

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**INTERNAL REVENUE SERVICE'S MOTION TO DISMISS THE COMPLAINT
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Defendant Internal Revenue Service, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves the Court to dismiss the complaint for failure to state a claim upon which relief may granted.

EPIC is requesting confidential third party returns and return information. EPIC’s action suffers from fatal flaws: *first*, EPIC has not shown that the third party taxpayers to whom its requests pertain have authorized the Service to release that information to EPIC under 26 U.S.C. § 6103(c); *second*, EPIC has not demonstrated a qualifying material interest by virtue of its relationship with the third parties listed in its request that allows for such release under 26 U.S.C. § 6103(e); and, *third*, the IRS cannot produce return information to EPIC under 26 U.S.C. § 6103(k)(1) as that provision only allows disclosure of limited information to a Public Inspection File. To the extent EPIC seeks the returns and return information at issue in in *Electronic Privacy Information Center v. Internal Revenue Service* (“*EPIC I*”), 910 F.3d 1232 (D.C. Cir. 2018), its claims are barred by *res judicata*.

Dated: March 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to Plaintiff.

/s/ Megan E. Hoffman-Logsdon
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**MEMORANDUM IN SUPPORT OF THE INTERNAL REVENUE SERVICE'S
MOTION TO DISMISS**

The Internal Revenue Service (“Service”) files this renewed motion to dismiss pursuant to Rule 12(b)(6) in light of the United States Court of Appeals’ decision in *Electronic Privacy Information Center v. Internal Revenue Service* (“*EPIC I*”), 910 F.3d 1232 (D.C. Cir. 2018).

Plaintiff Electronic Privacy Information Center (“EPIC”) filed this action against the Internal Revenue Service (“Service”) under the Freedom of Information Act (“FOIA”). The complaint seeks to compel the Service to search for and release two categories of records pertaining to the President and closely affiliated businesses (set forth on “Appendix A” of EPIC’s request for records – a 15 page list of names and employer identification numbers): (1) all accepted Offers in Compromise between the IRS and the President and the IRS and the entities; and (2) returns and return information necessary to permit inspection of the accepted Offers in Compromise. EPIC is requesting confidential third party returns and return information as defined by 26 U.S.C. § 6103(a), information that is exempt by statute from

disclosure in its entirety unless an exception applies.¹ The only possible exceptions applicable to EPIC’s request do not apply here: *first*, EPIC does not have consent or authorization from the third party taxpayers to whom its requests pertain that permits the Service to release that information to EPIC under 26 U.S.C. § 6103(c); *second*, EPIC does not have a qualifying material interest by virtue of its relationship with the third parties listed in its request that allows for such release under 26 U.S.C. § 6103(e); and, *third*, the IRS cannot produce return information to EPIC under 26 U.S.C. § 6103(k)(1) as that provision only allows disclosure of limited information to a Public Inspection File. As a result, EPIC has not stated a cognizable claim under FOIA, and the Court should dismiss this action under Rule 12(b)(6).

Factual Background

EPIC submitted a request for records to the Service dated February 5, 2018. (Complaint, [Dkt. No. 1] Ex. 1). The request sought all accepted offers-in-compromise relating to any past or present tax liability of the taxpayers EPIC identified. In addition, EPIC requested “[a]ll other **‘return information’** . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise described in Category 1 of this request . . . Records responsive to Category 2 include, but are not

¹ To the extent that EPIC seeks the same returns and “return information” it unsuccessfully requested in *EPIC I*, its requests are barred by *res judicata*. *EPIC I*, 910 F.3d at 1241. *EPIC I* and *EPIC II* arise out of a common nucleus of operative fact: the President’s refusal to disclose tax records. Compare *EPIC I* Compl. at ¶¶ 9-22; *EPIC II* Compl. at ¶¶ 12-20. *EPIC II*, filed only after extensive proceedings in *EPIC I*, at least in part seeks a subset of the same returns and return information requested in the initial action. The legal issues in *EPIC II* could and should have been raised in *EPIC I*, and, as a review of the complaints and pleadings in the two cases makes clear, there is no excuse for Plaintiff’s failure to do so. Consequently, *res judicata* bars this action. See generally *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980); *Nader v. The Democratic National Committee*, 590 F. Supp. 2d 164, 168-170 (D.D.C. 2008); cf., *Negley v. FBI*, 169 Fed. App’x 591, 593-94 (D.C. Cir. 2006); *Negley v. FBI*, 589 Fed. App’x 726, 728-29 (5th Cir. 2014) (no claim preclusion where “two actions are based on two different FOIA requests of different scope.”). Even if claim preclusion is not an absolute bar, issue preclusion collaterally estops Plaintiff from seeking *any* records arguably within the ambit of *EPIC I*, 910 F.3d at 1241. *Id.*

