IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERNAL REVENUE SERVICE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

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Introduction

Plaintiff Electronic Privacy Information Center ("EPIC") asks the Court to award its attorney's fees and costs even though the Service did not locate, let alone release, any records in this FOIA case. The procedural history of this case is not complicated. EPIC filed a complaint. The Service moved to dismiss it under Rule 12(b)(6) arguing that all of the requested records were categorically exempt under FOIA Exemption 3 in conjunction with 26 U.S.C. § 6103. The Court granted the motion to dismiss as to certain categories of EPIC's request (specifically, its requests for tax returns) and denied it as to the other categories. The Service searched for records and told EPIC that it found none. The parties then agreed that no merits disputes remain. Along the way, the parties filed a handful of status reports. For all of that, EPIC now argues that it "substantially prevailed" under 5 U.S.C. § 552(a)(5)(E) and demands $60,000 for its trouble.

EPIC's motion is meritless. EPIC is not eligible for fees because it received no relief. The Court did not order any relief by simply denying the Service's motion to dismiss in part, and in any event the Service located no responsive records. EPIC is not entitled to fees because the Service located no responsive records. And even if EPIC were eligible and entitled to fees, its fee demand is unreasonable because the Service located no responsive records. In short, whether viewed through the lens of eligibility, entitlement, or reasonableness, the fact that the Service located no records is dispositive. The Court should deny the motion or, if it does not, at least slash EPIC's fee demand significantly.

Argument

I. EPIC IS NOT ELIGIBLE FOR ATTORNEY'S FEES

A FOIA requester is eligible for an attorney's fee award only if it "substantially prevails" in its suit. 5 U.S.C. § 552(a)(4)(E). A plaintiff "substantially prevails" if it "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." *Id.*; *Contreras v. DOJ*, 729 F. Supp. 2d 167, 170 (D.D.C. 2010).

EPIC is not eligible for fees under either test because it has not "obtained relief" in this case. The Court's order granting the IRS's motion did not grant EPIC any judicial "relief," it merely held that EPIC had stated a claim, and then only as to two of the four categories of records in its request. Nor did EPIC obtain relief through the Service's searches because the Service did not locate – let alone release – any responsive records to EPIC. If the Court agrees as to both points, then the Court need not address Sections II or III, below.

A. The Court's Order Granting The Service's Motion To Dismiss In Part And Denying It In Part Does Not Constitute Relief Through a Judicial Order

EPIC argues that the Court's order denying in part and granting in part the Service's motion to dismiss constitutes an order for relief. It describes this relief in various ways: as "securing a search for responsive records," and obtaining an order requiring the IRS to "comply with the law." Mot. for Attorney's Fees at 9-10. It cites two cases in support: *CREW v. FEC*, 66 F. Supp. 3d 134 (D.D.C. 2014) and *PETA v. NIH*, 130 F. Supp. 3d 156 (D.D.C. 2015). *Id.* at 11-12. The Court of Appeals, however, has rejected EPIC's argument. And the cases on which EPIC relies are irrelevant.

First, the D.C. Circuit has held that an order denying a motion to dismiss does not constitute a judicial order for relief under 5 U.S.C. § 552(a)(5)(E). In *Oil, Chem. and Atomic Workers Int'l*

Union .v Dep't of Energy, 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"), the Court of Appeals for the D.C. Circuit rejected the very same argument EPIC makes here.[1] There, the government moved to dismiss for lack of subject matter jurisdiction asserting that the original agency defendant no longer existed. *Id.* at 453. The Court denied the motion to dismiss and substituted the Department of Energy as the proper defendant. *Id.* The agency then began conducting searches and releasing records, until the parties agreed on the merits and dismissed the action by stipulation, while reserving the issue of attorney's fees. *Id.* The Court of Appeals rejected the plaintiff's claim that it had substantially prevailed through the order denying the motion to dismiss, correctly concluding that "surviving a motion to dismiss does not alter the legal relationship between parties" and therefore did not amount to "judicial relief." *Id.* at 458-459.

The district court opinions in *CREW* and *PETA* do not support EPIC's position either. Neither case involved a trial court order denying a motion to dismiss. Rather, in both cases the trial court granted the agencies' dispositive motions and were reversed by an *appellate* court order. And in both cases, the district courts expressly stated that the operative "judicial order" was the Court of Appeals' order reversing and remanding.

