IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

For the reasons set forth in the accompanying Memorandum of Points and Authorities, Plaintiff Electronic Privacy Information Center ("EPIC") hereby moves the Court to assess an award of attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E)(i) against Defendant Internal Revenue Service in the amount of **$60,079.72.**

Respectfully Submitted,

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Dated: June 6, 2022

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 3

A. EPIC's FOIA Request 3

B. The IRS's commitment and subsequent failure to expeditiously process EPIC's FOIA Request 4

C. EPIC's FOIA lawsuit and the IRS's first motion to dismiss 4

D. The IRS's second motion to dismiss 5

E. The Court's ruling 6

F. The IRS's completion of a reasonable search 7

STANDARD OF REVIEW 7

ARGUMENT 8

I. EPIC is eligible to recover fees and costs because it substantially prevailed in this litigation. 9

A. EPIC obtained significant relief by securing a search for responsive records. 9

B. EPIC obtained the relief it sought through the Court's order denying the IRS's motion to dismiss. 10

C. In the alternative, EPIC obtained the relief it sought by catalyzing a unilateral change in the IRS's position. 12

II. EPIC is entitled to fees and costs because the four-factor test decisively favors recovery 14

A. The public benefit associated with this case is substantial. 14

B. EPIC derived no commercial benefit from its FOIA request or suit. 17

C. EPIC's interest in the requested records was to inform the public. 17

D. The IRS's conduct in this matter was plainly unreasonable. 18

III. EPIC's requested fee award is reasonable. 20

A. The attorney's fees EPIC seeks for its work on this case are reasonable. 20

B. EPIC is entitled to fees on fees. 23

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Am. Lands Alliance v. Norton,
525 F. Supp. 2d 135 (D.D.C. 2007) ... 22

American Oversight v. DOJ,
375 F. Supp. 3d 50 (D.D.C. 2019) ... 13

Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.,
136 F.3d 794 (D.C. Cir. 1998) ... 20

Brayton v. Office of the U.S. Trade Rep.,
641 F.3d 521 (D.C. Cir. 2011) ... 12

Brennan Ctr. for Just. v. DHS,
No. CV 16-1609 (ABJ), 2019 WL 280954 (D.D.C. Jan. 22, 2019) ... 23

Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.,
532 U.S. 598 (2001) ... 10

Campaign for Responsible Transplantation v. Food & Drug Admin.,
511 F.3d 187 (D.C. Cir. 2007) ... 10

Church of Scientology of Cal. v. Harris,
653 F.2d 584 (D.C. Cir. 1981) ... 13

Codrea v. Bureau of Alcohol, Tobacco, Firearms & Explosives,
272 F. Supp. 3d 49 (D.D.C. 2017). ... 13

Cotton v. Heyman,
63 F.3d 1115 (D.C. Cir. 1995) ... 14

Covington v. District of Columbia,
57 F.3d 1101 (D.C. Cir. 1995) ... 21, 22

CREW v. FEC,
66 F. Supp. 3d 134 (D.D.C. 2014) ... 10, 12

Davy v. CIA,
550 F.3d 1155 (D.C. Cir. 2008) ... 18

Edmonds v. FBI,
417 F.3d 1319 (D.C. Cir. 2005) ... 8, 9

EPIC v. DHS,
811 F. Supp. 2d 216 (D.D.C. 2011) ... 23

EPIC v. FBI,
80 F. Supp. 3d 149 (D.D.C. 2015) ... 23

EPIC v. IRS,
910 F.3d 1232 (D.C. Cir. 2018) 2

Farrar v. Hobby,
506 U.S. 103, 109 (1992) 8

Grand Canyon Trust v. Bernhardt,
947 F.3d 94 (D.C. Cir. 2020) 13

Halperin v. Dep't of State,
565 F.2d 699 (D.C. Cir. 1977) 12

Judicial Watch, Inc. v. DOJ,
774 F. Supp. 2d 225 (D.D.C. 2011) 20

LaSalle Extension Univ. v. FTC,
627 F.2d 481 (D.C. Cir. 1980) 18

Mobley v. DHS,
908 F. Supp. 2d 42 (D.D.C. 2012) 9, 13

Morley v. CIA,
719 F.3d 689 (D.C. Cir. 2013) 8, 14, 18

Morley v. CIA,
810 F.3d 841 (D.C. Cir. 2016) 14

Morley v. CIA,
894 F.3d 389 (D.C. Cir. 2018) 14

Nat'l Sec. Counselors v. CIA,
189 F. Supp. 3d 73 (D.D.C. 2016) 13, 16

Pub. Rec. Media, LLC v. U.S. Dep't of Justice,
No. CIV. 12-1225 MJD/AJB, 2013 WL 3024091 (D. Minn. Jan. 29, 2013) 16

Salazar v. District of Columbia,
809 F.3d 58 (D.C. Cir. 2015) 21

Tax Analysts v. DOJ,
965 F.2d 1092 (D.C. Cir. 1992) 18

Trump v. Mazars USA, LLP,
140 S. Ct. 2019 (2020) 15

Trump v. Vance,
140 S. Ct. 2412 (2020) 15

Vollmann v. Dep't of Just.,
No. CV 12-0939 (FYP), 2022 WL 1124814 (D.D.C. Apr. 14, 2022) 21

Wadelton v. Dep't of State,
No. 13-cv-12 (TSC), 2018 WL 4705793 (D.D.C. 2018) 10, 14

Weisberg v. DOJ,
No. CIV.A. 75-1996, 1987 WL 11984 (D.D.C. May 28, 1987) 18

Statutes

26 U.S.C. § 6103(k)(1) 1, 2, 6, 11, 12, 19

5 U.S.C. ¶ 552

§ 552(4)(A)(ii)(II) 4

§ 552(a)(4)(A)(iii) 4

§ 552(a)(4)(E)(i) 7, 9

§ 552(a)(4)(E)(ii) 7, 9, 10, 12

§ 552(a)(6)(B) 5

§ 552(a)(6)(E)(v)(II) 4

Other Authorities

Allan Blutstein, *FOIA News: Trump Agreements With IRS, But Not Tax Returns, Must Be Released*, FOIA Advisor 17