limited to, ‘income, excess profits, declared value excess profits, capital stock, and estate or gift **tax returns** for any taxable year’ as applicable.” (*Id.* ¶ 22, Ex. 1 [footnotes omitted]) (emphasis added). EPIC put no time limits on the years for which it sought the requested records. EPIC further requested that the Service release all such records, “whether such records take the form of a Public Inspection File, an AOIC [Automated Offer in Compromise system] Masterfile Screen Transcript, a TDS [Transcript Delivery Service] transcript, a Form 656 [Offer in Compromise submission made to the Service by the taxpayer], a Form 433 [Collection Information Statement], a Form 7249 [Offer Acceptance Report], or any other agency document.” (*Id.* ¶ 23, Ex. 1).

EPIC did not include with its request authorization to receive returns or return information from any of the taxpayers whose records it seeks. It is clear from EPIC’s self-description in the complaint that EPIC does not have a qualifying material interest by virtue of a covered relationship with any of the taxpayers whose information it seeks.

The Service received the records request on February 5, 2018, and assigned it case number F18036-0068. (*Id.* ¶ 32, Ex. 2). The case was assigned to a Government Information Specialist. The Specialist sent a letter dated March 6, 2018 to EPIC extending the statutory response deadline to March 30, 2018. (*Id.* ¶ 35, Ex. 5). On March 28, 2018, the Service sent EPIC a second letter requesting an extension of the response due date to April 27, 2018. (*Id.* ¶ 38, Ex. 7). On April 17, 2018, EPIC filed this lawsuit. (Dkt. No. 1).²

² On April 25, 2018, before the Service became aware of this action (Dkt. No. 5-2), the Service sent EPIC another letter. The Service informed EPIC that, to the extent it requested records under 26 U.S.C. § 6103(k)(1) that was the confidential tax return information of a third party, the request had not been made in accordance with the Service’s published FOIA regulations. The Service instructed EPIC that it could visit “the location designated by the Service based on the taxpayer’s geographic area of residence to inspect the Public Information File. Because this letter is not attached to the complaint, the Service does not rely on it to support this motion to

The United States Court of Appeals for the District of Columbia Circuit recently issued its opinion in *EPIC I*, a FOIA case in which EPIC requested the President’s federal income tax returns from the Service without obtaining the President’s written consent. The D.C. Circuit held that, absent consent from the taxpayer whose records it sought, EPIC’s complaint failed to state a claim upon which relief could be granted because the record are “in their entirety, exempt from disclosure.” *EPIC*, 910 F.3d at 1239-40. As we demonstrate below, EPIC’s claims here fare no better as the tax returns and return information sought through EPIC’s FOIA request are “in their entirety, exempt from disclosure.” *Id.*

Argument

Just as in *EPIC I*, EPIC here fails to state a claim because it has requested records that are entirely exempt from disclosure under FOIA. Specifically, EPIC’s request seeks third party taxpayers’ returns and return information, which are confidential under 26 U.S.C. § 6103(a) and therefore exempt under FOIA Exemption 3 (5 U.S.C. § 552(b)(3)). Accordingly, the Service may not disclose those records to EPIC – or even confirm their existence – unless EPIC either obtained authorization from the taxpayers or has a qualifying material interest under Section 6103(c) and (e), respectively. Because EPIC has neither, its FOIA complaint fails to state a claim upon which relief can be granted. *EPIC*, 910 F.3d at 1240.

I. EPIC CANNOT STATE A CLAIM UNDER FOIA BECAUSE IT HAS REQUESTED RETURNS AND RETURN INFORMATION THAT ARE EXEMPT IN THEIR ENTIRETY FROM DISCLOSURE

In order to state a claim under the FOIA, a requester “must establish (or, at this stage, plausibly allege) that the agency has (1) improperly (2) withheld (3) agency records.” *EPIC I*,

dismiss. The Service, however, reserves the right to include the April 25 letter in any subsequent motion for summary judgment should the Court deny this motion to dismiss.

