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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") hereby provides this Reply 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"), ECF No. 38. EPIC previously established that it is eligible for attorney's fees because it substantially prevailed in this matter; that it is entitled to such fees because the balance of relevant factors decisively favors EPIC; and that its fee demand is reasonable. Mem. P. & A., ECF 38-1. In response, the IRS recycles the same baseless argument over and over (though couched in different terms): EPIC cannot recover fees because the IRS did not identify responsive records. Opp'n, ECF No. 40. **That is simply not the law.**

As the D.C. Circuit has made clear, "The purpose of the fee provision is 'to remove the incentive for administrative resistance to disclosure requests based . . . on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation.'" *Morley v. CIA*, 810 F.3d 841, 844 (D.C. Cir. 2016) (quoting *Davy v. CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008)). Put differently, the FOIA fee provision prevents agencies from "shifting to the plaintiff the risk that [any] disclosures will be unilluminating" when the plaintiff "can know nothing about" the contents or existence of responsive records. *Id.* (quoting Davy, 550 F.3d at 1162 n.3). The IRS's view of the FOIA fee provision—in which an agency can flout its obligation to conduct a reasonable search, force the requester to pursue years of litigation, lose resoundingly on the law, and nevertheless expect the requester to foot the bill when the agency finally admits that responsive records do not exist—would turn that provision on its head. The FOIA does not sanction such gamesmanship by agencies. This Court should not either.

Each of the IRS's arguments to the contrary fails. First, EPIC is eligible for fees it because it obtained processing of its FOIA request, whether by judicial order or under the catalyst theory. The searches EPIC obtained are assuredly "relief," a fact underscored by the IRS's staunch refusal to conduct those searches for nearly four years. And even if that were not so, EPIC also obtained relief through a judicial order clarifying the IRS's FOIA obligations. Second, the balance of entitlement factors tilts sharply toward EPIC. The IRS agrees that two of the four factors favor EPIC, and the Service's arguments on the other two factors are directly at odds with controlling Circuit precedent. Finally, EPIC's requested fee award is reasonable. The deductions that the IRS proposes are either groundless or already accounted for in EPIC's Bill of Fees and Costs, ECF No. 38-6. Further, the IRS does not dispute (and thus concedes) that EPIC is entitled to all the fees on fees it seeks. Accordingly, EPIC renews its request for an award of fees and costs in the amount of **$60,079.72**.

ARGUMENT

I. EPIC IS ELIGIBLE FOR FEES BECAUSE IT SECURED BOTH A RULING CLARIFYING THE IRS'S FOIA OBLIGATIONS AND A SEARCH FOR RESPONSIVE RECORDS.

A. EPIC substantially prevailed by obtaining a ruling clarifying the IRS's FOIA obligations.

EPIC substantially prevailed in this case simply by obtaining a ruling clarifying the IRS's obligations under the FOIA—a form of relief that is distinct from the searches EPIC also secured. "[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); *accord PETA v. NIH*, 130 F. Supp. 3d 156, 163 (D.D.C. 2015). In *CREW*, the district court initially ruled that CREW had failed to exhaust its

administrative remedies. *CREW*, 66 F. Supp. 3d at 139. But the D.C. Circuit reversed, explaining that the FEC had failed to make a "determination" within the statutory timeframe. *Id.* at 141–42. CREW therefore had no obligation to pursue administrative remedies, and its case could go forward on remand. *Id.* Though the order did not require the FEC to turn over any documents—and indeed, the agency never did—CREW was eligible for fees because the D.C. Circuit's order in its case "provided guidance as to what type of response from an agency constitutes a determination that must be communicated to a FOIA requester in the future." *Id.* at 143.

Much like CREW, EPIC substantially prevailed by obtaining a ruling clarifying the defendant agency's FOIA obligations. The IRS consistently maintained it that had no obligation to process EPIC's request because § 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 Court squarely rejected this argument, explaining 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. EPIC substantially prevailed because its litigation "benefited the nation by making the [Service] aware of the laws it must observe." *CREW*, 66 F. Supp. 3d at 142 (quoting *Halperin v. Dep't of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977)).