Aysha Bagchi, *Trump Agreements With IRS, But Not Tax Returns, Must Be Released*, Bloomberg Tax (Dec. 6, 2021) 16

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EPIC, *About Us* (2022) 17

Frank Figliuzzi, *New York Times' Trump taxes bombshell reveals massive national security threat*, NBC (Sept. 29, 2020) 15

Internal Revenue Serv., *Form 15086: Offer in Compromise Public Inspection File Request* (Sep. 2018) 19

IRM § 5.8.8.1.1 3

IRM 11.3.11.8 19

Larry Mednick, OIP Opinion Letter No. 89-3, 1989 WL 406076 (Nov. 3, 1989) 15

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Bloomberg (Dec. 6, 2021) 16

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S. Rep. No. 94-938 (1976) 15

Theresa Schliep, *IRS Comes Up Empty in FOIA Search For Trump Docs*,
Law360 (Mar. 10, 2022) 16

Treasury Inspector Gen. for Tax Admin., *Letter Report: Procedures to Protect Taxpayer Information at Offer in Compromise Public Inspection File Locations Should Be Enhanced* (March 28, 2016) 15

Vidya Kauri, *Privacy Group Starts 2nd Lawsuit Seeking Trump's Tax Info*,
Law360 17

INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") hereby provides this Memorandum of Points and Authorities in support of its Motion to assess attorney's fees and costs reasonably incurred by EPIC in this Freedom of Information Act ("FOIA") case against the Internal Revenue Service ("IRS"). For the reasons set forth below and supported by the attached exhibits, EPIC is eligible and entitled to recover fees and costs in the amount of **$60,079.72**.

This should have been a simple FOIA matter. In February 2018, EPIC filed a FOIA Request with the IRS seeking records of any accepted offers-in-compromise involving then-President Donald J. Trump and associated businesses. EPIC specified the individuals and entities to whom the requested records pertained, identified the form those records might take, and cited the unambiguous command of Congress requiring the IRS to make publicly available any tax return information necessary to permit inspection of accepted offers-in-compromise. 26 U.S.C. § 6103(k)(1). EPIC also described the acute public interest in the types of records it sought and called for expedited processing of its Request.

This should have been a simple FOIA matter, and it almost was. Three days after EPIC filed its FOIA Request, the IRS confirmed that the agency would search for responsive documents, as it was bound by law to do. The IRS also granted expedited treatment, an admission that there was a compelling need to inform the public about the subject matter of EPIC's Request. The agency promised to "make every effort to respond as quickly as possible." EPIC awaited the results of the IRS's search, which—it would later turn out—only required the agency to query two databases.

This should have been a simple FOIA matter, but the IRS's actions ensured otherwise. After the IRS failed to make a determination on EPIC's Request for more than two months, EPIC filed suit. In its complaint, EPIC asked the Court to order a search for responsive

documents and the disclosure of any non-exempt records. But rather than complete the search that the agency had promised (and was required by law) to conduct, the IRS abruptly reversed course. The agency claimed that it had no obligation to process EPIC's Request after all and took the unusual step of moving to dismiss EPIC's FOIA complaint outright.

Even then, this case could have been resolved with a limited expenditure of resources by the parties and the Court. But again, the IRS's actions made that impossible. With its motion to dismiss still pending, the IRS conducted an internal search in August 2018 that it believed was reasonably calculated to locate all responsive records, finding no accepted offers-in-compromise. Instead of informing EPIC of the results of this search—which might well have brought a quick end to this case—the IRS continued to pursue an order of dismissal. When the Service's original motion to dismiss was rendered untenable by the D.C. Circuit's ruling in *EPIC v. IRS*, 910 F.3d 1232 (D.C. Cir. 2018), the IRS doubled down, filing a second motion to dismiss based on novel legal theories.

This Court soundly rejected the IRS's arguments for dismissal in its December 2021 ruling, save for one category of potentially responsive records. The Court confirmed what was already clear from the FOIA, the Internal Revenue Code, and the overwhelming weight of case law: "§ 6103(k)(1) creates a FOIA obligation for the IRS to disclose return information to EPIC, to the extent that information is necessary to permit inspection of an accepted offer-in-compromise." Mem Op. 9. Only then did the IRS finally complete processing, notifying EPIC of the results of its 2018 search and conducting several follow-up queries.

Now, at the conclusion of a case that the IRS could have ended years ago, EPIC seeks to recover reasonable attorney's fees and costs expended on this matter. The FOIA makes EPIC eligible to recover fees and costs because EPIC substantially prevailed by obtaining the search

for responsive records that the IRS long refused. EPIC is entitled to fees and costs because this case was likely to (and did in fact) provide a public benefit; because this case did not confer any commercial benefit on EPIC, a non-profit research and advocacy center; and because this case was made necessary by the IRS's unreasonable refusal to complete processing of EPIC's Request for nearly four years. Accordingly, EPIC asks the Court to assess an award of fees and costs in this matter against the IRS.

FACTUAL BACKGROUND

A. EPIC's FOIA Request

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

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

Id. at 1–2 (internal citations omitted). With respect to the records of business entities associated with the President Trump, EPIC requested:

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

An offer-in-compromise is "an agreement between the taxpayer and the IRS to settle a federal tax debt for less than the full amount owed." IRM § 5.8.8.1.1.

As part of EPIC's FOIA Request, EPIC sought expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II), "news media" fee status under 5 U.S.C. § 552(4)(A)(ii)(II), and a waiver of all duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii). Compl. Ex. 1 at 6–8

B. The IRS's commitment and subsequent failure to expeditiously process EPIC's FOIA Request

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

On March 6, 2018, EPIC attorney John Davisson sent an email to Tax Law Specialist Michael Young asking Young to "advise on when the IRS will complete processing of EPIC's request[.]" Compl. Ex. 3, ECF No. 1–5. Young responded that "The IRS is requesting an extension of the due date (through March 30, 2018) to provide a response to your request." Compl. Ex. 4, ECF No. 1–5. Young also communicated the IRS's request for an extension by letter dated March 6, 2018. Compl. Ex. 5, ECF No. 1–5. "We have extended the response date to March 30, 2018 when we believe we can provide a final response," Young wrote. *Id.* at 1.

