

**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 OPPOSITION TO DEFENDANT’S SECOND MOTION TO DISMISS

Plaintiff Electronic Privacy Information Center (“EPIC”) respectfully opposes the second motion by Defendant Internal Revenue Service (“IRS”) to dismiss EPIC’s Complaint. ECF No. 21. The IRS’s failure to process EPIC’s FOIA Request is contrary to law and the agency’s own established practice of disclosing records under 26 U.S.C. § 6103(k)(1) pursuant to written requests.

EPIC’s FOIA Request for “accepted offers-in-compromise,” unlike the vast majority of FOIA requests for taxpayer records, falls within a provision of the Internal Revenue Code that requires public disclosure. § 6103(k)(1). Yet for over a year, the IRS has failed to process EPIC’s request. First the agency filed a Motion to Dismiss that it subsequently withdrew following the D.C. Circuit’s decision in *EPIC v. IRS* (*EPIC v. IRS I*), 910 F.3d 1232 (D.C. Cir. 2018). Now the IRS has filed a second Motion to Dismiss based on the argument—contrary to the plain text of § 6103(k)(1)—that the agency may refuse to release all of the records that EPIC seeks under the FOIA. This interpretation of (k)(1) is without basis in statute, case law, legislative history, Treasury regulations, or the IRS’s own policies and practices. In fact, materials currently on the

IRS website make clear that the agency routinely discloses the types of records sought in EPIC’s request under § 6103(k)(1).

Because EPIC has plausibly alleged multiple violations of the FOIA, the Court should deny the IRS’s Motion to Dismiss. Instead, the Court should order the agency to immediately conduct a reasonable search and to promptly release all nonexempt responsive records.

BACKGROUND

I. EPIC’s FOIA Request for records subject to 26 U.S.C. § 6103(k)(1)

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 (quoting 26 U.S.C. § 6103(k)(1); Exec. Order No. 10,386, 17 Fed. Reg. at 7,685). “An offer in compromise (OIC) is an agreement between a taxpayer and the Internal Revenue Service that settles a taxpayer's tax liabilities for less than the full amount owed.” Internal Revenue Serv., *Topic Number 204—Offers in Compromise* (Jan. 28, 2019).¹

EPIC also attached to its FOIA Request a fifteen-page list, labeled Appendix A, of business entities with which President Trump is associated. Compl. Ex. 1 at 9–23. With respect to the business entities identified in Appendix A, 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.

¹ <https://www.irs.gov/taxtopics/tc204>.

- (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.

Id. at 2 (quoting § 6103(k)(1); Exec. Order No. 10,386). EPIC explained that the requested records described may “take the form of a Public Inspection File, an AOIC Masterfile Screen transcript, a TDS transcript, a Form 656, a Form 433, a Form 7249, or any other agency document.” *Id.* at 1 (internal citations omitted).

The Internal Revenue Manual expressly acknowledges that—at a minimum—Form 7249 (“Offer Acceptance Report”) may be obtained via FOIA request. IRM 11.3.11.8 ¶¶ 4, 5.

According to a sample version of Form 7249 published on the IRS’s website, the form contains the following types of information:

Offer Acceptance Report				
Taxpayer(s) name John Q. Public		Public inspection file location Western		Acceptance date 01/23/2018
City Any Town		State CO	ZIP code 11111	Offer number 100100100
Liability Description				
Type of Tax	Taxable Period(s)	Date Assessed	Balance as of <u>1/23/2018</u> <i>(see attached transcript(s))</i>	
1040	12/31/2010	11/25/2013	141.91	
1040	12/31/2011	11/25/2013	3,312.1	
1040	12/31/2012	11/25/2013	1,558.36	

Internal Revenue Serv., *Form 7249: Offer Acceptance Report (Sample) 1* (Mar. 2017) (“Form 7249”).² The form then identifies the “[b]alance as of received date,” the IRS’s “[r]eason for acceptance of the offer,” and the “[t]erms of th[e] offer”:

² https://www.irs.gov/pub/irs-utl/f7249--2017-03-00_Sample_508.pdf [https://web.archive.org/web/20190318014758/https://www.irs.gov/pub/irs-utl/f7249--2017-03-00_Sample_508.pdf].

Balance as of received date
\$230.15

Reason for acceptance of the offer

Doubt as to collectibility

Taxpayer's assets and income are less than the tax liability and this offer is consistent with the taxpayer's ability to pay. The Service believes collection of the remaining liability is in doubt.

Doubt as to collectibility with special circumstances

Taxpayer's assets and income are less than the tax liability. Special circumstances warrant acceptance of the offer for less than the calculated reasonable collection potential.

Doubt as to liability

There is a genuine dispute as to the existence or amount of the correct tax liability under the law and the liability has not been established by a final court decision or judgment concerning the existence or amount of the liability of the taxes listed on this form.

Promotion of effective tax administration

Economic hardship or compelling public policy or equity considerations justify compromising the liability because, due to exceptional circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner. The taxpayer has demonstrated circumstances that justify compromise even though a similarly situated taxpayer may have paid his liability in full.

Terms of this offer

Lump Sum offer of \$3,344.00 with \$854.80 paid prior to acceptance. The remaining balance of \$2,485.20 to be paid 5 months after acceptance. After making all the payments, you must still comply with all the other contract provisions contained in Section 7, Terms, Conditions, and Legal Agreement.

Id. The form also lists the IRS employee(s) who approved the agency's acceptance of the offer and the date(s) of such approval(s). *Id.* at 2.

Finally, 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.

II. The IRS's commitment—and subsequent refusal—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—twenty working days after EPIC filed its FOIA Request—EPIC Counsel 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. Later that day, Young responded to Davisson by email. Compl. Ex. 4, ECF No. 1–5. Young stated that "The IRS is requesting an extension of the due date (through March 30, 2018) to

provide a response to your request.” *Id.* at 1. EPIC did not consent to such an extension. 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. Again, EPIC did not consent to such an extension. Compl. ¶ 35, ECF No. 1.

On April 2, 2018—39 working days after EPIC filed its FOIA Request—Davisson sent an 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. Once again, EPIC did not consent to such an extension. Compl. ¶ 38.

III. 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.

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. The IRS argued that EPIC had failed to exhaust its administrative remedies before filing suit. IRS Mem. in Supp. of First Mot. Dismiss at 1–2, ECF No. 9-1.

On June 29, 2018, EPIC filed an Opposition to the IRS’s Motion to Dismiss, ECF No. 10, explaining that “[t]he IRS’s arguments in support of dismissal border on the frivolous, and the Court should reject them in their entirety.” *Id.* at 6. The IRS filed a Reply in support of the

agency’s Motion, ECF No. 12, and EPIC subsequently moved for leave to file a Surreply concerning the IRS’s collateral estoppel arguments. Mot. Leave File Surreply, ECF No. 13.