910 F.3d at 1240. A plaintiff cannot state a plausible claim under 5 U.S.C. § 552(a)(4) when the requested records are “exempt in their entirety” under Exemption 3 of the FOIA. *Id.* The agency bears the burden of showing that records are exempt under Exemption 3. *Id.* Here, the description of the records requested, certain types of tax returns and return information, establishes that the records are exempt under FOIA Exemption 3, because disclosure of the requested records is prohibited by 26 U.S.C. § 6103(a) and no exception to the disclosure prohibition applies to EPIC’s request.

Exemption 3 permits an agency to withhold records that are “specifically exempted from disclosure” by statute. Exemption 3 is unequivocal: if such a qualifying statute exists, material within the statute’s scope must be withheld. *Goland v. C.I.A.*, 607 F.2d 339, 351 (D.C. Cir. 1978). Section 6103 of the Internal Revenue Code is a qualifying statute for applying Exemption 3. *Tax Analysts v. I.R.S.*, 117 F.3d 607, 611 (1997). The issue in this case is the same issue that the D.C. Circuit examined in *EPIC I*: are the “returns” and “return information” that EPIC seeks within an exception to the prohibition on disclosure codified in 26 U.S.C. § 6103? As in *EPIC I*, the answer is no. The records EPIC seeks are “returns” and “return information” and there is no provision that allows the IRS to disclose those taxpayer-specific records to it under some other provision of Section 6103. “Because any response to EPIC’s requests would reveal ‘[r]eturns [or] return information’ . . . section 6103(a) prevent[s] the IRS from complying with the requests unless an exception to the disclosure bar applie[s].” *EPIC I*, 910 F.3d at 1241.

A. EPIC’s Request Seeks Third Parties’ “Returns” and “Return Information” That Are Confidential Under 26 U.S.C. § 6103(a)

Taxpayer confidentiality, and the protection of return information, is the overarching concern of 26 U.S.C. § 6103. Section 6103 provides that “returns and return information *shall be confidential*” and that no “officer or employee of the United States” shall disclose “returns or

return information” except as authorized by the Internal Revenue Code. 26 U.S.C. § 6103(a)(1) (emphasis added). That statute lays down a “general rule” of confidentiality which covers all returns and return information, including a taxpayer’s identity, the source or amount of his income, payments, liabilities, and various other pieces of tax information. *Church of Scientology of Cal. v. I.R.S.*, 484 U.S. 9, 10 (1987).

EPIC requests “income, excess profits, declared value excess profits, capital stock, and estate or gift *tax returns* for any taxable year,” (Complaint, Ex. 1, requests 2 and 4 [emphasis added]). EPIC also requests “all other ‘*return information*” (Complaint, Ex. 1, requests 2 and 4) (emphasis added).³ Return information includes acknowledging whether a taxpayer filed a return or entered into an offer in compromise. *See EPIC I*, 910 F.3d at 1241.

B. No Exception in Section 6103 Provides for Disclosure by the IRS to EPIC of the Requested Records.

1. Subsections 6103(c) and (e) do not permit disclosure to EPIC.

Because all of the information that EPIC requests is either “returns” or “return information,” the Service cannot disclose those records to EPIC unless another provision of the

³ Congress defined “return information” broadly to include:

a **taxpayer’s identity**, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation **or processing**, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A)(emphasis added).

Internal Revenue Code permits it. 26 U.S.C. § 6103(a). While Section 6103 contains numerous such permissive provisions, the only two that potentially are applicable here are subsection (c) (consent) and subsection (e) (material interest). In order to obtain the records under those exceptions, EPIC must have either (i) the consent of the taxpayer to the disclosure (26 U.S.C. § 6103(c)); or (ii) a material interest by virtue of a covered relationship with the taxpayer (26 U.S.C. § 6103(e)). EPIC does not meet either requirement and has not pleaded to the contrary.