On April 2, 2018, Davisson sent a further email to Young to inquire about the status of EPIC's FOIA Request. Compl. Ex. 6, ECF No. 1–5. Later that day, EPIC received a letter from Young dated March 28, 2018. Compl. Ex. 7, ECF No. 1–5. Young requested on behalf of the IRS "additional time to April 27, 2018." *Id.* at 1.

C. EPIC's FOIA lawsuit and the IRS's first motion to dismiss

On April 17, 2018—the 50th working day after the IRS received EPIC's FOIA Request—EPIC filed this suit. EPIC charged that the IRS had violated the FOIA in two respects.

First, EPIC alleged that the IRS had unlawfully failed to comply with the processing deadline set forth in 5 U.S.C. § 552(a)(6)(B). Compl. ¶¶ 43–46, ECF No. 1. Second, EPIC alleged that the IRS had unlawfully withheld agency records from EPIC in violation of 5 U.S.C. § 552(a)(6)(C)(i). Compl. ¶¶ 47–51. As relief, EPIC asked the Court to order the IRS "to immediately conduct a reasonable search for all responsive records" and "to disclose to Plaintiff all responsive, non-exempt records." Compl. 12 ("Requested Relief").

On June 15, 2018, the IRS filed its first motion to dismiss EPIC's Complaint under Fed. R. Civ. P. 12(b)(6). IRS First Mot. Dismiss, ECF No. 9. Contrary to the IRS's February 8, 2018 letter, the agency now argued that EPIC had failed to exhaust its administrative remedies before filing suit and that the agency had no obligation to process EPIC's FOIA Request. Mem. Supp. IRS First Mot. Dismiss 1–2, ECF No. 9-1. The parties concluded briefing on the IRS's Motion on July 12, 2018. Opp'n to Pl.'s Mot. Leave to File Surreply, ECF No. 14.

In August 2018, while the IRS's first Motion to Dismiss was still pending, the IRS initiated what it would characterize as "a search reasonably calculated to locate all responsive records" described by EPIC's FOIA Request. Letter from Ryan O. McMonagle, Dep't of Justice, to John Davisson, EPIC, at 1 (Dec. 20, 2021), Ex. A. The IRS performed keyword searches of the agency's Automated Offers in Compromise ("AOIC") and Appeals Centralized Database System ("ACDS") to identify any accepted offers-in-compromise responsive to EPIC's Request. *Id.* The IRS identified none. *Id.* The agency would not disclose the results of this search to EPIC until three years later in December 2021.

D. The IRS's second motion to dismiss

On December 18, 2018, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *EPIC v. IRS*, 910 F.3d 1232, a separate FOIA suit to obtain President Trump's individual tax returns. On December 19, 2018, EPIC filed a Notice of Supplemental Authority to apprise this

Court of the D.C. Circuit's decision and to explain the significance of the decision to the instant case. ECF No. 16. EPIC explained that the D.C. Circuit's holding concerning the exhaustion of administrative remedies "delivered the final blow the IRS's Motion to Dismiss in this case, which must be denied." *Id.* at 1.

On February 11, 2019, the IRS filed a Notice of Withdrawal of Motion, ECF No. 18. In its filing, the IRS "notifie[d] the Court that it withdraws its pending Motion to Dismiss." *Id.* at 1. In the same Notice, the IRS also announced its intention "to file within twenty-one days a revised Motion to Dismiss in light of the United States Court of Appeals for the D.C. Circuit's decision[.]"

On March 4, 2019, the IRS filed a Second Motion to Dismiss contending, *inter alia*, that "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." Mem. Supp. Second IRS Mot. Dismiss 1, ECF No. 21-1. The parties concluded briefing on the IRS's Motion on April 8, 2019. IRS Reply in Supp. Second Mot. Dismiss, ECF No. 25.

E. The Court's ruling

On December 3, 2021, this Court entered an order granting in part and denying in part the IRS's Second Motion to Dismiss. Order, ECF No. 31. The Court rejected nearly every argument raised by the IRS, holding that "§ 6103(k)(1) creates a FOIA obligation for the IRS to disclose return information to EPIC, to the extent that information is necessary to permit inspection of an accepted offer-in-compromise." Mem Op. 9. But the Court added the "caveat" that EPIC had "fail[ed] to state a claim to obtain tax returns," Mem. Op. 10, a category of records that EPIC addressed for two paragraphs in its 38-page Opposition. Pl.'s Opp'n to Def.'s Second Mot. Dismiss 36–37, ECF No. 22. Accordingly, the Court granted the IRS's Motion to the extent that EPIC sought "disclosure of the former President's tax returns or other return information not

necessary to inspect any accepted offers-in-compromise," while denying the Motion in all other respects. Mem. Op. 1.

F. The IRS's completion of a reasonable search

On December 20, 2021, the IRS notified EPIC of the results of the search the agency had initiated in August 2018 for accepted offers-in-compromise responsive to EPIC's FOIA Request. Ex. A. The IRS reported that its searches of the AOIC system and ACDS had revealed no pertinent accepted offers-in-compromise and that the agency had, in its view, "conducted a search reasonably calculated to locate all responsive records." *Id.* at 1.

In response to concerns raised by EPIC about the keywords used in the agency's 2018 search, the IRS conducted six supplemental searches of the AOIC system in early 2022. Email from Ryan O. McMonagle, U.S. Dep't of Justice, to John Davisson, EPIC (Feb. 25, 2022), Ex. B. On February 25, 2022, the IRS notified EPIC that its supplemental searches "did not locate any records responsive to EPIC's request." *Id.*

Accordingly, the parties informed the Court on March 9, 2022, that "the IRS ha[d] satisfied its obligations under the FOIA to conduct a reasonable search and properly withhold from disclosure responsive records, if any" and that they had "resolved all merits issues in this matter." J. Status Rep. ¶ 6. "The only remaining issue is Plaintiff's asserted entitlement to attorney's fees," the parties noted. *Id.* ¶ 7.