IV. The IRS’s recent publication of a form designed for written § 6103(k)(1) requests

In September 2018—seven months after EPIC filed its FOIA Request, and three months after the IRS denied that § 6103(k)(1) entitled EPIC to the disclosure of any records—the IRS published a form that expressly permits records covered by (k)(1) to be disclosed pursuant to a written request. *See Internal Revenue Serv., Form 15086: Offer in Compromise Public Inspection File Request* (Sep. 2018) (“Form 15086”).³ At no point has the IRS acknowledged the existence of this form, either in its responses to EPIC’s FOIA Request or in the course of briefing the agency’s two motions to dismiss.

Form 15086 first asks a requester to “[i]dentify the Accepted Offer in Compromise (*e.g.* offer number, name, state) as specifically as possible”:

Form 15086 (September 2018)	Department of the Treasury - Internal Revenue Service Offer in Compromise Public Inspection File Request
Identify the Accepted Offer in Compromise (<i>e.g.</i> offer number, name, state) as specifically as possible below.	
<div style="background-color: #e0e0e0; height: 40px;"></div>	

Id. The form then asks whether the requester wishes to have the records in question sent by mail or by fax:

I request the form(s) be sent to me: (<i>check one</i>)	
<input type="checkbox"/> Mail to address below	<input type="checkbox"/> Fax to: <div style="background-color: #e0e0e0; width: 150px; height: 15px;"></div>
Provide your name, address and phone number below:	
Name <div style="background-color: #e0e0e0; width: 150px; height: 15px;"></div>	

³ <https://www.irs.gov/pub/irs-pdf/f15086.pdf>
[<https://web.archive.org/web/20190318014543/https://www.irs.gov/pub/irs-pdf/f15086.pdf>].

Id. Finally, the form asks the requester’s reason for seeking the records and lists a dedicated IRS address for “PIF Request[s]”:

Requestor information:

- Personal - I am requesting this information for personal reasons
 - Representative - I am requesting this information on behalf of a client
-

Directions:

Fax or mail your completed request form to the fax number or address below:

Fax number: 855-286-3809 (*preferred method*)

Mail: IRS PIF Request
Offer in Compromise, Mail Stop 880
5333 Getwell Road
Memphis, TN 38118

Form 15086 does not ask the requester to provide proof of taxpayer consent or to demonstrate a material interest in the records requested. *See id.*

V. The IRS’s withdrawal of its first Motion to Dismiss in light of *EPIC v. IRS I*

On December 18, 2018, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *EPIC v. IRS I*, 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. EPIC also noted that the D.C. Circuit clarified the meaning of 26 U.S.C. § 6103(k)(1), placing (k)(1) in a class of disclosure provisions—like 26 U.S.C. § 6104—that open particular tax return information to “inspection,” and thus require disclosure to the general public pursuant to a FOIA request. *Id.* at 3.

On February 11, 2019—rather than filing a submission “setting forth Defendant’s position on the impact of the D.C. Circuit’s decision,” Minute Order (Dec. 21, 2018)—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. The IRS said nothing concerning the legal impact of the D.C. Circuit’s decision on the instant case. *See id.* 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 in *Electronic Privacy Information Center v. Internal Revenue Service*, 910 F.3d 1232 (D.C. Cir. 2018).” *Id.* The IRS did not explain why it was unable to “set[] forth Defendant's position on the impact of the D.C. Circuit's decision” in a submission filed by February 11, as the Court ordered the agency to do. Minute Order (Dec. 21, 2018). Nor did the IRS explain why it would be necessary to start an entirely new briefing process, at a time of the agency’s choosing, more than seven months after the parties fully briefed the IRS’s withdrawn Motion to Dismiss.

On February 13, 2019, EPIC moved the Court to adopt a schedule for further proceedings and to order the IRS to produce and disclose all nonexempt records responsive to EPIC’s FOIA Request. Status R. & Mot. to Adopt Schedule for Further Proceedings, ECF No. 19. EPIC wrote that “[a]s a result of the IRS’s voluntary withdrawal of its own Motion to Dismiss, the agency [had] failed to ‘serve an answer or otherwise plead to [EPIC’s] complaint’ within the time allowed by law and this Court’s orders.” *Id.* ¶ 11 (quoting 5 U.S.C. § 552(a)(4)(C)). EPIC noted that “[t]he deadline to respond to EPIC’s complaint was June 15, 2018. Now, **243 days** after that deadline, the Court is in receipt of neither an answer, nor a motion to dismiss, nor any other responsive pleading from the IRS.” *Id.* (emphasis in original). EPIC explained that the IRS had “therefore admitted to all of the factual allegations set forth in EPIC’s Complaint” and urged the Court to follow the Court’s “ordinary protocol in FOIA cases, which is to establish a schedule for disclosure and/or briefing once the pleading process has concluded.” *Id.* ¶¶ 14, 20. EPIC’s Motion to Adopt a Schedule for Further Proceedings is currently pending before this Court.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only “contain sufficient factual matter, [if] accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.” *Greenpeace, Inc. v. DHS*, No. CV 17-479 (TJK), 2018 WL 2048876, at *6 (D.D.C. May 1, 2018) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012)). The Federal Rules of Civil Procedure “do not require ‘detailed factual allegations’ for a claim to survive a motion to dismiss,” *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

Though plausibility requires “more than a sheer possibility that a defendant has acted unlawfully,” it is not a “probability requirement.” *Banneker Ventures*, 798 F.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678). “A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would ‘allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Iqbal*, 556 U.S. at 678). “[A] well-pleaded complaint should be allowed to proceed ‘even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.’” *Id.* (quoting *Twombly*, 550 U.S. at 556).

In order to state a claim under the FOIA, a requester need only “establish (or, at this stage, plausibly allege) that the agency has (1) improperly (2) withheld (3) agency records.” *EPIC v. IRS I*, 910 F.3d at 1240. “FOIA reverses the normal burden of proof, requiring the agency, not the plaintiff, to prove that it conducted an adequate search and to justify any

exemptions it claims.” *Greenpeace, Inc.*, No. CV 17-479 (TJK), 2018 WL 2048876, at *9. “At all times, courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure” *Citizens for Responsibility & Ethics in Washington v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011)).

ARGUMENT

The IRS’s renewed arguments in support of dismissal border on the frivolous and should be rejected. EPIC filed a fully compliant FOIA Request for offers-in-compromise and related return information pertaining to President Trump and associated businesses, which the IRS is obligated to process. *See* 5 U.S.C. 552(a)(3). More than year later, the IRS has not even conducted a search for records responsive to EPIC’s request. Instead, the agency has filed two separate motions to dismiss in effort to avoid and postpone the disclosure obligations that 26 U.S.C. § 6103(k)(1) and the FOIA plainly impose. The D.C. Circuit made the first of the IRS’s motions untenable with the holding in *EPIC v. IRS I*, rejecting the agency’s theory that administrative exhaustion barred judicial review of EPIC’s claims. *EPIC v. IRS I*, 910 F.3d at 1238–39. Now comes the IRS with a second theory: that (k)(1)’s requirement to “disclose[]” and “permit inspection” of offer-in-compromise records somehow precludes the release of records pursuant to the FOIA.