Cornered by the holdings of *CREW* and *PETA*, the IRS attempts to fashion a new rule that only *appellate* orders can make an agency "aware of the laws it must observe" (and thus confer "relief" sufficient for fee eligibility). *Id.* (quoting *Halperin*, 565 F.2d at 706 n.11). The IRS notes that "the D.C. Circuit's order – not the trial court's order – 'changed the legal relationship' between the parties" in *CREW* and *PETA*. Opp'n 3. True, but irrelevant. Neither *CREW* nor *PETA* suggests that favorable appellate rulings are *necessary* for fee eligibility, only

that they were *sufficient* in both cases. *See CREW*, 66 F. Supp. 3d at 142–42; *PETA*, 130 F. Supp. 3d at 163. Unlike *CREW* and *PETA*—in which the agencies won their dispositive motions in the district court—the IRS *lost* its motion to dismiss here and received an explanation of its FOIA obligations from this Court in the process. Neither *CREW* nor *PETA* nor the IRS offers a coherent basis to distinguish between an appellate order explaining an agency's FOIA obligations and a district order doing the same. Indeed, other FOIA plaintiffs have recovered fees based solely on favorable district court rulings. *E.g.*, *Campaign for Responsible Transplantation v. FDA.*, 511 F.3d 187, 189 (D.C. Cir. 2007). Because the IRS was not at liberty to ignore this Court's ruling on its FOIA obligations to EPIC, the Court's order necessarily "[forced] an agency to more fully comply with FOIA." *CREW*, 66 F. Supp. 3d at 142.

B. The Court's order denying the IRS's motion to dismiss changed the legal relationship between the parties.

EPIC also substantially prevailed by securing a ruling that changed the legal relationship between the parties, clearing the path to a key measure of relief EPIC sought from the IRS. An order changes the legal relationship between the parties when it "requires a party to comply with the law and to do something it was previously unwilling to do." *Campaign for Responsible Transplantation v. Food & Drug Admin.*, 511 F.3d 187, 196 (D.C. Cir. 2007). And an order is on the merits when it has the effect of granting or denying a plaintiff a measure of relief it sought.

EPIC filed suit—in part—to compel processing of EPIC's FOIA request, an obligation the IRS fervently denied it had. *See, e.g.*, Mem. Supp. IRS First Mot. Dismiss 1–2, ECF No. 9-1. The Court agreed that the IRS's legal position was untenable, 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. This changed the legal relationship between the parties: the IRS could no longer deny its

obligation to search for records responsive to EPIC's request after the Court's order. And it was an order on the merits of EPIC's claim because EPIC specifically requested such a search. Compl. at 12, ECF No. 1 (seeking "a reasonable search for all responsive records").

A judicial order changes the legal relationship between the parties when it compels an agency to do something it was unwilling to do at the outset of litigation. A comparison of *Davy v. CIA*, 456 F.3d 162 (D.C. Cir. 2006) (hereinafter "*Davy I*"), and *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (hereinafter "*OCAW*"), is instructive. The judicial orders in both cases appear nearly identical, but only one changed the legal relationship between the parties by forcing the agency to abandon its prior position. The stipulation by the parties in *Davy I* read: "CIA will provide Plaintiff all responsive documents, if any" by a date certain. *Davy I*, 456 F.3d at 164. The *OCAW* stipulation stated that the DOE "would search for the remaining items and release any that did not merit withholding under FOIA's exemptions" by a date certain and that the union was dismissing its case with prejudice except for the remaining items. *OCAW*, 288 F.3d at 457. In both cases, the court adopted the parties' stipulation into an order. *See Davy I*, 456 F.3d at 164; *OCAW* 288 F.3d at 457. But in *Davy I*, the order changed the legal relationship between the parties because the CIA had originally resisted the course of conduct to which it was now acceding. *Davy I*, 456 F.3d at 166. In *OCAW*, by contrast, the court had appointed the Department of Energy ("DOE") as the defendant midway through litigation after the previous defendant was deemed exempt from FOIA. *OCAW*, 288 F.3d at 453. Because DOE never contested its FOIA obligations and quickly began producing documents, *id.*, it was not being forced to do something it was previously unwilling to do. Thus, there were "no contested issues before [the Court]," and the order was "merely a formality." *OCAW*, 288 F.3d at 457.

The IRS in this case is closely analogous to the CIA in *Davy I*. Like the CIA, the IRS disputed its obligations under the FOIA. Mem. Supp. Second IRS Mot. Dismiss 1, ECF No. 21-1. But after this Court's order and opinion rejecting the argument that the IRS had no duty to process EPIC's request, the Service was forced to complete the search EPIC sought. This constitutes a changed legal relationship between the parties.