STANDARD OF REVIEW

A plaintiff is eligible for reasonable attorney's fees and costs if it substantially prevails in a FOIA matter. 5 U.S.C. § 552(a)(4)(E)(i). A plaintiff substantially prevails if the plaintiff "obtained relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii)(I)–(II). "[P]laintiffs may be

considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Edmonds v. FBI*, 417 F.3d 1319, 1326–27 (D.C. Cir. 2005) (quoting *Farrar v. Hobby*, 506 U.S. 103 (1992)).

A substantially prevailing FOIA plaintiff is entitled to reasonable attorney's fees and costs at the discretion of a trial court if the "balancing of [four] factors" favors the plaintiff: "(1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct." *Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013).

ARGUMENT

The Court should assess fees and costs of **$60,079.72** against the IRS because EPIC is eligible for fees and costs as a substantially prevailing plaintiff; because the four-factor fee entitlement test conclusively favors EPIC; and because the fee award EPIC seeks is reasonable. EPIC substantially prevailed in this litigation by securing a search for responsive records, a significant measure of relief which the IRS denied EPIC for four years. EPIC is therefore eligible for fees. EPIC is entitled to fees because (1) the public benefit associated with this litigation is substantial; (2) EPIC derived no commercial benefit from this suit; (3) EPIC's interest in obtaining the requested records was to inform the public; and (4) the IRS's conduct in this litigation was unreasonable and unsupported by credible legal arguments. Lastly, EPIC's request for fees and costs of **$60,079.72** is justified in view of prevailing hourly rates for equivalent litigation and the attorney hours EPIC reasonably expended on its successful litigation.

I. EPIC IS ELIGIBLE TO RECOVER FEES AND COSTS BECAUSE IT SUBSTANTIALLY PREVAILED IN THIS LITIGATION.

EPIC is eligible for fees because it substantially prevailed in this matter. 5 U.S.C. § 552(a)(4)(E)(i). A FOIA plaintiff substantially prevails if the plaintiff "obtained relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii)(I)–(II). Here, EPIC obtained a significant measure of the relief it sought—"a reasonable search for all responsive records." Compl. 12, ECF No. 1—through a favorable judicial order or, in the alternative, through a unilateral change in position by the IRS. EPIC obtained a court order denying in part the IRS's Motion to Dismiss and establishing that the IRS had an obligation to conduct a search for responsive records. *See* Order, ECF No. 31; Mem. Op. 9. Alternatively, EPIC prevailed by catalyzing the IRS's unilateral change in position concerning EPIC's entitlement to a search for responsive records.

A. EPIC obtained significant relief by securing a search for responsive records..

EPIC substantially prevailed in this case because it obtained a material form of relief that it sought: a search for all responsive records. A FOIA plaintiff obtains relief sufficient for fee eligibility "if they succeed on any significant issue in litigation [that] achieves some of the benefit [the plaintiff] sought in bringing the suit." *Edmonds*, 417 F.3d at 1326–27. Here, EPIC obtained a search for responsive records that the IRS assiduously denied it had any obligation to conduct, thereby succeeding on a significant issue in dispute. *See* Ex. A; Ex. B. That is all the relief required to make a plaintiff eligible for fees. *See Mobley v. DHS*, 908 F. Supp. 2d 42, 48 (D.D.C. 2012) (holding that "interim relief that is antecedent or incident to any dispute about the production or non-production of records themselves" is adequate for a plaintiff to substantially prevail).

Indeed, the D.C. Circuit has made clear that an order requiring an agency to process a request on an expedited basis is enough for a plaintiff to substantially prevail. *Edmonds*, 417 F.3d at 1322; *see also Wadelton v. Dep't of State*, No. 13-cv-12 (TSC), 2018 WL 4705793 *4 (D.D.C. 2018). If a plaintiff can become eligible for fees merely by securing expedited treatment of a FOIA request that is already set to be processed, EPIC assuredly became eligible for fees in this case by obtaining a search that the IRS had previously refused to conduct at all.

EPIC also obtained significant relief by forcing the IRS to comply with its obligation to process FOIA requests for accepted offers-in-compromise. "[A] plaintiff in this Circuit may establish that he or she has substantially prevailed by obtaining a ruling that will force an agency to more fully comply with FOIA, even if such a ruling does not require the actual release of the requested documents in that matter." *CREW v. FEC*, 66 F. Supp. 3d 134, 142 (D.D.C. 2014). Accordingly, EPIC obtained two separate forms of relief sufficient for a plaintiff to substantially prevail.

B. EPIC obtained the relief it sought through the Court's order denying the IRS's motion to dismiss.

EPIC substantially prevailed under 5 U.S.C. § 552(a)(4)(E)(ii)(I) by obtaining a Court order denying the IRS's Motion to Dismiss and establishing that the IRS was obligated to conduct a search for responsive documents. Order, ECF No. 31; Mem Op. 9. A plaintiff substantially prevails under § 552(a)(4)(E)(ii)(I) if a court order "change[s] in the legal relationship between the plaintiff and the defendant.'" *Campaign for Responsible Transplantation v. Food & Drug Admin.*, 511 F.3d 187, 194 (D.C. Cir. 2007) (quoting *Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)). This occurs when an order requires a party to comply with the law and to do something it was previously unwilling to do. *See id.* at 196.