In *CREW*, for example, the district court dismissed the case for failure to exhaust administrative remedies, and the D.C. Circuit reversed. *CREW v. FEC*, 711 F.3d 180, 190 (D.C. Cir. 2013). Considering the plaintiff's application for attorney's fees on remand, the Court held that CREW "had substantially prevailed *by virtue of its favorable appellate decision*." *CREW v.*

[1] When the Court of Appeals decided *OCAW*, a FOIA plaintiff was only eligible for attorney's fees if it could show it obtained a judicial order granting relief. But Congress amended FOIA in 2007 to add another ground for eligibility for plaintiffs who "initiat[ed] a lawsuit that causes the agency to make a voluntary or unilateral change in its position," commonly called the "catalyst" test. The "judicial order" test, however, is still in place. Thus, while *OCAW*'s central holding (that the plaintiff was not eligible) has been superseded by statute because Congress has added an eligibility ground unavailable to the plaintiff in that case, it remains good law on the "judicial order" test.

FEC, 66 F. Supp. 3d 134, 142 (D.D.C. 2014) (emphasis added). In other words, the D.C. Circuit's order – not the trial court's order – "changed the legal relationship" between the parties by reviving a dismissed case. *CREW*, 2014 WL 12935326, at *8 ("After Judge Kollar-Kotelly's ruling dismissing the case, however, CREW and the FEC had *no* legal relationship because the case had been dismissed. Only after CREW prevailed at the D.C. Circuit did the parties once again have a legal relationship that permitted CREW to demand compliance with FOIA"), *report and recommendation adopted* 66 F. Supp. 3d 134 (D.D.C. 2014).[2]

PETA's reasoning is not on point for the same reason. In *PETA* the district court granted summary judgment favor of the agency. *PETA v. NIH*, 853 F. Supp. 2d 146, 159 (D.D.C. 2012). On appeal, the D.C. Circuit reversed the grant of summary judgment with instructions that the agency conduct another search as to one category of records. *PETA v. NIH*, 745 F.3d 535, 545 (D.C. Cir. 2014). After plaintiff then moved for attorney's fees on remand, the district court held that "the D.C. Circuit's order changed the legal relationship between PETA and NIH, and it resulted in further action on the agency's part." *PETA*, 130 F. Supp. 3d at 163.

In short, neither *CREW* nor *PETA* support EPIC's argument, and the D.C. Circuit's decision in *OCAW* explicitly rejects it. Thus EPIC's argument has no merit.

EPIC also fundamentally misrepresents the Court's order. The Court's order was on a Rule 12(b)(6) motion. As in any Rule 12(b)(6) motion, the Court did not rule that EPIC is *entitled* to relief, let alone grant it any. The Court ruled only that EPIC stated a claim under the FOIA, and that the Service had "duties" under the FOIA. And then it ordered the parties to "file a joint status report concerning how they wish to proceed." That is a far cry from "obtaining relief via a judicial

[2] EPIC's reliance on *CREW* is so confusing that it tries to suggest that the D.C. Circuit's opinion in *EPIC I* constitutes a judicial order in this case. Mot. for Attorney's Fees at 12.

order." *See Summers v. DOJ*, 569 F.3d 500, 505 (D.C. Cir. 2009) (court-ordered status report regarding "voluntary disclosures" did not change the legal relationship between the parties because the agency could have "refused to disclose a single document or datum" and still not be in violation of a court order); *accord Barnard v. DHS*, 656 F. Supp. 2d 91, 98-99 (D.D.C. 2009).[3]

B. EPIC is Not Eligible For Fees Under the "Catalyst" Test Because The Service Located No Responsive Records

EPIC next argues that, because it sued and partly survived the Service's motion to dismiss, this suit was the "catalyst" for the Service to search. The thrust – if not the entirety – of EPIC's argument is that it obtained relief because the Service's decision to search for accepted offers in compromise is a "voluntary or unilateral change in position" under 5 U.S.C. § 552(a)(5)(E)(ii)(II). Mot. for Attorney's Fees at 12-13.