The IRS’s reading of § 6103(k)(1) fails at every turn. First, the IRS publishes and distributes a form (Form 15086) by which members of the public may request mailed or faxed copies of individual taxpayers’ offer-in-compromise files. The agency’s creation and use of this form directly contradicts the IRS’s argument that disclosure under (k)(1) is limited solely to in-person inspection of records at IRS field offices. Second, the IRS’s proposed construction of (k)(1) is contrary to the broad disclosure mandate that Congress has imposed. EPIC’s interpretation of (k)(1), by contrast, is supported by the text, legislative history, Treasury

regulations, and agency practice, as well as the precedents of this Circuit. Third, the fact that the IRS has created an in-person inspection system for (k)(1) records does not limit the public's right to access the same records through the FOIA. Fourth, the decision of the D.C. Circuit in *EPIC v. IRS I* supports EPIC's interpretation of (k)(1). Finally, the IRS's attempts to mischaracterize the scope of EPIC's FOIA Request are no reason to allow the agency to avoid the obligations imposed by the FOIA and (k)(1). The Court should deny the IRS's motion and order the agency to identify and release all nonexempt responsive records.

I. THE IRS HAS UNLAWFULLY REFUSED TO PROCESS EPIC'S FOIA REQUEST.

In February 2018, EPIC filed a FOIA Request for accepted offers-in-compromise and related return information subject to mandatory "disclos[ure]" and "inspection" under 26 U.S.C. § 6103(k)(1). For more than a year, the IRS has failed to conduct a reasonable search for responsive records, to issue a determination, or to disclose any information to EPIC. These failures by the agency violate the FOIA in multiple respects. EPIC has therefore plausibly stated claims entitling it to relief, and the IRS's Motion to Dismiss must be denied.

EPIC's FOIA Request calls for "accepted offers-in-compromise" and "return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise." Compl. Ex. 1 at 1–2. Accepted offers-in-compromise, and the return information necessary to inspect those offers, constitute "return information" under 26 U.S.C. § 6103(b)(2). Under most circumstances, return information may not be released by the IRS without proof of the taxpayer's consent or the requester's material interest. 26 U.S.C. § 6103(a); *see also* §§ 6103(c), (e). But EPIC's request relies on a distinct provision of § 6103 that *requires* the disclosure of particular return information, notwithstanding the "general rule" of confidentiality under § 6103(a). Section 6103(k)(1) states:

(1) Disclosure of accepted offers-in-compromise

Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

Thus, while § 6103 would ordinarily permit the IRS to withhold records pursuant to Exemption 3 of the FOIA, *see EPIC v. IRS*, 910 F.3d at 1237, nondisclosure is not an option for return information and records described by (k)(1). The IRS “shall” disclose such records. § 6103(k)(1).

Section 6103(k)(1) was one of several provisions in the Tax Reform Act of 1976 that Congress enacted to ensure that certain “returns or return information should be public as a matter of policy” S. Rep. No. 94-938, at 340 (1976). According to the Treasury Inspector General for Tax Administration:

The reason OICs [offers-in-compromise] are available for public inspection goes back several decades. In the early 1950s, an IRS employee was indicted for taking bribes from taxpayers seeking to compromise their outstanding tax liabilities. A congressional investigation revealed that the IRS had accepted offers with generous terms from racketeers and politically connected individuals. In response to these scandals, on August 20, 1952, President Truman issued Executive Order 10386 directing the IRS to open for public inspection any accepted OIC. The Internal Revenue Code permits public inspection and copying of accepted OIC case files.

Treasury Inspector Gen. for Tax Admin., *supra*, at 2. As one tax official wrote of § 6103(k)(1), “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.” Larry Mednick, OIP Opinion Letter No. 89-3, 1989 WL 406076, at *6 (Nov. 3, 1989).

The IRS, in furtherance of § 6103(k)(1), has established two different mechanisms for the public to obtain offers-in-compromise and the relevant return information. First, for a year after a given taxpayer’s offer-in-compromise is accepted by the IRS, the taxpayer’s Form 7249 (“Offer

Acceptance Report”) and associated “sanitized account transcript” is made available for public inspection at a geographically corresponding IRS field office. 26 C.F.R. § 601.702(d)(8); *see* Treasury Inspector Gen. for Tax Admin., *supra*, at 2. Members of the public are permitted to copy and retain these documents; however, the “inspection file” at each IRS office only contains records specific to that IRS region, and only records that are a year or less old. *See* IRM 11.3.11.8 ¶ 2; § 601.702(d)(8). Second, the IRS makes offers-in-compromise and associated return information available pursuant to the “*Freedom of Information Act*.” *See* IRM 11.3.11.8 ¶ 5 (“Requests to inspect Forms 7249 . . . [where] more than one year has elapsed since acceptance should be in writing and processed in accordance with IRM 11.3.13, *Freedom of Information Act*.” (emphasis in original)); *accord* IRM 11.3.11.8 ¶ 4. Recently, the IRS even published a form (Form 15086) that enables requesters to seek specific taxpayers’ offer-in-compromise records via written request. It is this second procedure—disclosure in writing—that EPIC’s FOIA Request relies on.

The IRS initially granted EPIC’s request for expedited processing. Compl. Ex. 2, ECF No. 1–5—a determination that the FOIA does not allow an agency to revoke. *See* 5 U.S.C. § 552(a)(6)(E)(iii) (“An agency *shall* process as soon as practicable any request for records to which the agency has granted expedited processing under [5 U.S.C. § 552(a)(6)(E)].” (emphasis added)); 26 C.F.R. § 601.702 (“When a requester demonstrates compelling need, a request *shall* be taken out of order and given expedited treatment.” (emphasis added)).

By refusing to process and disclose records responsive to EPIC’s FOIA Request, the IRS has violated the FOIA in two respects. First, the IRS failed to comply with statutory deadlines (Count I). EPIC filed a FOIA Request for offers-in-compromise and related return information pertaining to President Trump and associated businesses. Compl. ¶¶ 21–31. The IRS accepted

EPIC’s FOIA Request and granted it expedited processing. Compl. Ex. 2. The IRS then failed to issue a determination on that request within the prescribed period, rendering EPIC’s remedies constructively exhausted. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i); Compl. ¶¶ 40–42. As relief, EPIC is entitled to a reasonable search for responsive records and a determination on its FOIA Request. 5 U.S.C. § 552(a)(6)(A)(i); Compl. p. 12 (“Requested Relief”).

Second, the IRS is unlawfully withholding agency records (Count II). EPIC filed a FOIA Request for offers-in-compromise and related return information pertaining to President Trump and his businesses. Compl. ¶¶ 21–31. The IRS accepted EPIC’s FOIA Request and granted expedited processing. Compl. Ex. 2. The IRS failed to disclose any of the requested records within the prescribed period, rendering EPIC’s remedies constructively exhausted. 5 U.S.C. § 552(a)(6)(A)(i), (C)(i); Compl. ¶¶ 40–42. As relief, EPIC is entitled to release of nonexempt responsive records. 5 U.S.C. § 552(a)(3)(A); Compl. p. 12 (“Requested Relief”).