The IRS ignores the holding of *CREW v. FEC* to claim that a judicial order denying a motion to dismiss can never render a FOIA plaintiff eligible for fees. Opp'n 2–3. Not so. If a court's ruling denying a motion to dismiss is silent on the substance of the parties' claims and simply directs the case to proceed to discovery, then that order may indeed be inadequate for fee eligibility. For example, in *Hanrahan v. Hampton*, a civil rights case cited in *OCAW*, the plaintiffs were not eligible for fees after simply securing the reversal of a directed verdict against them. 446 U.S. 754, 758–59 (1980). The court explained that plaintiffs had only secured a procedural win guaranteeing their case would proceed, not a win on the merits of their claims. *Id.* But if—as here—a court's ruling denying a motion to dismiss forces an agency to comply with FOIA more fully, then *CREW* applies, and the plaintiffs have substantially prevailed. *CREW v. FEC*, 66 F. Supp. 3d at 142. The Court's ruling in this case explained why the IRS's legal arguments failed and clarified the IRS's FOIA obligations. Mem Op. 9. After the ruling, the IRS could no longer sidestep its duty to process EPIC's FOIA request seeking tax return information necessary to inspect accepted offers-in-compromise.

The procedural posture and unusual facts of *OCAW* make it inapposite here. After the defendant in *OCAW* was privatized, government counsel submitted a "suggestion" to the Court that the suit be dismissed because the now-private company was not subject to FOIA. *See* Br. Appellant 8, *OCAW v. DOE*, 288 F.3d 452 (D.C. Cir. 2008). The Court construed the suggestion

as a motion to dismiss for lack of jurisdiction. *See OCAW*, 288 F.3d at 453. It denied the motion, decided *sua sponte* to substitute the DOE as the defendant, and directed the plaintiffs to serve notice on the DOE. *Id.* Unlike the instant case, the court's ruling did not effect a change in the legal relationship between the parties with respect to the plaintiff's claims. The DOE was not even a party until that moment, so the DOE had never denied its obligation to search for and produce documents. And substituting the DOE was not the relief sought by OCAW. While OCAW's holding may be controlling in cases where a plaintiff merely "surviv[es] a motion to dismiss," *OCAW*, 288 F.3d at 458; *see also Hanrahan*, 446 U.S. at 758–59, it does not address a case like this in one in which a court's ruling on a motion dismiss establishes the legal obligations of the defendant agency. Here, the judicial order and opinion were sufficient to change the legal relationship between EPIC and the IRS and to render EPIC a substantially prevailing party.

C. Alternatively, EPIC substantially prevailed because litigation catalyzed the IRS's change of position on its willingness to process EPIC's request.

Alternatively, EPIC substantially prevailed through the "catalyst theory" because its litigation caused the IRS to change its position and complete the search it long refused to conduct. *See* 5 U.S.C. § 552(a)(4)(E)(ii)(II). The Service does not seriously dispute that EPIC's litigation catalyzed the IRS's completion of a search for responsive records.[1] The IRS simply argues that the processing of EPIC's request and completion of a search are not "relief" under the

[1] However, the IRS takes to the footnotes to note that it "conducted its initial searches"—the results of which the IRS would withhold for three years—in 2018. But unless the IRS means to say that an agency can fulfill its FOIA obligations to a requester by conducting undisclosed searches in secrecy (an argument absurd on its face), the date that the IRS *initiated* its searches is irrelevant. The IRS did not *complete* processing until it informed EPIC of its search results in late 2021 and early 2022. Moreover, even if the IRS's suggestion had merit, the searches the IRS conducted in late 2018 were assuredly catalyzed by this lawsuit. Finally, far from a "courtesy," the IRS's supplemental queries in 2022 were made necessary by the Service's failure to conduct an adequate search in the first place.

FOIA. This is a curious argument coming from an agency that spent years litigating against EPIC to avoid completing a search for responsive records—something the IRS clearly viewed as a significant measure of relief. Regardless, because EPIC sought and obtained a search for responsive records over the initial opposition of the IRS, *see* Compl. 12, it secured all the relief needed to become eligible for fees. *See Edmonds v. FBI,* 417 F.3d 1319, 1322 (D.C. Cir. 2005) (holding that a plaintiff who secured expedited processing through FOIA litigation had thereby obtained "relief" sufficient for fee eligibility); *see also Wadelton v. Dep't of State*, No. 13-cv-12 (TSC), 2018 WL 4705793 *4 (D.D.C. 2018). As the court explained in *Mobley v. Department of Homeland Security*:

> A FOIA requester must sometimes obtain interim relief that is antecedent or incident to any dispute about the production or non-production of records themselves. If an agency were to provide this sort of interim relief to a plaintiff by way of a voluntary and unilateral change in the agency's position, then it could be reasonable to conclude that, under the catalyst theory, that plaintiff has 'substantially prevailed.'