EPIC substantially prevailed because the Court's ruling established that the IRS was obligated to complete the search for responsive records that EPIC sought. Compl. 12. From the outset of this lawsuit, the IRS denied it had any legal duty to conduct a search. *See* Letter from David Nimmo, IRS, to John Davisson, EPIC, at 2 (Apr. 25, 2018), Ex. C (closing EPIC's request on the asserted grounds that it was "not fully compliant with the IRS' published rules and [could not] be processed"); IRS Mem Supp. First IRS Mot. Dismiss 1 (asserting that "the Service was under no obligation to search for records" responsive to EPIC's request); Mem. Supp. Second IRS Mot. Dismiss 1, ECF No. 21-1 (arguing for dismissal of EPIC's complaint, which sought "to compel the Service to search for . . . two categories of records"). But the Court rejected this contention and denied the agency's effort to dismiss EPIC's Complaint on these grounds, agreeing with EPIC that "§ 6103(k)(1) creates a FOIA obligation for the IRS to disclose return information to EPIC." Mem. Op. 9.

A judicial order need not require the production of documents to make a FOIA plaintiff eligible for fees. In *PETA v. NIH*, the D.C. Circuit ruled that the NIH could not issue a *Glomar* response as to every document in PETA's FOIA request and remanded the case for further consideration. 130 F. Supp. 3d 156, 163 (D.D.C. 2015). Although the NIH's subsequent search revealed no responsive documents, PETA substantially prevailed because the Court's ruling "changed the legal relationship" between the parties by clarifying the NIH's legal obligations and compelling the Institutes to complete a search for documents. *Id.* So too here. While no documents were ultimately located or produced by the IRS in this case, EPIC substantially prevailed because—like PETA—it obtained a court order clarifying that the agency was legally obliged to conduct a search. After the D.C. Circuit's order and opinion, the IRS could no longer disregard its obligation to complete a search for responsive records.

EPIC also substantially prevailed under 5 U.S.C. § 552(a)(4)(E)(ii)(I) by making the agency aware of duties imposed upon it by the FOIA. In *CREW v. FEC*, the plaintiff substantially prevailed by obtaining a favorable D.C. Circuit Court ruling, even though the Court had not ordered the release of any documents and the parties ultimately settled the litigation. 66 F. Supp. 3d 134, 143 (D.D.C. 2014). Though the FEC was at no point ordered to produce records, the D.C. Circuit reversed the district court's ruling that CREW failed to exhaust its administrative remedies. *Id.* at 139–142. In granting CREW's motion for attorney's fees, the district court explained that it was immaterial that no court had ordered the FEC to provide CREW with responsive documents because CREW had secured "a ruling that will force an agency to more fully comply with FOIA." *Id.* at 142. CREW thus substantially prevailed, "benefit[ting] the nation by making the Department aware of the laws it must observe[.]" *Id.* (quoting *Halperin v. Dep't of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977)).

Like CREW, EPIC obtained a D.C. Circuit order clarifying the IRS's obligation to disclose return information necessary to inspect accepted offers-in-compromise under the FOIA. Mem. Op. 9 (citing 26 U.S.C. § 6103(k)(1)). Because EPIC's case also "benefit[ed] the nation by making the [agency] aware of the laws it must observe," *Halperin*, 565 F.2d at 706 n.11, EPIC substantially prevailed in two separate ways.

C. In the alternative, EPIC obtained the relief it sought by catalyzing a unilateral change in the IRS's position.

Alternatively, EPIC substantially prevailed by causing "a voluntary or unilateral change in position by the agency" on its substantial claims. 5 U.S.C. § 552(a)(4)(E)(ii)(II). A FOIA plaintiff can become eligible for fees when its litigation causes an agency to change its position. *See Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524–25 (D.C. Cir. 2011). This "not particularly high" standard asks whether the litigation "could reasonably be regarded as

necessary" to achieve the relief sought and whether a "causal nexus" exists between the action and the agency's change in position. *Nat'l Sec. Counselors v. CIA*, 189 F. Supp. 3d 73, 79–80 (D.D.C. 2016) (internal quotation marks and citations omitted); *see also Church of Scientology of Cal. v. Harris*, 653 F.2d 584, 587 (D.C. Cir. 1981); *American Oversight v. DOJ*, 375 F. Supp. 3d 50, 61 (D.D.C. 2019); *Mobley*, 908 F. Supp. 2d at 47.

Courts generally focus on the timing of an agency's change in position to determine whether the causal nexus exists. For example, in *National Security Counselors v. CIA*, the plaintiffs requested documents in 1997, filed suit in 2011, and began receiving documents seven months later. 189 F. Supp. 3d at 80. The fact that fourteen years passed between the request and the lawsuit, yet less than a year passed between the initiation of the lawsuit and the beginning of the documents' release, weighed heavily in favor of finding a causal nexus. *Id.*

EPIC's suit plainly caused IRS to change its position on whether it was obligated to conduct a search. After disclaiming any obligation to complete a search for four years, *see* Ex C, the IRS finally completed processing of EPIC's request in December 2021 and February 2022. *See* Ex A; Ex. B. EPIC's complaint catalyzed a complete reversal of the IRS's position—not merely a minor acceleration in production as in *Grand Canyon Trust v. Bernhardt*, 947 F.3d 94, 98 (D.C. Cir. 2020), or adherence to a delayed production schedule as in *Codrea v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 272 F. Supp. 3d 49, 53 (D.D.C. 2017). If the IRS's long-delayed completion of a search for responsive records was not already compelled by this Court's December 3, 2022 Order, then it was indisputably catalyzed by EPIC's Complaint and successful Opposition to the IRS's Second Motion to Dismiss. For this reason, EPIC is eligible for fees and costs.

II. EPIC IS ENTITLED TO FEES AND COSTS BECAUSE THE FOUR-FACTOR TEST DECISIVELY FAVORS RECOVERY.

EPIC is also entitled to an award fees and costs because the balance of the relevant factors decisively favors EPIC. In determining whether a prevailing plaintiff is entitled to fees, courts in the D.C. Circuit balance four factors: "(1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct." *Morley*, 719 F.3d at 690. Each of these factors weighs in EPIC's favor.