EPIC trains its argument exclusively on the "change in position" language. *Id.* at 13. Again, it insists that the inquiry is solely whether a "causal nexus exists between the action and the agency's change in position." *Id.* The only question, according to EPIC, is timing*:* the Service refused to search at the administrative level, EPIC sued, and then the Service searched after the motion to dismiss was granted in part and denied in part. *Id.* So, according to EPIC, the suit "catalyzed" the Service to search, and that is the end of it. *Id.* (citing *National Security Counselors v. CIA*, 189 F. Supp. 3d 73 (D.D.C. 2016)).

But EPIC's argument is incomplete and incorrect. As with the "judicial order" test for eligibility, a requester must show not only that the agency "voluntarily' changed its position, but also that the requester "obtained relief" from that change of position. But according to the very case on which EPIC relies – *National Security Counselors* ("*NSC*"), 189 F. Supp. 3d 73, 79

[3] In any event, the Service conducted its initial searches in August 2018, three years before the Court ruled on the motion to dismiss. *See* 1/7/22 Joint Status Report (Dkt. No. 33) ¶ 3. It conducted a supplemental search as a courtesy to Plaintiff and not because the Court ordered it to do so.

(D.D.C. 2016) (Mot. for Attorney's Fees at 13) – merely convincing an agency to search for records does not suffice. In *NSC*, the Court held that a FOIA requester did not substantially prevail on one of its requests because the defendant agency "searched but found no responsive records." *Id.* at 79. And the *NSC* court is not alone in that conclusion. Another court in this district recently explained that compelling an agency to change its position is not enough: the "unilateral change in position" must "result[] in the release of documents." *AquAlliance v. NOAA*, No. 17-cv-2108, 2019 WL 2451687, at *1 (D.D.C. June 12, 2019).

None of the remaining cases EPIC cites on page 13 of its Motion support EPIC's position either. In fact, like *NSC*, they all support the Service's position. In *Church of Scientology of Cal. v. Harris*, the Court found that the plaintiff substantially prevailed because the litigation caused the agency to release 150 documents. *Church of Scientology*, 653 F.2d 584, 588 (D.C. Cir. 1981). In *Am. Oversight v. U.S. Dep't of Justice*, the agency also released records. *Am. Oversight*, 375 F. Supp. 3d 50, 59 (D.D.C. 2019). And the Court there held that the plaintiff was eligible for fees under the judicial order prong; not the catalyst prong. *Id.* at 61 ("Because the Court agrees that Plaintiff prevailed, at least in part, based upon a court order . . . it need not address whether the instant litigation was the catalyst to the production and voluntary disclosure of the records at issue"). And finally, in *Mobley v. Dep't of Homeland Sec.*, the court held that the plaintiff did not substantially prevail at all. *Mobley*, 908 F. Supp. 2d 42, 49 (D.D.C. 2012). There, the Court noted specifically that "the fact that the plaintiffs received no documents, despite the fact that the defendant processed their request, militates against a conclusion that the plaintiffs substantially prevailed." *Id.* at 48.

II. EPIC IS NOT ENTITLED TO ATTORNEY'S FEES

EPIC also argues that it satisfies the four independent factors for "entitlement" to fees. It greatly overstates the purported public interest in this case. And it hurls much rhetoric at the

Service for arguing that the returns and return information EPIC requested were exempt from disclosure at the administrative level and in its motions to dismiss.

In determining whether a FOIA plaintiff is entitled to fees, courts consider and weigh a "variety of factors": "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *Wren v. U.S. Dep't of Justice*, 282 F. Supp. 3d 216, 225 (D.D.C. 2017) (quoting *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011) *and Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013)). None of these factors "is dispositive, although the court will not assess fees when the agency has demonstrated that it had a lawful right to withhold disclosure." *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008).

But EPIC ignores several important if not dispositive things. First, it largely ignores that this Court and both the District Court and Court of Appeals in *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.* ("*EPIC I*"), 910 F.3d 1232 (D.C. Cir. 2018) have adopted the Service's position here at least in part. Second, it largely ignores the importance of the fact that the Service located no responsive records. And third, EPIC ignores an on-point 2020 case in which the court awarded no fees under more favorable facts (*Gov't Accountability Project v. U.S. Dept of Homeland Sec.*, 17-cv-2518, 2020 WL 4931932 (D.D.C. 2020)) along with another case it cites for a different element that is also bad for it, but less so (*Pub. Rec. Media, LLC v. U.S. Dep't of Justice*, 2013 WL 3024091 (D. Minn. Jan. 29, 2013)).