908 F. Supp. 2d 42, 47–48 (D.D.C. 2012).

In many of the cases the IRS cites, the plaintiffs' entitlement to searches for responsive records was never in dispute; the cases instead turned on the production of documents. Opp'n 6 (citing *Church of Scientology of California v. Harris*, 653 F.2d 584, 585 (D.C. Cir. 1981) (parties disputed the adequacy of the search, not the defendant's obligation to process it); *Am. Oversight v. U.S. Dep't of Justice*, 375 F. Supp. 3d 50, 59 (D.D.C. 2019) (DOJ failed to respond to FOIA request in a timely manner but never denied its obligation to process)). Here, by contrast, the IRS took the extreme position that it was not obligated to provide *any* processing of EPIC's request, Mem. Supp. Second IRS Mot. Dismiss 1, ECF No. 21-1—a measure of relief that the IRS only supplied after years of litigation. The IRS's suggestion that document production is a prerequisite to fee eligibility cannot account for cases such as *CREW* in which plaintiffs recovered fees

without receiving documents. 66 F. Supp. 3d at 143. The IRS put its obligation to conduct a search at issue, and EPIC specifically included that relief in its complaint. The IRS cannot now claim that the Service's completion of a search—whether through Court's ruling or its unilateral change in position—is not relief on the merits.

The IRS cites *Mobley v. Department of Homeland Security*, for the claim that not receiving documents hurts a FOIA plaintiff's claim for fee eligibility, but the IRS fails to note that the *Mobley* court specifically anticipated a case like this one marked by "dilatory litigation tactics" 908 F. Supp. 2d at 47–48. In *Mobley*, the plaintiffs sought fees on the theory that their litigation catalyzed the Department of Homeland Security to reverse course on its initial refusal to process the plaintiffs' request. *Mobley*, 908 F. Supp. 2d at 47. As the court explained: "The language of the [FOIA] itself . . . suggests that a broader conception of substantially prevailing is possible when a plaintiff relies on the catalyst theory. . . . For example, many FOIA plaintiffs seek relief only in the form of an order directing an agency to conduct an adequate search for responsive records." *Mobley*, 908 F. Supp. 2d at 47. And although the *Mobley* plaintiffs were ineligible for fees, that conclusion was based in part on the agency's unilateral reversal occurring "only three weeks after the complaint was filed"—a far cry from the "sort of dilatory litigation tactics" engaged in by the IRS when it changed position three years after the initiation of this suit. *Id.* at 47–48.

Thus, if the IRS's delayed completion of a search for responsive records was not already compelled by a judicial order, it was assuredly catalyzed by EPIC's litigation.

II. EPIC IS ENTITLED TO FEES BECAUSE THE RECORDS IT SOUGHT ARE OF SIGNIFICANT INTEREST TO THE PUBLIC AND THE IRS'S CONDUCT WAS PLAINLY UNREASONABLE.

EPIC is entitled to fees because the balance of relevant factors decisively favors EPIC. *See Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013). The IRS does not dispute that EPIC

stood to gain no commercial benefit from its request (factor 2) or that EPIC's interest in the requested records was public-oriented (factor 3). Opp'n 7. The IRS's arguments focus instead on the first and fourth factors of the *Morley* test—yet fail on both accounts.

A. The public benefit associated with EPIC's request is substantial.

The first entitlement factor favors EPIC because the public benefit associated with information surrounding accepted offers-in-compromise is substantial. The IRS's arguments to the contrary rest on three faulty grounds: the final outcome of the *Morley* FOIA saga, EPIC's calls for the disclosure of President Trump's tax returns, and the fact that information about accepted offers-in-compromise is made publicly available in regional IRS office for one year at a time.