A. The public benefit associated with this case is substantial.

The first entitlement factor favors EPIC because the public benefit associated with this case is substantial. As the D.C. Circuit has explained, the public benefit factor "requires an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest." *Morley v. CIA*, 810 F.3d 841, 844 (D.C. Cir. 2016). In order to have "potential public value," a request need only have "a modest probability of generating useful new information about a matter of public concern." *Id.* "The public benefit factor contemplates whether 'the complainant's victory is likely to add to the fund of public information that citizens may use in making vital political choices.'" *Wadelton*, No. 13-CV-412 (TSC), 2018 WL 4705793, at *4 (quoting *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995)). For example, in *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018), the D.C. Circuit found that the public benefit factor favored the plaintiff "because there was at least a small public benefit from the information sought by Morley." *Id.* at 392.

The type of information EPIC sought in its FOIA request—tax return information necessary to inspect accepted offers-in-compromise—is of significant public value. Congress left no doubt on this point when it required such information to be made available to the public, 26

U.S.C. § 6103(k)(1), notwithstanding the confidentiality ordinarily imposed on tax return information by 26 U.S.C. § 6103(a). *See* S. Rep. No. 94-938, at 340 (1976) (explaining that the exceptions to confidentiality in 26 U.S.C. § 6103(k) reflect Congress's judgment that certain return information "should be public as a matter of policy"); Treasury Inspector Gen. for Tax Admin., *Letter Report: Procedures to Protect Taxpayer Information at Offer in Compromise Public Inspection File Locations Should Be Enhanced* 6 (March 28, 2016) ("noting that offers-in-compromise were first made "available for public inspection" following a congressional investigation revealing "that the IRS had accepted offers with generous terms from racketeers and politically connected individuals"); Larry Mednick, OIP Opinion Letter No. 89-3, 1989 WL 406076, at *6 (Nov. 3, 1989) ("Presumably, the public policy behind the federal exemption from confidentiality of return information is a Congressional belief that the compromise of tax liabilities is affected with significant public interest, to the extent that all taxpayers are affected by such a compromise.").

The particular subset of accepted offers-in-compromise sought in EPIC's request—and the existence or non-existence of such records—was of special value to the public. Former President Trump's tax status and interactions with the IRS are of surpassing interest to the public and have been the subject of extensive litigation and press coverage. *See, e.g.*, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *Trump v. Vance*, 140 S. Ct. 2412 (2020); Frank Figliuzzi, *New York Times' Trump taxes bombshell reveals massive national security threat*, NBC (Sept. 29, 2020).[1] There was also a significant probability that EPIC's FOIA Request for accepted offers-in-compromise would result in the disclosure of relevant records, given that Mr. Trump is known to have settled tax debts with the IRS. *See, e.g.*, Russ Buettner et al., *Long-Concealed*

[1] https://www.nbcnews.com/think/opinion/new-york-times-trump-taxes-bombshell-reveals-massive-national-security-ncna1241363

*Records Show Trump's Chronic Losses and Years of Tax Avoidanc*e, N.Y. Times (Sept. 27, 2020)[2] (reporting that Mr. Trump and the IRS reached an "agreement" over his disputed $72.9 million refund in 2014).

Even analyzed *ex post*, EPIC's request produced a significant public benefit. The IRS's disclosure that it could find no records responsive to EPIC's FOIA Request demonstrates that President Trump and his businesses have not settled any tax liabilities with the IRS over the past several decades through the offer-in-compromise procedure. This fact is "in and of itself valuable information that benefits the public, even if the public [did] not gain access to any relevant documents." *Pub. Rec. Media, LLC v. U.S. Dep't of Justice*, No. CIV. 12-1225 MJD/AJB, 2013 WL 3024091, at *3 (D. Minn. Jan. 29, 2013); *see also Nat'l Sec. Couns.*, 189 F. Supp. 3d at 79 (noting that a FOIA request which yielded no agency records but confirmed the nonexistence of legally required CIA procedures could provide a public benefit and "weigh in favor of [the plaintiff] as to its 'entitlement' to fees").

Indeed, the final results of EPIC's FOIA Request were covered by the press, Theresa Schliep, *IRS Comes Up Empty in FOIA Search For Trump Docs*, Law360 (Mar. 10, 2022),[3] adding to the significant public attention EPIC's case had already attracted. *See, e.g.*, Michaela Ross, *Trump Agreements With IRS Must Be Released*, Bloomberg (Dec. 6, 2021);[4] Aysha Bagchi, *Trump Agreements With IRS, But Not Tax Returns, Must Be Released*, Bloomberg Tax (Dec. 6, 2021);[5] Emlyn Cameron, *Judge Trims Suit Seeking Trump Tax Return Info From IRS*, Law360 (Dec. 6, 2021);[6] *Trump tax records*, Courthouse News Serv. (Dec. 6, 2021);[7] Allan

[2] https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html
[3] https://www.law360.com/tax-authority/articles/1472657/irs-comes-up-empty-in-foia-search-for-trump-docs
[4] https://about.bgov.com/news/schumer-aims-for-holiday-deadline-u-s-to-boycott-beijing-games/
[5] https://news.bloombergtax.com/daily-tax-report/trump-agreements-with-irs-but-not-tax-returns-must-be-%20released
[6] https://www.law360.com/tax-authority/articles/1445961/judge-trims-suit-seeking-trump-tax-return-info-from-irs
[7] https://www.courthousenews.com/trump-tax-records/

Blutstein, *FOIA News: Trump Agreements With IRS, But Not Tax Returns, Must Be Released*, FOIA Advisor (Dec. 6, 2021);[8] Vidya Kauri, *Privacy Group Starts 2nd Lawsuit Seeking Trump's Tax Info*, Law360 (Apr. 18, 2018).[9]

Whether analyzed *ex ante* or *ex post*, the public benefit associated with this case is clear and substantial. Accordingly, the first factor favors EPIC.

