, as well as the Service's institutional practices, the roles of various components within the Service, and the types of records maintained in each component.

3. Due to the nature of my duties, I am familiar with the requirements for disclosure in response to a FOIA request, including that the FOIA exempts certain types of documents from disclosure in response to a request. I make this declaration based on my personal knowledge and knowledge of the official business records that I have reviewed in the AFOIA system in connection with this case. AFOIA is a computer system used, among other purposes, to process Disclosure casework under FOIA. AFOIA can be accessed by all Disclosure Office personnel and Disclosure Office personnel can use AFOIA to search files pertaining to a particular FOIA request.

4. Ms. Eleni Kyriakides, on behalf of Plaintiff Electronic Privacy Information Center, submitted a FOIA request dated February 16, 2017, to the Service's Atlanta Office (the "First Records Request"). The First Records Request sought "all of Donald J. Trump's individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses." A true and correct copy of the First Records Request is attached as Exhibit A to this declaration.

5. The First Records Request did not include an executed power of attorney form, Privacy Act consent, or tax information authorization that would permit the requestor to receive confidential third party return information from the Service.

6. The Service received the First Records Request on February 16, 2017, and assigned it case number F17048-0017.

7. After reviewing the First Records Request, I determined that the First Records Request sought tax returns and tax return information of a third party taxpayer. When a requestor seeks records pertaining to other persons or businesses, “the requestor shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization.” 26 C.F.R. § 601.702(c)(5)(iii)(C). Because the requestor failed to provide the applicable authorization to receive third-party records, I determined that the request was incomplete and could not be processed.

8. The Service timely responded to the First Records Request by letter dated March 2, 2017. A true and correct copy of the Service’s response letter as mailed is attached as Exhibit B to this declaration. In the letter, the Service stated that the documents EPIC sought, to the extent they existed, consisted of, or contained the tax returns or return information of a third party. The Service stated that the request for the third party return information was “incomplete” and could not be processed unless the requestor “furnish[ed] a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate,” pursuant to the Treasury Regulations. The letter stated that it was “closing [EPIC’s] request as incomplete with no further action” because the required authorization was not provided. *See Decl. Ex. B.*

9. The March 2, 2017 letter does not include any information about administrative appeal rights because this response letter was not a determination. *Id.*

10. Mr. John Davisson, on behalf of Plaintiff Electronic Privacy Information Center, submitted a second FOIA request dated March 29, 2017, to the Service’s Atlanta Office (the “Second Records Request”). The Second Records Request sought “all of Donald J. Trump’s individual income tax returns for tax years 2010 forward, and any other indications of financial

relations with the Russian government or Russian businesses.” A true and correct copy of the Second Records Request is attached as Exhibit C to this declaration.

11. The Second Records Request did not include an executed power of attorney form, Privacy Act consent, or tax information authorization that would authorize the requestor to receive confidential third party return information from the Service. *See* Decl. Ex. C.

12. The Service received the Second Records Request on March 29, 2017, and assigned it case number F17089-0037.

13. After reviewing the Second Records Request, I determined that the Second Records Request sought tax returns and tax return information of a third party taxpayer. When a requestor seeks records pertaining to other persons or businesses, “the requestor shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization.” 26 C.F.R. § 601.702(c)(5)(iii)(C). Because the requestor failed to provide the applicable authorization to receive third-party records, I determined that the request was incomplete and could not be processed.

14. The Service timely responded to the Second Records Request by letter dated April 6, 2017. A true and correct copy of the Service’s response is attached as Exhibit D to this declaration. In the letter, the Service stated that the documents EPIC sought, to the extent they existed, consisted of, or contained the tax returns or return information of a third party. The Service stated that the request for the third party return information was “incomplete” and could not be processed unless the requestor “furnish[ed] a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate,” pursuant to the Treasury Regulations. Decl. Ex. D.

15. The Service denied EPIC's characterization of the Second Records Request as an "appeal" and specifically stated that it would "not consider an appeal of an incomplete FOIA request that cannot be processed due to the inability of the requester to establish a right to the disclosure of the records requested." *Id.*

16. The letter stated that it was "closing [EPIC's] request as incomplete with no further action" because the required authorization was not provided. *Id.*

17. The Service's April 6, 2017 letter does not include any information about administrative appeal rights because this response letter was not a determination.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 2017 in Orange County, CA.



Michael C. Young
Internal Revenue Service
Government Information Specialist
Laguna Niguel, CA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY)
 INFORMATION CENTER)
 1718 Connecticut Avenue, N.W.)
 Suite 200)
 Washington, D.C. 20009,)
)
 Plaintiff,)
)
 v.)
)
 INTERNAL REVENUE SERVICE)
 1111 Constitution Avenue, N.W.)
 Washington, D.C. 20224)
)
 Defendant.)

Civil Action No. 17-670

DECLARATION OF JOHN DAVISSON

I, John Louis Davisson, do hereby state and declare as follows

1. I am the Appellate Advocacy Fellow at the Electronic Privacy Information Center (“EPIC”).
2. On March 29, 2017, I submitted on behalf of EPIC a renewed FOIA request and appeal to the Internal Revenue Service (“IRS”).
3. In that request, EPIC sought “Donald J. Trump’s tax returns for tax years 2010 forward and any other indications of financial relations with the Russian government or Russian businesses.”
4. EPIC’s request also explained EPIC’s right to access the requested records under 26 U.S.C. § 6103(k)(3).

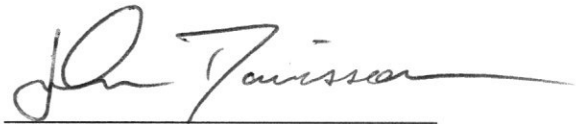
5. On April 4, 2017, I conducted a phone conference with IRS Disclosure Manager David Nimmo concerning EPIC's renewed FOIA request and appeal.

6. During the phone conference, Mr. Nimmo stated that the IRS was closing EPIC's request as incomplete.

7. Mr. Nimmo stated that "we're not going to do a (k)(3)" and that "we're not exercising (k)(3)."

8. Mr. Nimmo also stated that EPIC could "file a suit" and seek "judicial review."

9. I declare under penalty of perjury that the foregoing is true and correct. Executed on June 26, 2017 in Washington, DC.



John Louis Davisson
EPIC Appellate Advocacy Fellow

Dated: June 26, 2017

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Electronic Privacy Information Center

Plaintiff

vs.

Civil Action No. 17-670

Internal Revenue Service

Defendant

NOTICE OF APPEAL

Notice is hereby given this 29th day of September, 2017, that

Electronic Privacy Information Center (Plaintiff)

hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from

the judgment of this Court entered on the 18th day of August, 2017

in favor of Internal Revenue Service (Defendant)

against said Electronic Privacy Information Center (Plaintiff)

Attorney or Pro Se Litigant

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, D.C. 20009
(202) 483-1140

Address and Phone Number

(Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure a notice of appeal in a civil action must be filed within 30 days after the date of entry of judgment or 60 days if the United States or officer or agency is a party)

CLERK Please mail copies of the above Notice of Appeal to the following at the addresses indicated:

Kieran O. Carter
Trial Attorney, Tax Division
U.S. Department of Justice
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