First, the IRS's fixation on *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018) appears based on a fundamental misunderstanding of how legal precedent operates. That the plaintiff in *Morley* ultimately failed to recover fees in his twenty-year litigation does not disturb the formulation of the fee entitlement test laid down by the D.C. Circuit in *Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013); the holding of the D.C. Circuit concerning the need to evaluate the public benefit of a FOIA case *ex ante* in *Morley v. CIA*, 810 F.3d 841, 844 (D.C. Cir. 2016); or the fact that the that the public benefit factor favored the plaintiff in *Morley v. CIA*, 894 F.3d 389, 392 (D.C. Cir. 2018) "because there was at least a small public benefit from the information sought by Morley." EPIC does not rely on the *Morley* line of cases because it claims to stand in precisely the same shoes as Jefferson Morley, whose fee motion failed on grounds unrelated to the public benefit factor. Rather, EPIC relies on the relevant points of law from those precedents, which confirm EPIC's formulation of the fee entitlement test and corroborate its argument that the first factor favors EPIC.

Next, the IRS muddies the water by suggesting that EPIC's past statements about the public interest in the disclosure of President Trump's tax returns somehow undercut the well-established public interest in disclosure of accepted offers-in-compromise linked to the President. Mem. P. & A. 14–17. Lest there be any confusion: yes, EPIC was unsuccessful in obtaining President's tax returns in both this case and in *EPIC v. IRS I*, 910 F.3d 1232 (D.C. Cir. 2018). EPIC does not seek to run from those holdings. But they are largely irrelevant to evaluating the public interest in the core records EPIC sought in this case: any accepted offers-in-compromise to which President Trump or one of his associated business entities were party. As EPIC has detailed, Congress and the press both agree that such records are of significant public interest, Mem. P. & A. 14–17—a point to which the IRS has no answer. Indeed, the IRS itself acknowledged the substantial public interest in the records EPIC sought when it granted expedited processing of EPIC's FOIA Request. Ex. 2, ECF No. 1–5.

Finally, the IRS makes the remarkable claim that there was little public interest in disclosure of the requested offers-in-compromise because they would have all been made available to the public at regional field offices for one year. Opp'n 9. Setting aside that the public's interest in records can vary dramatically over time based on new developments—for example, a taxpayer being elected President—the bulk of the records EPIC sought would not have been in the public domain at the time EPIC sought them. That readily distinguishes EPIC's request from the cases cited by the IRS. *See Tax Analysts v. DOJ*, 965 F.2d 1092 (D.C. Cir. 1992) (plaintiffs wanted to obtain information from the Justice Department, but it was already available from district courts); *Wren v. Dep't of Justice*, 282 F. Supp. 3d 216 (D.D.C. 2017) (information sought was publicly available in court transcripts); *Laughlin v. Comm'r*, 117 F. Supp. 2d 997, 1002 (S.D. Cal. 2000) (information sought was available for purchase). It is

particularly absurd for the IRS—which spent years arguing that public disclosure of the records requested by EPIC would *violate* 26 U.S.C. § 6013(a)—to now suggest that those records have been readily available to the public all along. Accordingly, the IRS has done nothing to change the favorable analysis for EPIC under factor 1.

B. The IRS has done nothing to establish the reasonableness of its conduct.

The fourth factor also favors EPIC because the IRS engaged in a lengthy pattern of unreasonable conduct in failing to process EPIC's FOIA Request despite an unambiguous statutory command that it do so. The IRS's attempts to undermine this conclusion fail.

First, it is important to correct a misstatement by the IRS: the D.C. Circuit never called the fourth factor "dispositive" in *Morley*, the district court did. Opp'n. 8. The D.C. Circuit only decided that the district court *had not abused its discretion* in deciding that the fourth factor outweighed the first three in that case. *Morley*, 894 F.3d at 396. The D.C. Circuit took pains to foreclose the IRS's misreading of its holding, going so far as to clarify that "[i]f the District Court had awarded attorney's fees in this case, we would have affirmed," *id.* at 397; stressing the "deferential standard" of its review, *id.* at 391; and repeatedly using the phrases "double dose of deference" and "[d]eference piled on deference" to explain the narrowness of its holding. *Id.* at 393, 395. Contra the IRS, it is not the law of this Circuit that the fourth entitlement factor is dispositive.