EPIC has plausibly alleged facts necessary to prove both of these violations and that EPIC is entitled to relief in each instance. Thus, the IRS’s Motion to Dismiss must be denied.

II. THE IRS’S ARGUMENTS FOR DISMISSAL ARE DIRECTLY REFUTED BY SECTION 6103, THE D.C. CIRCUIT, AND THE IRS ITSELF.

EPIC filed a conforming FOIA Request for the disclosure of accepted offers-in-compromise and related return information. The IRS no longer disputes that EPIC’s request was perfected, and thus concedes this point. *See DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997). Instead, the IRS now insists that the records EPIC seeks under 26 U.S.C. § 6103(k)(1) are somehow immune from disclosure under the FOIA. This view is contrary to the plain text of (k)(1), two decades of D.C. Circuit case law, the relevant Treasury regulations, the legislative purpose behind the statute, and the agency’s own disclosure policies and practices. In short, the IRS’s arguments for dismissal are without merit.

A. The IRS does, in fact, accept written requests for accepted offers-in-compromise and related return information.

The existence of IRS Form 15086 is a death knell for the agency's second Motion to Dismiss. Contrary to what the IRS has claimed over the past year in this case, the agency's unambiguous policy is to solicit, accept, and process written requests for the disclosure of taxpayer records under § 6103(k)(1).

As noted, Form 15086 invites any requester to identify an "Accepted Offer in Compromise" by "number, name, [and/or] state" in order to obtain a "Offer in Compromise Public Inspection File." Under IRS regulations, a "Public Inspection File" contains the Form 7249 corresponding to each accepted offer-in-compromise. 26 C.F.R. § 601.702(d)(8). Form 7249, in turn, lists a wealth of return information (so as to permit inspection of the offer-in-compromise). Specifically, Form 7249 lists the taxpayer's name, location, state, and zip code; the number and acceptance date of the offer; the type of tax, taxable period, date assessed, and current balance for each liability settled; the total balance of liabilities settled; the balance received; the reason for the IRS's acceptance of the offer; the precise terms of the offer; the employee(s) who approved the IRS's acceptance of the offer; and the date of each such approval. This is precisely the type of return information that § 6103(k)(1) requires the IRS to disclose, and it is precisely the type of information that EPIC sought through its FOIA Request.

Importantly, Form 15086 also permits a requester to specify whether they want the requested "Public Inspection File" records "sent to [them]" by mail or fax. The form promises a response within "15 business days," or "20 business days if mailed." *Id.* The form also identifies a special "IRS PIF Request" mailing address and fax number based in Tennessee. *Id.* Nowhere does Form 15086 require that a requester demonstrate a material interest in the requested records or the consent of the taxpayer to whom the records pertain. Quite the contrary: the form allows

the requester to specify that they are simply “requesting this information for personal reasons.”
Id.

Given the IRS’s publication of and reliance on Form 15086, it is contrary to fact for the agency to characterize § 6103(k)(1) as “permitting only public inspection through the Public Inspection Files (rather than as permitting disclosure upon written request under FOIA for specific taxpayer return information).” IRS Mem. 10. The agency has created a form to facilitate requests for specific records about offers-in-compromise—and to have those records delivered by mail or fax. Form 15086 at 1. Moreover, the requester can demand disclosure of these records for no other reason than personal curiosity. *Id.* And as the Internal Revenue Manual makes clear, the (k)(1) records subject to disclosure by written request are far more numerous than the single year’s worth of records found in Public Inspection Files. *See* IRM 11.3.11.8 ¶ 5 (“Requests to inspect a Form 7249 that are not available under [IRM 11.3.11.8 ¶ 2] above because more than one year has elapsed since acceptance should be in writing and processed in accordance with IRM 11.3.13, *Disclosure of Official Information - Freedom of Information Act.*”).

Thus, the IRS’s arguments for dismissal fail. *Contra* the IRS, § 6103(k)(1) does, indeed, “permit[] disclosure upon written request under FOIA for specific taxpayer return information[.]” IRS Mem. 10; *see also id.* at 9. *Contra* the IRS, the disclosure sought by EPIC is not at all “textually [or] qualitatively different” from the (k)(1) disclosures that the IRS already makes. IRS Mem. 9. And *contra* the IRS, neither *EPIC v. IRS I* nor the rest of § 6103(k) authorizes the agency to refuse disclosure of the records EPIC has requested. IRS Mem. 9–10. The agency’s motion should be denied on these grounds alone.

B. The IRS’s proposed reading of § 6103(k)(1) is directly at odds with the plain text of the statute.

Even if the IRS could overcome its glaring admission that taxpayer-specific records covered by § 6103(k)(1) may be obtained in writing, the agency’s proposed reading of (k)(1) squarely contradicts the plain text of the statute and must be rejected.

As the IRS tells it, Congress hid an unwritten “limitation” in (k)(1) which restricts disclosure of information solely to the Public Inspection Files at IRS field offices. IRS Mem. 9. The statute contains no such limitation. Section 6103(k)(1)—titled “Disclosure of accepted offers-in-compromise”—states simply that accepted offers-in-compromise and certain related return information “shall be disclosed to members of the general public[.]” § 6103(k)(1). Congress identified no limits on the places and manners in which disclosure must occur, and it certainly did not impose the elaborate constraints on disclosure that the IRS attempts to pencil into the statute for the purposes of this litigation. To the contrary: § 6103 defines “disclosure” in exceptionally broad terms as “the making known to any person *in any manner whatever* a return or return information.” 26 U.S.C. § 6103(b)(8) (emphasis added); *see also Welborn v. IRS*, 218 F. Supp. 3d 64, 83 (D.D.C. 2016) (rejecting the IRS’s argument that “disclosure” under § 6103(b)(8) refers only to “person-to-person” transfers of information). Thus, under the plain language of the statute, the (k)(1) records that EPIC requested must be “ma[de] known to [EPIC] in any manner whatever”—including pursuant to a FOIA request. § 6103(b)(8). Nothing in the statute authorizes the IRS to refuse to disclose records simply because EPIC has made a request through the “entirely harmonious” procedures that Congress established in the FOIA. *Church of Scientology of California v. IRS (Church of Scientology)*, 792 F.2d 146, 149 (D.C. Cir. 1986).

The IRS also suggests, without support, that (k)(1)’s public “inspection” requirement should be read to exclude FOIA requests as a permissible means of inspecting records. IRS

Mem. 9, 10. But again, Congress neither permitted nor intended such a limitation. The statute broadly requires the “disclos[ure]” of return information “to the extent necessary to permit inspection of any accepted offer-in-compromise[.]” § 6103(k)(1). The word “inspection” is defined as “*any* examination of a return or return information.” 26 U.S.C. § 6103(b)(7) (emphasis added). Thus, if a member of the public seeks to make *any* type of examination of *any* accepted offer-in-compromise—whether by scheduling an appointment at an IRS field office or by filing a FOIA request—the text of § 6103(k)(1) requires the IRS to (a) “permit inspection” and (b) disclose the “return information” “necessary” for the requester to carry out that inspection.⁴ *Id.* Outside of this litigation, that is exactly IRS reads the statute as well. *See, e.g.,* Form 15086.