All of these facts tip the "entitlement" factors in favor of the Service. The Service does not contest that EPIC does not have a commercial interest in the requested records, nor does it contest why EPIC wants them. That said, the remaining two factors do not favor EPIC. The first factor, "public interest," is nonexistent here: no records were even located, let alone released. The fourth

factor does not support EPIC either. The Service did not withhold records and, in any event, took a reasonable position that the returns and return information that EPIC requested were categorically exempt. In short, this case is far more like *GAP* - a case involving no records in which the Court awarded no fees that EPIC's brief conveniently ignores – than like any other case. And EPIC's request should suffer the same fate as the Plaintiff's request in *GAP*.

A. The First Factor Weighs Against Entitlement Because There Is Little, If Any Public Interest Served By The Fruitless Searches In This Case

EPIC relies on *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018), arguing that the D.C. Circuit in that case found that the "public benefit factor favored the plaintiff." Mot. for Attorney's Fees at 14 (citing *Morley*, 894 F.3d at 392)). It claims "Congress left no doubt [as to the public benefit of disclosing accepted OICs] when it required such information to be made available to the public." Mot. for Attorney's Fees at 14. And it claims that "Former President Trump's tax status and interactions with the IRS are of surpassing interest to the public." *Id.* at 15.

To begin, EPIC's decision to highlight *Morley* is odd. *Morley* involved a matter of public interest: records about the assassination of President Kennedy. And the public interest in those records is obvious. But even so, and despite the fact that the litigation proceeded for twenty years and involved multiple releases, the D.C. Circuit affirmed the denial of *all* fees. And in doing so, it held that the fourth factor was "dispositive" (see below a p. 9). So, as discussed below, what minimal support *Morley* provides *EPIC* as to the first factor, it completely undercuts as to the fourth factor, and the overall disposition of the case. In other words, it is just not a good case for EPIC.

Also, EPIC has – from its complaint to this motion – couched the "public interest" in this case as obtaining the former President's tax returns. It said so again and again in its Complaint. Compl. ¶¶ 14-16, Fn. 5, 6, 7, 8, 9, 10, 11, 12, 13. And though it tries to distance itself from those

statements somewhat now, it admits that purpose again in its fee motion. *See* Mot. for Attorney Fees at 15-16.[4] But as discussed below, EPIC cannot obtain the former President's returns without obtaining his consent or showing a material interest. It cannot even state a claim under the FOIA for them. 910 F.3d at 1241. The Service won on that very issue three times: at the district and Court of Appeals in *EPIC I*, and in this case.

The fruitless search here did not serve the FOIA's purposes either. All the information about accepted OICs are made publicly available – though only for a one-year period. Courts have found that the public interest factor does not support a fee award when the released information is already in the public domain. *See, e.g. Tax Analysts v. DOJ*, 965 F.2d 1092, 1093 (D.C. Cir. 1992) (affirming district court's finding that more prompt reporting by Tax Analysts of additional publicly-available district court tax decisions was "less than overwhelming" contribution to public interest); *Wren*, 282 F. Supp. 3d at 225 (finding no public benefit when plaintiff's FOIA suit "produced only faster disclosure of publicly available information."); *Laughlin v. Comm'r*, 117 F. Supp. 2d 997, 1002 (S.D. Cal. 2000) (declining to award fees for disclosure of document that is "readily accessible commercially").

B. The Fourth Factor Weighs Against Entitlement Because The Service Did Not Withhold Records And Its Position That Any Responsive Records Were Exempt Under Exemption 3 In Conjunction With 26 U.S.C. § 6103 Was Reasonable

The fourth and final factor "evaluates why the agency initially withheld the records." *Morley*, 894 F.3d at 392. The question is not "whether the agency acted correctly, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the

[4] EPIC is careful to use phrases like "President Trump's tax status and interactions with the IRS." Mot. for Attorney's Fees at 15. That language is just euphemistic: all the sources to which it cites (to the they pertain to his "tax status" at all), relate to his tax *returns*. *Id.* at 15-16 (discussing *Trump v. Vance*, 140 S. Ct. 2412 (2020) (NY District Attorney subpoena for tax returns); Frank Figliuzzi, *New York Times' Trump Taxes bombshell reveals national security threat*, NBC (Sept. 29, 2020) (discussing NY Times' obtaining two decades' of tax returns)).