Second, the IRS unsuccessfully likens its years-long refusal to conduct a search to a case in which the defendant agency willingly conducted several searches before it even faced a lawsuit. In *GAP*, the agency conducted an initial search that revealed no responsive documents. *Gov't Accountability Project v. U.S. Dep't of Homeland Sec.*, No. 17-CV-2518 (CRC), 2020 WL 4931932, at *1 (D.D.C. June 2, 2020). The plaintiff sued, and the agency conducted a second search with the same result. *Id.* The court determined that the agency adopted too narrow an

interpretation of the plaintiff's request and ordered the agency to conduct another search with broader terms. *Id.* This third, broader search similarly returned no responsive records. *Id.* The court reasoned that the agency's withholding had a reasonable basis in law because none of the three of the searches revealed responsive records. These facts readily distinguish *GAP* from the instant case, in which the . And to the extent that *GAP* can be read to impose a categorical requirement that records be disclosed in order for a plaintiff to recover fees, such a holding is in conflict with *Morley v. CIA*, 719 F.3d at 690 (which clarifies that the fourth factor concerns "the reasonableness of the agency's *conduct*," not merely its withholding of records), and *Morley v. CIA*, 894 F.3d at 391–97 (which specifically avoids holding that the fourth factor of the entitlement test is dispositive).

Third, the IRS similarly fails to distinguish *Public Record Media, LLC v. U.S. Department of Justice* from the present case. In *PRM*, the court found that the plaintiff was entitled to fees because the first three factors were met. *Pub. Rec. Media, LLC v. U.S. Dep't of Just.*, No. CIV. 12-1225 MJD/AJB, 2013 WL 3024091, at *3–4 (D. Minn. Jan. 29, 2013), *aff'd*, No. CIV. 12-1225 MJD/AJB, 2013 WL 1900622 (D. Minn. May 7, 2013). As noted by the IRS, the fourth factor in *PRM* 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." *Id.* at *4 (emphasis added). The court did not conclude that the fourth factor was not met. Instead, the court did not need to discuss the fourth factor because it was simply not relevant. Despite the fact that none of the requested documents related to the disputed category existed, the court awarded fees to the plaintiff. The court concluded, "because Plaintiff was seeking information to benefit the public without any commercial benefits to itself, and because the public can derive a benefit from the

information discerned after the initiation of Plaintiff's lawsuit, the Court finds that Plaintiff is entitled to fees pursuant to FOIA." *Id.* at *4. *PRM*'s holding does nothing to bolster the IRS's case.

Fourth, the IRS's arguments concerning the meaning of *EPIC v. IRS I* are impossible to square with the IRS's decision to withdraw its first Motion to Dismiss after the D.C. Circuit's ruling in *EPIC I*. As EPIC set forth in its Notice of Supplemental Authority, the D.C. Circuit's ruling did indeed foreclose the IRS's argument that EPIC was obligated to demonstrate its entitlement to the requested records as a condition of its FOIA Request. *See* Notice of Supplemental Authority, ECF No. 16. As a direct result of the D.C. Circuit's ruling and EPIC's Notice, the IRS withdrew its Motion to Dismiss premised on that discredited legal theory (before eventually filing a Second Motion to Dismiss). Withdrawal of Motion, ECF No. 18

Finally, the IRS's subjective view of whether it had a colorable basis in law to refuse to conduct a search for records responsive to EPIC's request is irrelevant in the face of this Court's resounding rejection of nearly every argument raised by the IRS in its Second Motion to Dismiss. *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.").

III. EPIC'S REQUESTED FEE AWARD IS REASONABLE AND REFLECTS THE SUCCESS OF EPIC'S CASE.

The IRS's objections to the reasonableness of EPIC's requested fee award fail in their entirety. First, the IRS's proposed deductions for issues and motions on which EPIC did not prevail are consistent with—if not smaller than—the deductions EPIC already applied in its Bill of Fees and Costs, ECF No. 38-6. Second, the IRS's attempt to apply across-the-board discounts to EPIC's billable hours are baseless and duplicative of the Service's proposed line-item reductions. Moreover, the IRS's theory that EPIC's fee award should be linked to the categories of its FOIA Request rather than the issues in dispute in this case has no basis in law.

A. EPIC has already reduced its lodestar to account for motions and issues on which it did not succeed.

EPIC's requested fee award in this case is reasonable because EPIC has already reduced its lodestar to reflect work performed on unsuccessful filings and as an exercise of general billing judgment. In its Opposition, the IRS highlights $4,864 of fees for 10.7 hours of attorney work expended on allegedly unsuccessful motions. Opp'n 14. As an initial matter, the IRS mischaracterizes the outcome of two of the filings it highlights. First, the IRS's May 18, 2018 motion to extend its time to answer the Complaint was granted only in part; the extension granted by the Court was a compromise between the IRS's and EPIC's proposals. Minute Order (May 21, 2018). Second, EPIC's July 12, 2018 motion to file a sur-reply was denied as moot only after the IRS chose to withdraw its motion to dismiss—a development for which EPIC clearly is not at fault. *See* Notice of Supplemental Authority, ECF No. 16; Notice of Withdrawal of Motion, ECF No. 18; Minute Order (Feb. 11, 2019).