Congress’s use of the word “inspection” in addition to the word “disclos[ure]” is a telling sign of (k)(1)’s breadth. Had Congress only mandated “disclosure” under (k)(1), the IRS might have attempted a less direct and informative method of “making” accepted offers-in-compromise “known” to the public. 26 U.S.C. § 6103(b)(8). As the D.C. Circuit has noted, a statute that requires “disclosure of certain information held by the government . . . creates tension with the understandable reluctance of government agencies to part with that information[.]” *NRDC v. Def. Nuclear Facilities Safety Bd.*, 969 F.2d 1248, 1250 (D.C. Cir. 1992) (quoting *Reporters Comm. for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987)). This reluctance is visible in other statutorily required disclosures made by the IRS. For example, in order to fulfill the agency’s disclosure obligation under 26 U.S.C. § 6108(a) (“Publication or other disclosure of

⁴ Of course the FOIA still permits the IRS to establish “reasonable” rules and procedures for (k)(1) records requests made in writing. *Clemente v. FBI*, 867 F.3d 111, 119 (D.C. Cir. 2017). But the IRS no longer disputes that EPIC’s request fully conforms to the Treasury’s FOIA regulations.

statistics of income”), the IRS simply produces an annual digest of statistics. *See* 26 C.F.R. § 601.702(d)(6). Were (k)(1) worded less explicitly, the IRS might well have adopted a similar strategy as the exclusive means of disclosing accepted offers-in-compromise. But Congress left nothing to chance. Mandating public “inspection” under (k)(1) means that the IRS must permit the public to actually examine the records described by (k)(1); the agency may not simply summarize or confirm the contents or existence of those records.

Indeed, that is the critical difference between “inspection” and “disclosure” under § 6103—not the IRS’s artificial distinction between in-office viewing of records and FOIA requests. *Compare* § 6103(b)(7), *with* § 6103(b)(8). To be clear: § 6103(k)(1) mandates *both* “inspection” *and* “disclos[ure],” so both of these terms apply with full force to (k)(1) records. Yet even if (k)(1) spoke solely of “inspection,” § 6103 gives no hint that such inspection must occur at an IRS office or that inspection must end with the surrender of the records examined. In fact, the opposite is evident from the use of the word “inspect” in a neighboring provision. 26 U.S.C. § 6103(f)(4)(A) gives certain Congressional personnel the power “to *inspect* returns and return information *at such time and in such manner as may be determined by*” the committee chairman or committee chief of staff. *Id.* (emphasis added). It also provides that the returns and return information “*obtained* by or on behalf of such committee” as a result of such “inspect[ion]” may be submitted by the committee to the full chamber of Congress. *Id.* (emphasis added). Section 6103(f)(4)(A) would make no sense if “inspection” could only occur within the four walls of an IRS field office, or if the IRS had to maintain full custody of the relevant records at all times. Rather, Congress’s use of the word “inspect” emphasizes that the IRS must furnish the full records in question for direct examination.

Twenty years of D.C. Circuit precedent confirm that the public “inspection” mandated by § 6103(k)(1) includes disclosure by FOIA request. In *Lehrfeld v. Richardson*, 132 F.3d 1463 (D.C. Cir. 1998), a FOIA requester sought IRS records concerning a particular tax-exempt organization to determine whether “prominent U.S. politicians had used their influence to speed up the processing of [that organization’s tax-exempt] status application[.]” *Id.* at 1464. The requester argued that—notwithstanding the general rule of confidentiality under § 6103(a)—the records were subject to FOIA disclosure under 26 U.S.C. § 6104(a) (“Inspection of applications for tax exemption or notice of status”). *Lehrfeld*, 132 F.3d at 1467. That provision reads in relevant part:

If an organization described in section 501(c) or (d) is exempt from taxation under section 501(a) for any taxable year or a political organization is exempt from taxation under section 527 for any taxable year, the application filed by the organization with respect to which the Secretary made his determination that such organization was entitled to exemption under section 501(a) or notice of status filed by the organization under section 527(i), together with any papers submitted in support of such application or notice, and any letter or other document issued by the Internal Revenue Service with respect to such application or notice *shall be open to public inspection* at the national office of the Internal Revenue Service.

§ 6104(a)(1)(A) (emphasis added). At no point does § 6104 use the word “request” to describe the IRS’s obligation to make tax-exempt application materials publicly available; the text of the statute only mandates “public inspection” of such records.⁵ Nevertheless, the *Lehrfeld* court recognized that § 6104 was an “exception” to § 6103(a) and thus mandated disclosure of certain records via the FOIA.⁶ *Lehrfeld*, 132 F.3d at 1467. If the Internal Revenue Code instructs the IRS

⁵ Other parts of § 6104 use the word “request” in unrelated contexts, but never in reference to the IRS’s obligation to publicly disclose tax-exempt application materials. *See, e.g.*, § 6104(a)(1)(A) (requiring the Secretary, “on the request of any person” to “furnish a statement indicating the subsection and paragraph of section 501 . . . that describes a [given tax-exempt] organization”); § 6104(d) (requiring each tax-exempt organization to furnish three years’ worth of its own tax records “upon request of an individual made at such [organization’s] office[s]”).

⁶ The court ultimately concluded that the records sought by the plaintiff fell beyond the substantive limits of § 6104(a)(1)(A).

to make certain information available for public “inspection,” *Lehrfeld* requires that the information be disclosed pursuant to a FOIA request. *See id.* So too with records and information subject to “inspection” under § 6103(k)(1).

The D.C. Circuit has only sharpened this point since *Lehrfeld*. In *Tax Analysts v. IRS (Tax Analysts I)*, 214 F.3d 179 (D.C. Cir. 2000), the court held explicitly that § 6104 “may be characterized as an exception to the exception from the general disclosure rule offered by FOIA Exemption 3 and I.R.C. § 6103.” *Tax Analysts I*, 214 F.3d at 183. The court then went on “to consider whether the information requested by Tax Analysts falls within the scope of I.R.C. § 6104(a)(1)(A), and thus must be disclosed despite FOIA Exemption 3 and I.R.C. § 6103.” *Tax Analysts I*, 214 F.3d at 183 (emphasis added). The court reiterated this point a year later in *Landmark Legal Foundation v. IRS*, 267 F.3d 1132 (D.C. Cir. 2001), noting—in the context of a FOIA request—that § 6104(a)(1)(A) “carves out a narrow exception to § 6103 by providing that any tax-exempt organization’s application for tax-exempt status and any ‘paper[s] submitted in support of such application’ shall be ‘open to public inspection.’” *Landmark Legal Found.*, 267 F.3d at 1137. And in *Tax Analysts v. IRS (Tax Analysts III)*, 410 F.3d 715 (D.C. Cir. 2005), the court held yet again that § 6104(a)(1)(A) is “an exception to the exception from the general disclosure rule offered by FOIA Exemption 3 and I.R.C. § 6103.” *Tax Analysts III*, 410 F. 3d at 717 (quoting *Tax Analysts I*, 214 F.3d at 183).