B. EPIC derived no commercial benefit from its FOIA request or suit.

The second entitlement factor plainly favors EPIC because this case conferred no commercial benefit. EPIC is a non-profit research and advocacy center which focuses public attention on issues of "privacy, freedom of expression, and democratic values," EPIC, *About Us* (2022),[10] including questionable financial dealings implicating public officials that may threaten the integrity of democratic institutions. EPIC derived no commercial benefit from its FOIA Request, nor would EPIC have derived any commercial benefit had the IRS's searches identified responsive records. Accordingly, this factor weighs in EPIC's favor. *See EPIC v. FBI*, 72 F. Supp. 3d 338, 347 (D.D.C. 2014) (finding "persuasive" EPIC's "conten[tion] that its interests in the records obtained in this case are entirely public-oriented and that it has derived no commercial benefit from its FOIA request or from this suit").

C. EPIC's interest in the requested records was to inform the public.

The third factor EPIC's interest in obtaining the requested records was to "shed light on the IRS's decision(s) to settle tax liabilities with [President Trump]," if any, and to "allow the public to assess the agency's judgment in doing so." Compl. Ex. 1 at 6. Accordingly, this factor

[8] https://www.foiaadvisor.com/home/2021/12/6/foia-news-trump-agreements-with-irs-but-not-tax-returns-%20must-be-released
[9] https://www.law360.com/articles/1034912/privacy-group-starts-2nd-lawsuit-seeking-trump-s-tax-info

[10] https://epic.org/about/.

also weighs in EPIC's favor. *See Weisberg v. DOJ*, No. CIV.A. 75-1996, 1987 WL 11984, at *8 (D.D.C. May 28, 1987) ("Where the plaintiff's interest in the information is scholarly, journalistic, or public-interest oriented, a court will generally award fees.").

D. The IRS's conduct in this matter was plainly unreasonable.

Finally, the fourth factor favors EPIC because of "the [un]reasonableness of the agency's conduct" in refusing to process and complete a search for records responsive to EPIC's FOIA Request. *Morley*, 719 F.3d at 690. This factor contemplates whether the agency's opposition to the relief sought "had a reasonable basis in law[.]" *Davy v. CIA*, 550 F.3d 1155, 1162 (D.C. Cir. 2008) (quoting *Tax Analysts v. DOJ,* 965 F.2d 1092, 1094 (D.C. Cir. 1992)). It also considers "whether the agency 'had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior,'" *Davy*, 550 F.3d at 1162 (quoting *LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 486 (D.C. Cir. 1980)). In *Davy*, the D.C. Circuit explained that the burden of this factor falls on the agency. "The question is not whether [the requestor plaintiff] has affirmatively shown that the agency was unreasonable, but rather whether the agency has shown that it had any colorable or reasonable basis" for its refusal to provide the relief sought. *Id*. at 1163; *see also Kwoka v. IRS,* 989 F.3d 1058, 1065 (D.C. Cir. 2021).

The history of this case readily demonstrates the unreasonableness of the IRS's conduct. When EPIC filed its FOIA Request in February 2018, even the IRS agreed that EPIC was entitled to a search for responsive records. Compl. Ex. 2 at 1 ("We are granting your request for expedited processing. We will search for documents responsive to this request."). But two months later, the IRS attempted to reverse this decision on the theory that EPIC's FOIA Request was "not fully compliant with the IRS' published rules and [could not] be processed." Ex. C at 2. The IRS renewed this argument in its first Motion to Dismiss, asserting that "the Service was

under no obligation to search for records" responsive to EPIC's request. Mem. Supp. First Mot. Dismiss 1.

With its Motion to Dismiss still pending, the IRS conducted an internal search that it believed was "reasonably calculated to locate all responsive records" in August 2018, finding none. Ex. A at 1. But instead of informing EPIC of the results of this search and likely bringing a swift end to the case, the IRS continued to expend the parties' and the Court's resources in pursuit of an order of dismissal.

When the Service's initial arguments were precluded by the D.C. Circuit's ruling in *EPIC v. IRS*, 910 F.3d 1232, the IRS nevertheless doubled down, filing a Second Motion to Dismiss. The IRS now contended that 26 U.S.C. § 6103(k)(1) did not "permit[] disclosure upon written request under FOIA for specific taxpayer return information." Mem. Supp. Second IRS Mot. Dismiss 10. The Service pressed this argument despite language in the Internal Revenue Manual stating that accepted offers in compromise open to public inspection under § 6103(k)(1) could be obtained through the FOIA, IRM 11.3.11.8, and despite making recent offers in compromise accessible to the public by written request using a form published on the IRS website. Internal Revenue Serv., *Form 15086: Offer in Compromise Public Inspection File Request* (Sep. 2018).[11]

Apart from one category of records, the Court flatly rejected the IRS's arguments in its December 2021 ruling. The Court confirmed what was already clear: "§ 6103(k)(1) creates a FOIA obligation for the IRS to disclose return information to EPIC, to the extent that information is necessary to permit inspection of an accepted offer-in-compromise." Mem. Op. 9.

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[11] https://www.irs.gov/pub/irs-pdf/f15086.pdf

The Court left little doubt about the unreasonableness of the IRS's refusal to process EPIC's request for accepted offers in compromise.[12]

Only then—nearly four years after EPIC had filed its FOIA Request—did the IRS finally complete processing of that Request, notifying EPIC of the results of its 2018 searches and conducting several supplemental searches. Ex. A; Ex. B. This extraordinary delay by the IRS, based on legal arguments that even the agency did not espouse at the beginning of this case, was plainly unreasonable.

Because the fourth entitlement factor—like the three before it—favors EPIC, EPIC is entitled to an award of attorney's fees and costs.

III. EPIC'S REQUESTED FEE AWARD IS REASONABLE.

A. The attorney's fees EPIC seeks for its work on this case are reasonable.

EPIC seeks an award of $60,079.72 in attorney's fees and costs in this matter, which is reasonable based on the hours worked and applicable billing rates. To determine whether fees are reasonable, the court must consider (1) whether the attorneys charged a reasonable hourly rate and (2) whether the time attorneys logged on the case was reasonable. *Judicial Watch, Inc. v. DOJ*, 774 F. Supp. 2d 225, 232 (D.D.C. 2011) (citing *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 801 (D.C. Cir. 1998)).