Even setting aside these flaws in the IRS's calculations, the total reduction that the IRS proposes for unsuccessful motions practice is $4,824.10. Opp'n. 14. Remarkably, that total is *lower* than the $4,965.84 write-down EPIC already applied in its Bill of Fees of Costs to account for its lack of success or partial success on motions. *See* Bill of Fees of Costs 1; Davisson Decl. ¶ 14. And although the IRS's proposed line-item reduction does not account for the two unsuccessful paragraphs of EPIC's Opposition to the IRS's Second Motion to Dismiss arguing for the disclosure of tax returns, ECF No. 22, EPIC's lack of success on those paragraphs is more than covered by the 5% ($3,141.04) across-the-board write-down EPIC already has applied to its lodestar. *See* Bill of Fees of Costs 1; Davisson Decl. ¶ 15. Accordingly, the IRS has failed to identify any line-item reductions not already priced into EPIC's fee demand, and no further discount is warranted.

B. The IRS's call for additional across-the-board write-downs to EPIC's fee award is groundless.

The IRS makes several perplexing arguments in support of a further write-down of EPIC's proposed fee award. None are availing.

First, as it does elsewhere in its Opposition, the IRS attempts to focus this fee dispute on EPIC's call for the disclosure of tax returns, arguing that EPIC's lack of success on this lone merits issue warrants a drastic write-down of EPIC's fee award. Opp'n 15. But the IRS's subjective view about what this case was *really* about is irrelevant to the calculation of reasonable attorney's fees. As the motions, oppositions, and other filings in this case reflect, precious few attorney hours were spent on legal issues surrounding the disclosure of tax returns—and those hours have already been accounted for through significant write-downs to EPIC's lodestar. *See* Bill of Fees of Costs 1; Davisson Decl. ¶¶ 15. EPIC expended far more time, research, and briefing on the core question of whether the IRS was obligated to process

EPIC's request for the disclosure of tax return information necessary to inspect accepted offers-in-compromise, an issue on which EPIC prevailed. The Court should reject the IRS's attempt to squeeze this case into the sole merits issue the Service succeeded on.

Second, the IRS charges that EPIC's fee reductions of 10% and 15% are "unreasonably small" but fails to provide any credible calculations to support this claim or to suggest what a reasonable deduction in this case might be. This bare assertion—unsupported by math, law, or specific evidence—is entitled to little weight when measured against EPIC's rigorously documented and evidence-backed request for a fee award. Indeed, the only authority the IRS cites in the relevant section of its Opposition is *Summers v. U.S. Department of Justice*, 477 F. Supp. 2d 56 (D.D.C. 2007), a case that does not discuss fee reasonableness because the court determined that the plaintiff was not eligible or entitled to attorney's fees.

Finally, the IRS's suggestion that the Court apply a reduction to EPIC's proposed fee award based on the categories of records sought in EPIC's FOIA Request is utterly groundless. EPIC knows of no case—and the IRS cites none—in which a court has reduced a plaintiff's fee award according to which *categories of a request* yielded successful results rather than which *issues in dispute* the plaintiff prevailed on. *See, e.g.*, *EPIC v. DHS*, 197 F. Supp. 3d 290, 296 (D.D.C. 2016) ("In cases involving multiple discrete *claims or issues* that can be considered separately, this rule requires that *hours spent on any unsuccessful claims* be excluded from compensation." (emphasis added)). Nor would such a method be workable in most cases: the bulk of attorney's fees in FOIA cases arise from legal issues that do not pertain to an identifiable category of records, such as exemptions that an agency asserts across numerous documents or the adequacy of the agency's search. Evaluating fee reasonableness based on the formatting of

the plaintiff's FOIA Request rather the actual subject matter of attorney time expended on a case simply makes no sense. The Court should reject the IRS's invitation to do so.

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 affidavits and billing records. EPIC therefore renews its request that the Court assess an award of $60,079.72 in fees and costs against the IRS.

Respectfully Submitted,

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