relevant material." *Id.* at 395 (cleaned up). While, as noted above, no factor is "solely dispositive, the failure to satisfy the fourth element [of an unreasonable withholding] may foreclose a claim for attorney fees or costs." *Maydak v. DOJ*, 579 F. Supp. 2d 105, 108 (D.D.C. 2008), *accord Morley v. CIA*, 245 F. Supp. 3d 74, 78 (D.D.C. 2017), *aff'd*, 894 F.3d 389 (D.C. Cir. 2018) ("The final factor breaks the tie – it weighs heavily against Morley and is ultimately dispositive").

EPIC's position here is that it does not matter whether any records were found at all, let alone withheld. Rather, the question (as EPIC frames it) is whether the overall "position" of the Service at the administrative level was correct, whether or not responsive records existed.

EPIC's brief ignores that a court in this district recently denied a fee motion altogether in a case in which the agency found no responsive records. In *Gov't Accountability Project v. U.S. Dept of Homeland Sec.* ("*GAP*"), as here, the agency defendant searched but found no responsive records. *GAP*, No. 17-cv-2518, 2020 WL 4931932, at *1 (D.D.C. June 2, 2020). Unlike here, the parties in *GAP* briefed summary judgment motions, the plaintiff prevailed, and the court ordered the agency to conduct additional searches. *Id.* In other words, the plaintiff in *GAP* achieved much more "relief," than EPIC has here. Yet the Court still awarded the plaintiff no fees precisely because the agency located no records, therefore tipping the fourth entitlement factor in favor of the Service. As the Court noted, "whether the withholding had a reasonable basis in law – explicitly presupposes a 'withholding.' The only withholding by the agency here was of non-responsive records." *Id.* at *2. EPIC's choice to simply ignore this case in its opening brief speaks volumes.

EPIC also overlooks yet another case on which it relies elsewhere in its brief, *Pub. Rec. Media, LLC v. U.S. Dep't of Justice*, No. CIV 12-12225 MJD/AJB, 2013 WL 3024091 (D. Min. Jan. 29, 2013), *aff'd* 2013 WL 1900522 (May 7, 2013), that is a bad case for EPIC on this factor. *Public Rec. Media* is neither recent nor from this district. It does not involve a request for materials

subject to a mandatory nondisclosure statute. But importantly, the parties "seem[ed] to agree" in that case that the fourth factor was "not relevant to the case at hand, because no documents related to the third-category request were actually in existence, and therefore no documents related to the third category were actually withheld." *Pub. Rec. Media*, 2013 WL 19000522, at *4. While the court ended up awarding fees in that case, the amount was much smaller than what EPIC seeks here.

Even crediting EPIC's position that it does not matter whether responsive records exist, the Service' position that all the requested records were exempt, and that those that were not exempt were available through other agency procedures, was still colorable for two reasons.

First, EPIC's claim that the Service's arguments here were "precluded by the D.C. Circuit's ruling" in *EPIC I*, is wrong.[5] Mot. for Attorney's Fees at 19. In *EPIC I*, the D.C. Circuit *affirmed* the dismissal of EPIC's complaint. 910 F.3d at 1245. It held third party tax returns were categorically exempt from disclosure. *Id.* at 1241-42. And it rejected EPIC's argument that Section 6103(k)(3) somehow provided an applicable exception to confidentiality. *Id.* at 1243. In other words, the Service prevailed completely in *EPIC I*, both in the district court and on appeal in a FOIA case asking for some of the same records EPIC has asked for here. The Court held the same thing here, though as to a different creative and untested subsection of Section 6103: Section 6103(k)(1). Mem. Op. (Dkt. No. 32) at 9-10. So at least as to the categories of records seeking

[5] *EPIC I* did not "preclude" the Service's argument. It clarified that, when a FOIA requester seeks categorically exempt material – like tax returns – it is a merits question, rather than a question of "failure to exhaust administrative remedies." *EPIC I*, 910 F.3d at 1239-40. So after *EPIC I* was decided, the Service here withdrew its argument that EPIC's request for exempt material constituted a "failure to exhaust" and instead asserted it as a Rule 12(b)(6) merits question. And, again, the Service *prevailed* in part on its motion.

returns, the Service was not only reasonable, *it prevailed* on an issue on which EPIC refused to yield.