These cases slam the door on the IRS’s attempt to avoid the disclosure mandates of (k)(1) and the FOIA. A provision requiring public “inspection” of information necessarily requires disclosure of the same information pursuant to the FOIA. It is no coincidence that the D.C. Circuit recently likened § 6103(k)(1) to § 6104. *See EPIC v. IRS I*, 910 F.3d at 1243 n.9. In *EPIC*

v. *IRS I*, the court distinguished § 6103(k)(1) from the more numerous provisions of § 6103 that only authorize disclosure to “certain government officials or private parties”:

One exception does allow the public to inspect certain return information. I.R.C. § 6103(k)(1) (“Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise”); *see also id.* § 6104 (allowing public inspection of limited records related to certain tax exempt organizations and trusts).

EPIC v. IRS I, 910 F.3d at 1243, 1243 n.9; *see also Church of Scientology*, 792 F.2d at 149 (citing to (k)(1) as an “exception[.]” to § 6103(a) which requires disclosure “to the public at large”). Nothing in the Internal Revenue Code or the decisions of the D.C. Circuit supports the view that § 6103(k)(1) is somehow immune from the FOIA, while § 6104 is not.

Had Congress meant to limit the scope of (k)(1) solely to in-person inspection at IRS field offices—or to otherwise preempt inspection pursuant to the FOIA—“Congress knew exactly how to” do so. *Tax Analysts v. IRS (Tax Analysts II)*, 350 F.3d 100, 103 (D.C. Cir. 2003). For example, Congress could have mirrored the language of 26 U.S.C. § 6110, which was also enacted through the Tax Reform Act of 1976. Section 6110 makes written IRS determinations open “to public inspection *at such place as the Secretary may by regulations prescribe.*” § 6110(a) (emphasis added). Unlike (k)(1), section 6110 establishes separate “procedures to obtain and restrain disclosure, time limits, the level of assessable fees, and an action to compel or restrain disclosure in the Claims Court.” *Church of Scientology*, 792 F.2d at 149. Because—and only because—§ 6110 sets out a “comprehensive” scheme for public disclosure, the D.C. Circuit has interpreted § 6110 to “replac[e] the . . . FOIA” when it comes to public review of written IRS determinations. *Id.*

By contrast, § 6103(k)(1) sets out no restraints on disclosure, no time limits, no fees, and no separate cause of action. It requires simply that “[r]eturn information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-

in-compromise[.]” *Id.* This stark difference between the two components of the Tax Reform Act is dispositive. “It would be another matter if § 6103 established some rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access to IRS documents. But it does not.” *Church of Scientology*, 792 F.2d at 149. And “when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Tax Analysts II*, 350 F.3d at 104 (quoting *FEC v. NRA*, 254 F.3d 173, 194 (D.C. Cir. 2001)).

That Congress would impose a firm disclosure requirement under (k)(1) makes perfect sense in view of the statute’s core purpose: keeping the IRS honest. Section 6103(k)(1), and Executive Order 10,386 before it, were drafted in response to two particular IRS scandals: the indictment of an IRS employee “for taking bribes from taxpayers seeking to compromise their outstanding tax liabilities” and a congressional investigation “reveal[ing] that the IRS had accepted offers with generous terms from racketeers and politically connected individuals.” Treasury Inspector Gen. for Tax Admin., *supra*, at 2; *see also* Office of Tax Policy, Dep’t of the Treasury, *Report to The Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions, Volume I: Study of General Provisions*, at 35 (2000) (explaining that (k)(1) “appears to have grown out of a concern that compromises might result from favoritism or undue influence”). Concerned that these abuses might recur without greater public oversight, Congress decided that certain information regarding offers-in-compromise “should be public as a matter of policy” and that “the reasons for the limited disclosures outweighed any possible invasion of the taxpayer’s privacy which might result from disclosure.” and S. Rep. No. 94-938, at 340. Given Congress’s purpose in enacting (k)(1), it would have been nonsensical to grant the IRS complete

control over the terms on which disclosure might occur (if ever). Instead, Congress established a categorical inspection mandate under (k)(1), aware that—if nothing else—the public could access (k)(1) records via the Congressionally-established procedures of the FOIA. *See Church of Scientology*, 792 F.2d at 149 (explaining that “FOIA . . . requires all agencies, including the IRS, to provide nonexempt information to the public [and] establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption”).

Treasury regulations also make clear the breadth of the term “inspection” in § 6103(k)(1). As the IRS concedes, (k)(1) requires the IRS to disclose certain return information when a member of the public accesses the records contained in the Public Inspection File at an IRS field office. IRS Mem. 9, 10; *see also* 26 C.F.R. § 601.702(d)(8) (requiring that “form 7249, ‘Offer Acceptance Report,’ for each accepted offer in compromise . . . shall be made available for inspection” at the geographically corresponding office). Treasury regulations underscore that (k)(1) also requires the IRS to permit inspection of records *outside* of IRS field offices. § 601.702(d)(8). Members of the public have the right to “copy[.]” and retain records from Public Inspection Files and to carry out their examination of those records elsewhere. *Id.*; *accord* IRM 11.3.11.8 ¶ 2. If—as the IRS suggests—the “inspection” provided for in (k)(1) were limited solely to in-office viewings, the IRS’s copying policy under § 601.702(d)(8) would be plainly unlawful. Every time a member of the public left an IRS field office with a copy of a record from the Public Inspection File, the agency officials responsible for this purported breach of § 6103(a) confidentiality would be subject to felony prosecution. *See* 26 U.S.C. § 7213. But the reality is far less damning: the “inspection” guaranteed by (k)(1) includes “*any* examination” of records at any location, regardless of whether the examination occurs at an IRS office or beyond its walls.

This reading is compelled, too, by other provisions of § 601.702 (“Publication, public inspection, and specific requests for records”). Section 601.702 repeatedly uses the phrase “available for public inspection” and “open to public inspection” to describe records that can be obtained by written request. §§ 601.702(d)(4), (d)(5), (f)(7). In several cases, the regulation even requires records to be “made available for public inspection and copying” on the IRS’s website. §§ 601.702(b)(1)(iii), (d)(3). If allowing the world at large to download records off the IRS’s website constitutes “public inspection” in the agency’s view, that phrase certainly encompasses the disclosure of documents to an individual FOIA requester.