Here, EPIC admits that it has not obtained the taxpayers' consent to disclosure, and it does not even suggest that it could obtain that consent.⁴ Similarly, EPIC does not have a

⁴ 26 C.F.R. § 601.702(c)(5)(iii) provides detailed guidance regarding the documentation required to demonstrate "the right of the person making the request to the disclosure of the records," stating:

(C) In the case of an attorney-in-fact, or other person requesting records on behalf of or pertaining to other persons, the requester shall furnish a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate. In the case of a corporation, if the requester has the authority to legally bind the corporation under applicable state law, such as its corporate president or chief executive officer, then a written statement or tax information authorization certifying as to that person's authority to make a request on behalf of the corporation shall be sufficient. If the requester is any other officer or employee of the corporation, then such requester shall furnish a written statement certifying as to that person's authority to make a request on behalf of the corporation by any principal officer and attested to by the secretary or other officer (other than the requester) that the person making the request on behalf of the corporation is properly authorized to make such a request. If the requester is other than one of the above, then such person may furnish a resolution by the corporation's board of directors or other governing body which provides that the person making the request on behalf of the corporation is properly authorized to make such a request, or shall otherwise satisfy the requirements set forth in section 6103(e). A person requesting access to records of a partnership or a subchapter S Corporation shall provide a notarized statement, or a statement made under penalty of perjury in accordance with 28 U.S.C. 1746,

qualifying material interest in any of the entities identified in its FOIA request. It does not possess one of the eleven statutorily-defined categories of “material interests” such that it need not obtain taxpayer consent.⁵ That failure is dispositive.

2. Section 6103(k)(1) does not permit disclosure to EPIC other than through the Public Inspection Files.

EPIC attempts to sidestep the limits on FOIA access to returns and return information by suggesting in its complaint and exhibits that 26 U.S.C. § 6103(k)(1) somehow grants it the right to have taxpayer-specific offer-in-compromise information from the requested taxpayers’ files produced to it. EPIC misreads 26 U.S.C. § 6103(k)(1).

First, nothing in section 6103(k)(1) permits the disclosure of “returns” in any circumstance; the provision only applies to that “return information”⁶ necessary to permit public inspection of an accepted offer in compromise. Accordingly, to the extent that EPIC seeks returns (*e.g.*, request # 1, seeking “estate or gift tax returns for any taxable year”) section 6103(k)(1) offers no possible exception. The portion of the complaint seeking such records, therefore, fails to state a claim upon which relief can be granted and must be dismissed.

that the requester was a member of the partnership or subchapter S corporation for a part of each of the years included in the request.

Neither EPIC’s FOIA request nor its Complaint contains or refers to any documentation even remotely similar to the information needed for consent.

⁵ *See e.g.*, subsection (e)(1)(B) (disclosure to either spouse who filed joint return), (e)(1)(C) (disclosure of partnership return to partner), (e)(1)(D) (disclosure of return of corporation to officers, shareholders), (e)(3) (disclosure of deceased individual’s return to administrator, executor of estate or heirs and beneficiaries of will), (e)(6) (disclosure to attorney in fact)

⁶ Section 6103(b) defines “for purposes of the section” return (section 6103(b)(1)) and return information (section 6103(b)(2)). The only viable reading of section 6103(k)(1) is that it does not permit disclosure of returns.

Second, 26 U.S.C. § 6103(k)(1) does not by its terms permit the Service to disclose return information from taxpayer files upon request to a FOIA requester. Section 6103(k)(1) instead permits disclosure of certain limited return information to “members of the general public to the extent necessary *to permit inspection* of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.” *Id.* (emphasis added). The subsection permits the Service to take return information regarding the accepted offer-in-compromise located in non-public taxpayer-specific files and disclose that return information to a Public Inspection File that is not taxpayer-specific.⁷ *See* 26 C.F.R. § 601.702(d)(8). Disclosure (of only that return information “necessary . . . to permit inspection”) under Section 6103(k)(1) is both textually and qualitatively different from the “disclosure to . . . an individual” with a material interest under Section 6103(e). EPIC’s allegations regarding Section 6103(k)(1) stretch the provision beyond this clear limitation.