Second, the Service's argument that disclosure under Section 6103(k)(1) was limited to in-person inspection of the Public Inspection File was at least colorable. There is no dispute the information EPIC requested constituted "returns" or "return information" within the confidentiality provision of 26 U.S.C. § 6103(a), and therefore Exemption 3. Exemption 3 is a mandatory exemption; if it applies, the agency has no discretion to release records. The parties have only disagreed as to whether Section 6103(k)(1) nonetheless operates as an exception to mandatory withholding that applies to a FOIA request (rather than in-person review of the Public Inspection file). But before this case, no court had considered the Public Inspection File regime, despite the fact that it had existed since 1952, and had been set forth in the Service's FOIA regulations since 1966. *See* Internal Revenue Service Reply in Support of First Motion to Dismiss ("First Mot. to Dismiss") (Dkt. No. 12) at 6-7. Nor had any court considered – under the FOIA or otherwise – Section 6103(k)(1), which was added to the Internal Revenue Code in 1976. *Id.* at 7.

Considering that this case has largely involved uncharted territory (except for tax returns, on which the Service prevailed) the Service's actions at the administrative level were reasonable. To sum up: the Service received a FOIA request that: (i) requested material subject to mandatory withholding under Exemption 3 with 26 U.S.C. § 6103 unless an exception applies; (ii) asserted a novel, untested subsection of Section 6103 that had not been litigated in the more than 40 years it had existed; (iii) requested items available through other means (i.e., accepted OICs) and; (iv) requested other items (i.e., returns) that were and are exempt as a matter of law. Though EPIC bends over backwards to fault the Service for declining to decide the prima facie applicability of Section 6103(k)(1) to a mandatory exemption statute at the administrative level, the Service had

at least a colorable, if not reasonable, basis to do so. After all, EPIC tried to use a creative argument under Section 6103(k)(1) as a tool for obtaining the former President's tax returns here while it was also trying to use Section 6103(k)(3) to do the same thing with a similar request in *EPIC I*. And since, even after losing *EPIC I*, EPIC refused to relent on demanding tax returns here, it was inevitable that this case would have been litigated.

III. IF THE COURT AWARDS ANY FEES, IT SHOULD REDUCE THE FEE AWARD TO REFLECT EPIC'S LIMITED SUCCESS IN THIS CASE

EPIC alleges it billed $67,786.60 for 161.3 hours, including 47.9 hours and $17,962.50 in fees on fees for preparing the present fee motion. Declaration of John Davisson in support of Motion for Attorney's Fees ("Davisson Dec.") (Dkt. No. 38-5) ¶ 16-17. EPIC deducts from its lodestar $8,106.88: $1,852.51 for the first motion to dismiss, $3,113.33 for its work on the second motion to dismiss, and another $3,141.04 for "market factors," for a total demand of $60,079.72. *Id.* ¶ 16; Bill of Fees and Costs in Support of Motion for Attorney's Fees ("Bill of Fees") (Dkt. No. 38-6).

Even with EPIC's proposed reductions, the amount of its fee demand is unreasonable. First, EPIC's timesheets include 10.7 hours and $4,864 of fees for work on unsuccessful motions and oppositions to the Service's requests for extensions. That time is not compensable. Second, EPIC's fee demand is unreasonable considering the results it obtained: an order dismissing part of its claims, and a search that yielded no responsive records.

A. EPIC Should Not Be Awarded Fees For Non-Dispositive Motion Practice On Which It Did Not Succeed

EPIC's downward adjustments do not account for the several times it moved for relief it did not obtain, or opposed relief that the IRS did obtain. A plaintiff is not entitled to fees for time spent on matters on which it did not prevail. *Elec. Priv. Info. Ctr. v. United States Dep't of Homeland Sec.*, 218 F. Supp. 3d 27, 51 (D.D.C. 2016) (denying fees for summary judgment motion

because "EPIC did not prevail on a single issue"); *Jud. Watch v. U.S. Dep't of Justice*, 878. F. Supp. 2d 225 (D.D.C. 2012); *Summers v. DOJ*, 477 F. Supp.2 d 56, 63-65 (D.D.C. 2007). EPIC's fee demand, even with its downward adjustments, does not accurately reflect this.