Having admitted the broad scope of the word “inspection” in agency’s own regulations, the IRS has no basis to refuse EPIC’s FOIA request. EPIC seeks to obtain the same category of records that an individual may obtain by making an appointment at an IRS field office and using the photocopier. And indeed, the Internal Revenue Manual provides for exactly this type of “*Freedom of Information Act*” request. IRM 11.3.11.8 ¶ 4 (emphasis in original). IRM 11.3.11.8 states that “[r]equests for copies of Form 7249 available under [IRM 11.3.11.8 ¶ 2], where no personal inspection is involved, should be in writing and processed in accordance with IRM 11.3.13, *Disclosure of Official Information - Freedom of Information Act.*” IRM 11.3.11.8 ¶ 4 (emphasis in original); accord IRM 11.3.11.8 ¶ 5. Notably, this section of the Internal Revenue Manual was last updated on March 5, 2019—the day after the IRS filed its second Motion to Dismiss arguing that the IRS is prohibited by law from disclosing records pursuant to EPIC’s FOIA Request.

Finally, the IRS claims at several points that § 6103(k)(1)’s inspection mandate does not apply to return information located in “taxpayer-specific files.” IRS Mem. 10; see also IRS Mem. 9. The IRS offers no textual support for this illusory limitation on (k)(1), and there is none.

Nothing in (k)(1) suggests that disclosure is limited solely to records found in a Public Inspection File. Such a reading would make the statute superfluous: the only information subject to mandatory public disclosure would be the information already publicly disclosed. Moreover, the IRS would be permitted to avoid its disclosure obligations simply by leaving an offer-in-compromise out of the Public Inspection File. But § 6103(k)(1)—like EPIC’s FOIA Request—applies to *all* IRS records in *all* locations. If the relevant information for “any accepted offer-in-compromise” happens to reside in a “taxpayer-specific file” rather than the Public Inspection File, (k)(1) still requires disclosure of that information. That may well be the case for many of the records sought in EPIC’s FOIA Request, as the Public Inspection Files only contain records that are less than a year old. *See* IRM 11.3.11.8 ¶ 2; § 601.702(d)(8). And § 6103(k)(1) certainly does not permit the IRS to impose an arbitrary one-year cutoff on the information that the agency must disclose to EPIC.⁷

Nevertheless, the IRS insists that its atextual reading of (k)(1) is compelled by the “other provisions of Section 6103(k).” IRS Mem. 10; *see also id.* (citing to a single other provision of 6103(k)). That is not the case. First, the IRS wrongly presupposes that the sole “purpose” of (k)(1) is to permit “inspection through the Public Inspection Files.” IRS Mem. 10. As explained above, there is no such limitation in (k)(1); the provision ensures public inspection through the FOIA as well. Next, the IRS attempts to import limitations from 26 U.S.C. § 6103(k)(6) into (k)(1) by drawing an analogy between the two provisions. But the comparison breaks down immediately. In contrast to the mandatory language of (k)(1), § 6103(k)(6) is a permissive exception to 26 U.S.C. § 6103(a). *See id.* (“*may . . . disclose return information*” (emphasis

⁷ Even if such a temporal limitation were lawful, the IRS would be obligated to conduct a reasonable search of the active Public Inspection Files maintained at IRS field offices in order to satisfy EPIC’s FOIA Request. The agency’s motion would still fail.

added)). Thus, the determination of when disclosure is “necessary” is left to the agency’s discretion; a FOIA requester may not compel the release of undisclosed information under (k)(6) in the same way that it can under (k)(1). Moreover, § 6103(k)(6) makes no mention of “public” disclosure or inspection, whereas (k)(1) certainly does. Whatever may happen to tax lien notices once they are recorded at local government offices, there is no expectation that the IRS will reveal (k)(6) information directly to members of the public. Not so with (k)(1).

The only case the IRS cites in support of its (k)(6) analogy is an out-of-circuit decision that holds precisely the opposite of what the IRS claims. In *Smart-Tek Services, Inc. v. IRS*, 344 F. Supp. 3d 1166 (S.D. Cal. 2018), the court found that taxpayer identities disclosed by the IRS for the purpose of recording lien notices were “no longer privileged under § 6103” as a result of such disclosure. *Id.* at 1174. It was only the larger category of return information sought by the plaintiff—information that the IRS had not made public in any fashion—that the Court deemed off limits to a FOIA Request. *Id.* at 1174–75. *Smart-Tek* thus suggests that any records “made a part of the public domain” through placement in a Public Inspection File are “no longer privileged under § 6103.” *Id.* at 1174 (quoting *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988)). Even if the IRS could narrowly tailor (k)(1) in the way that it proposes, EPIC would still be entitled to a reasonable search for, and disclosure of, records that had been placed in a Public Inspection File at some point.

The IRS’s efforts to artificially constrain the plain meaning of § 6103(k)(1) cannot stand on close analysis. Congress, the D.C. Circuit, and the agency itself have all foreclosed the reading of the statute that the IRS proposes in this case. This Court should reject that reading as well.

C. The existence of Public Inspection Files does not narrow the plain meaning of § 6103(k)(1) or relieve the IRS of its FOIA disclosure obligations.

Throughout this litigation, the IRS has suggested the agency's policy and practice of disclosing offer-in-compromise records at IRS field offices should lead the Court to disregard the plain meaning of § 6103(k)(1) and declare the provision inaccessible to FOIA requesters. This argument has no basis in the FOIA or the relevant regulations.

First, nothing in the Treasury regulation implementing § 6103(k)(1) suggests that the Public Inspection File is the sole means by which the IRS intends the disclosure of offer-in-compromise to occur. That regulation reads in its entirety:

Accepted offers in compromise. For one year after the date of execution, a copy of the form 7249, "Offer Acceptance Report," for each accepted offer in compromise with respect to any liability for a tax imposed by title 26 shall be made available for inspection and copying in the location designated by the Compliance Area Director or Compliance Services Field Director within the Small Business and Self-Employed Division (SBSE) of the taxpayer's geographic area of residence.

26 C.F.R. § 601.702(d)(8). Had the IRS intended in-person inspection to be the exclusive procedure for accessing (k)(1) records, it could easily have said so. *See, e.g.*, 26 C.F.R. § 601.702(d)(1) ("Written requests for a copy of a tax return and attachments or a transcript of a tax return *shall be made* using IRS form 4506, "Request for Copy or Transcript of Tax Form." (emphasis added)). The agency did not. To the contrary: whenever the IRS has addressed the issue, it has consistently represented that the disclosure of records described by § 6103(k)(1) is required pursuant to the FOIA. *See* IRM 11.3.11.8 ¶ 4; IRM 11.3.11.8 ¶ 5; Form 15086; *cf. Goldstein v. IRS*, 174 F. Supp. 3d 38, 47 (D.D.C. 2016) ("[E]ven though the IRS has established a separate "non-FOIA" process for requesting tax returns . . . it does not follow that an action challenging the denial of such tax returns is not subject to FOIA.").