This reading of 6103(k)(1) is required by *EPIC I*. In holding that 26 U.S.C. § 6103(k)(3) does not carve out a confidentiality exception to allow EPIC to obtain the President’s income tax returns and related return information, the D.C. Circuit in *EPIC I* reasoned that “section 6103 includes thirteen categories of exceptions to the disclosure bar” and that “within those exceptions, there are numerous instances in which section 6103 authorizes the IRS to disclose a return or return information ‘upon written request’ from certain government officials or private parties.” The D.C. Circuit listed those provisions and – tellingly – did not list subsection (k)(1) as a provision allowing disclosure of “return information . . . upon written request” from a private party. *Id.* at 1243. Instead, it specifically noted that Section 6103(k)(1) merely “allow[s]

⁷ There is no allegation in the complaint that EPIC attempted to access the Public Information Files by complying with the rules set forth to access such files in 26 C.F.R. § 601.702(d)(8). Accordingly, we will not provide a detailed discussion of those requirements here.

the public to inspect certain return information.” *Id.* at n.9. That is precisely the Service’s point here.

Finally, reading Section 6103(k)(1) as permitting only public inspection through the Public Inspection Files (rather than as permitting disclosure upon written request under FOIA for specific taxpayer return information) is consistent with other provisions of Section 6103(k). The law requires that the Service publicly disclose return information for a specific purpose, but it does not follow that such return information becomes available to a requester under FOIA from different taxpayer-specific files. For example, Section 6103(k)(6) authorizes the Service to record notices of federal tax lien in the property records of local recorders’ offices. *Boritz v. United States*, 685 F. Supp. 2d 113, 128 (D.D.C. 2010). Copies of those notices of federal tax lien are publicly available, typically through a search of a local land records office. However, when a FOIA requester requests those same otherwise public records from the Service’s taxpayer-specific files, the Service must withhold that same otherwise-public information in response (absent consent or a material interest or other exception). *See Smart-Tek Servs., Inc. v. Internal Revenue Serv.*, 344 F. Supp. 3d 1166, 1174 (S.D. Cal. 2018) (requester could not obtain return information in taxpayer-specific file of entities listed on publicly-filed notices of federal tax lien without consent under 26 C.F.R. § 601.702(c)(5)(iii)(C)).

In fact, as the D.C. Circuit recognized in *EPIC I*, the Service cannot even admit that those otherwise-public documents exist in a taxpayer’s files without disclosing confidential return information. *EPIC I*, 910 F.3d at 1241 (“As the IRS correctly points out, ‘EPIC has framed its FOIA request in such a way that acknowledging the existence of any responsive documents would itself violate section 6103 by disclosing whether the President has filed income tax returns for the years in question . . .’”). *EPIC*’s request here creates the same disclosure problems.

EPIC requested categories of “return information” that it deems “necessary to permit public inspection” such as income, excess profits, declared value excess profits, [and] capital stock.”⁸ It also expressly requests that the Service search for that information “regardless of where and in what form the IRS maintains [it].” (Compl. Ex. 1). The Service does not make such information public with the Accepted Offer-in-Compromise Abstracts included in the Public Inspection File and Plaintiff has not shown that it has the right to know what is in any of the third party taxpayers’ files. So, as in *EPIC I*, the Service cannot even confirm the existence of such information without disclosing return information.

EPIC’s request for disclosure of return information fails to state a claim because no exceptions to the general disclosure prohibition of Section 6103(a) apply to EPIC’s request.

⁸ EPIC attempts to mimic the statutory authorization in 26 U.S.C. § 6103(k)(1) to the IRS to disclose return information to the Public Inspection File, to the extent necessary to permit the public inspection of accepted offers in compromise. The attempt overshoots its mark in that the statute gives IRS the responsibility of determining the extent of disclosure to the Public Inspection File; the statute does not give individual requesters the responsibility of making that determination.

Conclusion

Section 6103 prohibits the disclosure to EPIC of the third party returns and return information it requested. Absent consent or a qualifying material interest, FOIA does not provide access to third party returns or return information and EPIC's complaint fails to state a claim upon which relief may be granted. *EPIC I*, 910 F.3d at 1243. Also, to the extent that *EPIC* is attempting to use 26 U.S.C. § 6103(k)(1) as an end-run to obtain returns and return information that the Court of Appeals for the D.C. Circuit held it could not obtain in *EPIC I*, *res judicata* applies. Accordingly, the Service requests that the Court dismiss EPIC's complaint.

Dated: March 4, 2019

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