Setting the motions to dismiss aside for a moment, EPIC requests $4,824.10 of fees for the 10.6 hours its attorneys spent on these motions it filed that were denied and oppositions to the Service's motions that the Court granted:

- 2.7 hours on May 18, 2018 to review and oppose the IRS' motion to extend its time to answer the complaint. The Court granted the IRS's motion on May 21, 2018.
- 2.2 hours from July 10-July 12, 2018 discussing and drafting a motion for leave to file a sur-reply in response to the Service's first motion to dismiss. The Court denied this as moot.
- 3.4 hours on February 12-13, 2019 for a joint status report and "Motion for Scheduling Order," arguing that the Service had defaulted in response to the complaint could not file a renewed motion to dismiss. Dkt. No. 19-20. On February 14, 2019, the Court instead entered a minute order permitting the Service to file its renewed motion to dismiss.
- 1.2 hours on March 20, 2019 to oppose the IRS's motion for extension of time to file a reply in support of its renewed motion to dismiss. Dkt. No 24. The Court granted the Service's motion for extension of time on Marcy 21, 2019.
- 1.1 hours on April 27-28 and May 12, 2021 to draft a motion for hearing on the pending motion to dismiss and to review the Service's opposition. Dkt. No. 29. On December 3, 2021. The Court denied the motion as moot when it ruled on the motion to dismiss.

Bill of Fees at 2, 3, 5, 7-8, 10.

B. EPIC'S Fees Should Be Reduced Substantially To Reflect That The Complaint Only Partially Survived The Service's Motion To Dismiss

EPIC's 10% and 15% reductions for its oppositions to the Service's motions to dismiss are also unreasonably small given the outcome here.

As discussed above, two of the four categories of records in EPIC's FOIA request sought returns. But while the Service's first motion to dismiss was pending, the D.C. Circuit held in *EPIC I* that returns are categorically exempt under Exemption 3 and 26 U.S.C. § 6103(a) unless certain exceptions (not applicable here) apply. *EPIC I*, 910 F.3d at 1239-40. The D.C. Circuit also held that the Service need not even process requests for returns for that reason. *See id.* at 1241.

Even though EPIC lost on the return issue in *EPIC I*, it continued to demand the former President's returns here when the Service renewed its motion. EPIC Opp'n to Second Motion to Dismiss ("Opp'n to 2d Mot. to Dimiss") (Dkt. No. 22) at 36. To hear EPIC tell it now, its request for returns was incidental, if not unimportant, since it only dedicated "2 paragraphs" in its opposition to that point. Mot. for Attorney's Fees at 6. That is not what EPIC said before its fee motion. *See* above at 8-9. Even setting aside EPIC's double-talk, the reasonableness of fees is judged "in light of the results obtained," not on the amount of ink spilled on a specific unsuccessful argument. *Summers*, 477 F. Supp. 2d at 64. Particularly so when that unsuccessful argument was recently rejected by the Court of Appeals in a case involving the same statutes and parties. And on that score, EPIC lost as to two of its four categories of records it requested. That warrants a much higher reduction than ten or fifteen percent.

EPIC will likely respond that it did not really lose as to those two categories because the requests sought not only returns but "return information necessary to examine accepted offers in compromise, *including but not limited to* [returns]." Compl. Ex. 1 (Dkt. No. 1-5). But relying on that "including but not limited to" language is too clever for two reasons. First, the only records

EPIC identifies in those catch-all requests are returns – specifically "income, excess profits, declared value excess profits, capital stock, and estate or gift tax returns." *Id.* Second, EPIC did not obtain any *results* for this category of records, because this category contained no actual records. So whatever success it could have achieved if other records existed for those two categories is purely hypothetical, and EPIC should not be compensated for it in fees.

Should the Court award fees at all, it should not compensate EPIC for asking for records that do not exist and that it has been told by three courts it may not obtain anyway.

Conclusion

For all these reasons, the Court should deny EPIC's motion for attorney's fees and costs.

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Respectfully submitted,

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