Attorney's fees are calculated based on the "lodestar," which is the number of hours the lawyers reasonably spent on the case multiplied by the lawyers' hourly rates. *Id.* A lawyer's

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[12] *See, e.g.*, Mem. Op. 5 ("Still, this argument does not get the IRS very far."); Mem. Op. 5 ("There is no basis in the statute's text or structure to import these requirements into § 6103(k)(1)[.]"); Mem. Op. 6 ("But once again, the IRS's argument runs headlong into the text of the statute."); *id.* ("The Court cannot read this language as anything but a disclosure obligation."); Mem. Op. 7 ("At bottom, the Court can see no reason why § 6103(k)(1), or the non-FOIA in-person inspection regime established by the Secretary, operate to extinguish EPIC's right to make an otherwise valid FOIA request for records covered by the exception."); Mem. Op. 7 ("In addition, relevant case law does not support the IRS's argument that it has no disclosure obligations to EPIC under § 6103(k)(1)."); Mem. Op. 10 ("Finally, the IRS argues that to the extent EPIC seeks records at issue in EPIC I, its claim is barred by res judicata. Not so.").

hourly rate is measured by its fair market value, "regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The fee requester bears the burden of establishing the reasonableness of the hourly rates. *Salazar v. District of Columbia*, 809 F.3d 58, 64 (D.C. Cir. 2015) (*Covington v. District of Columbia*, 57 F.3d 1101, 1103 (D.C. Cir. 1995)).

EPIC's calculation of its lodestar relies on the Fitzpatrick Matrix, a newly-developed matrix of hourly rates for attorneys of various experience levels published by the Civil Division of the United States Attorney's Office for the District of Columbia. Ex. F. The Fitzpatrick Matrix "is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees," including FOIA cases. *Id.* It has been designed to provide "a reliable assessment of fees charged for complex federal litigation in the District [of Columbia]." *Id.* at 2. The data for the Fitzpatrick Matrix "was gathered from the dockets of cases litigated in the U.S. District Court for the District of Columbia[.]" *Id.* The Fitzpatrick Matrix was recently relied upon by another court in this District to calculate attorney's fees in a FOIA matter. *Vollmann v. Dep't of Just.*, No. CV 12-0939 (FYP), 2022 WL 1124814, at *7 (D.D.C. Apr. 14, 2022). In view of the rigorous methodology used to generate the Fitzpatrick Matrix, the recency of the data on which it is based, and the position of the U.S. Attorney's Office for the District of Columbia that it is suitable for use in FOIA matters, EPIC submits that the rates set forth in the Fitzpatrick Matrix are reasonable and appropriate for calculating EPIC's attorney's fees in this case. *See* Ex. D ¶ 9.[13]

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[13] Because the U.S. Attorney's Office for the District of Columbia has not yet updated the Fitzpatrick Matrix to reflect 2022 billing rates, EPIC applied a conservative 2.0% increase to 2021 rates to calculate the 2022 rates used in its billing records.

The D.C. Circuit has held that "the second prong of the equation for calculating a fee award—the reasonableness of hourly rates awarded under fee-shifting statutes— consists of 'at least three elements: the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community.'" *Am. Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148 (D.D.C. 2007) (citing *Covington*, 57 F.3d at 1107). To recover, the movant must provide "contemporaneous, complete, and standardized time records which accurately reflect the work done by each attorney." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

EPIC has provided complete, detailed billing records, *see* Ex. E, which were contemporaneously recorded and accurately reflect the work done by each attorney and staff member. *See* Ex. D ¶¶ 3–8. The records reflect the date, time, and nature of each activity and include details about the specific task performed. *See* Ex. E. Each entry is clearly labeled with the name of the attorney performing the work, the attorney's rate, the hours of work performed on the activity, and the total amount charged for the activity. *See id.* EPIC has therefore provided satisfactory billing records in this matter.

EPIC's request is further supported by affidavits from each attorney and staff member who worked on this case over the past four years, save for one attorney who is no longer employed by EPIC. *See* Aff. of Alan J. Butler, Ex. H; Aff. of John L. Davisson, Ex. I; Aff. of Sara Geoghegan, Ex. J; Aff. of Thomas McBrien, Ex. K; Ex. D ¶ 7. And EPIC's request for $400 in costs for filing in this case is supported by a contemporaneous receipt. Ex. G.

Based on the 161.3 hours worked by EPIC's attorneys and staff on this case and the applicable Fitzpatrick rates, the total lodestar amount for all work on this matter—including fees on fees—is $67,786.60. Ex. D ¶¶ 16–17. But EPIC has reduced this lodestar amount to account

for its lack of success or partial success on several filings and as an exercise of general billing judgment. *Id.* ¶ 14. EPIC accordingly requests a reasonable award of $60,079.72 for attorney fees and costs in this matter. *Id.* ¶ 17.

B. EPIC is entitled to fees on fees.

EPIC is entitled to recover fees for its work to obtain fees in this matter. "[I]t is settled in this circuit that hours reasonably devoted to a request for fees are compensable[.]" *Brennan Ctr. for Just. v. DHS*, No. CV 16-1609 (ABJ), 2019 WL 280954, at *5 (D.D.C. Jan. 22, 2019) (quoting *EPIC v. FBI*, 80 F. Supp. 3d 149, 162 (D.D.C. 2015)); *see also EPIC v. DHS*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011) ("It is a common practice in this jurisdiction to award fees on fees in FOIA cases."). Based on the 47.9 hours that EPIC's attorneys and staff have dedicated to obtaining fees in this matter and the applicable Fitzpatrick rates, the total lodestar amount for fees-on-fees in this matter is $17,962.50. Ex. D ¶ 17. The Court should accordingly grant EPIC's motion and award fees-on-fees.

CONCLUSION

EPIC has substantially prevailed in this case and is eligible for and entitled to recover fees under the FOIA. The award EPIC seeks is reasonable and supported by the attached affidavits and billing records. EPIC therefore requests that the Court assess an award of $60,079.72 in fees and costs against the IRS.

Respectfully Submitted,

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