Second, even if Treasury regulations could be read to support the IRS's position in this case, § 6103(k)(1) does not give the IRS unfettered discretion to decide which disclosures it will

carry out. Rather, “to the extent” that any “return information” is “necessary to permit inspection of any accepted offer-in-compromise,” that return information “*shall* be disclosed.” § 6103(k)(1) (emphasis added). The Supreme Court underscored the mandatory nature of such statutory language in *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663 (1988). In *Huffman*, the Court was called on to interpret a provision requiring

That the [Atomic Energy] Commission, *to the extent necessary* to assure the maintenance of a viable domestic uranium industry, *shall* not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

Id. at 664 n.3 (emphasis added) (quoting former 42 U.S.C. § 2201(v)). As the Court explained:

The statute requires DOE to impose restrictions “to the extent necessary to assure the maintenance of a viable domestic uranium industry.” If some amount of restriction would assure a viable domestic industry, there can be no doubt that DOE is required to impose restrictions. The term “shall” makes clear that, in such circumstances, DOE has no discretion to decline to impose restrictions.

Id. at 664. So too here: if “some amount” of disclosure would enable an inspection of an offer-in-compromise to occur, “there can be no doubt” that the IRS is required to make that disclosure.

Id.; *see also* 26 C.F.R. § 301.6103(k)(6)-1 (explaining that “necessary,” as used in a neighboring provision of § 6103(k), “does not mean essential or indispensable, but rather appropriate and helpful”). That obligation applies whether the disclosure occurs in person or in response to a FOIA request, both of which are encompassed by (k)(1).

Third, the historical practice of the IRS prior to the passage of the Tax Reform Act does not override the plain meaning of § 6103(k)(1). *Contra* Reply in Supp. of First IRS Motion to Dismiss 6–7, ECF No. 12. Indeed, when it enacted (k)(1), Congress squarely rejected aspects of the offer-in-compromise system that had been in operation prior to 1976. Before the Tax Reform Act, Treasury Decision 5927 provided that “the inspection [of offer-in-compromise records] shall be subject to such rules, and shall be made only under such circumstances, as the Secretary

of the Treasury, or such official as he may designate, shall determine to be in the public interest.” T.D. 5927, 1952-2 C.B. 298 (1952). But in determining that offer-in-compromise records “should be public as a matter of policy,” and S. Rep. No. 94-938, at 340, Congress stripped the IRS of the wide discretion that it had enjoyed over the disclosure of such records and opted instead for mandatory disclosure.

Although the IRS proposes that the court add the phrase “as determined by the Secretary” to (k)(1) in order to give the agency greater discretion, IRS Reply 7, those words are not actually in the statute. When Congress means to give statutory force to an executive pronouncement, it knows how to do so. *See* 26 U.S.C. § 6110(c)(2) (requiring the Secretary to withhold from the public “information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy”). And when Congress means to give an agency discretion over a disclosure matter, it knows how to do that, too. *See* § 6103(b)(5)(A)(ii)(III) (giving the Secretary “sole discretion” to “enter[] into an agreement regarding disclosure” with a municipality). Here, Congress did neither.

Finally, even if the IRS’s litigation position on § 6103(k)(1) found some support in the Treasury regulations or the legislative history of (k)(1), neither would be sufficient to overcome the FOIA’s strong presumption of disclosure. As the D.C. Circuit has explained, in order for an agency to withhold records “under authority of another statute [and] thus escape the release requirements of FOIA,” the Court “must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA)—not in the legislative history of the claimed withholding statute, nor in an agency’s interpretation of the statute.” *Reporters Comm. for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev’d on other grounds*, 489 U.S. 749 (1989); *accord NRDC v. Def. Nuclear Facilities Safety*

Bd., 969 F.2d 1248, 1251 (D.C. Cir. 1992). Here, the actual words of (k)(1) lift the prohibition of § 6103(a) and require “disclos[ure]” “to the extent necessary to permit inspection of any accepted offer-in-compromise[.]” § 6103(k)(1). As explained earlier, the text of (k)(1) evinces no intention whatsoever to exclude FOIA requests from its disclosure mandate. Thus, the IRS cannot rely on § 6103 to escape processing of EPIC’s FOIA Request.

D. *EPIC v. IRS I* requires the disclosure of records responsive to EPIC’s FOIA Request in this case.

The D.C. Circuit’s decision in *EPIC v. IRS I* leaves no doubt that records subject to disclosure § 6103(k)(1)—including the records EPIC has requested—must be disclosed pursuant to the FOIA. By placing (k)(1) in the same class of disclosure provisions as 26 U.S.C. § 6104, the court clarified two things. First, the court confirmed that (k)(1), unlike 26 U.S.C. § 6103(k)(3), “does allow the public to inspect certain return information.” *EPIC v. IRS I*, 910 F.3d at 1243 n.9. Second, the court signaled that (k)(1), like its analogue in § 6104, requires disclosure via the FOIA of any information subject to public “inspection.”

Undeterred, the IRS attempts to wrest a favorable holding from *EPIC v. IRS I*. On the IRS’s reading, the *EPIC v. IRS I* court established an across-the-board rule that no disclosure of return information can ever be made under the FOIA unless the relevant exception to § 6103(a) includes the word “request.” IRS Mem. 9–10. That is not what the court said, nor could such a “rule” be squared with decades of D.C. Circuit precedent and current IRS practice. First, as noted, the *EPIC v. IRS I* court expressly distinguished § 6103(k)(1) from other provisions of § 6103, explaining that (k)(1) “does allow the public to inspect certain return information” notwithstanding the absence of the word “request.” *EPIC v. IRS I*, 910 F.3d at 1243 n.9. Thus, even if the D.C. Circuit had imposed a litmus test based on the presence of the word “request”—

which it did not—(k)(1) would still require “inspection” and “disclos[ure] to members of the general public.”

Second, the court’s discussion of the word “request” had nothing to do with the scope of a provision that unambiguously requires public disclosure of records and return information. Rather, the court focused on the word “request” to determine whether Congress intended § 6103(k)(3) to allow *any public disclosure at all*. *EPIC v. IRS I*, 910 F.3d at 1243; *see also id.* at 1242 (“The statute leaves undefined *when* the IRS must disclose records under section 6103(k)(3) and to *whom*.”). Because (k)(3) was missing the word “request” *and* manifested no other intention to allow public disclosure, the Court concluded that (k)(3) was a “*sui generis*” provision “afford[ing] a FOIA requester no disclosure right.” *EPIC v. IRS I*, 910 F.3d at 1243. That is not true of (k)(1), which conveys an extremely clear Congressional intent to require public disclosure. Indeed, at the beginning of the same paragraph of *EPIC v. IRS I*, the Court explained that “when the Congress intend[s] to allow for public disclosure of IRS records under the exceptions to the section 6103(a) disclosure bar, it [knows] how to do so.” *Id.* It is quite a stretch to argue that Congress, in mandating public “inspection” and “disclos[ure] to members of the general public” under § 6103(k)(1), meant to do something other than “allow for public disclosure of IRS records.” *EPIC v. IRS I*, 910 F.3d at 1243; *see also Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582–83 (D.C. Cir. 1990) (“It would be a tall piece of statutory construction for a court to say that an ‘establishment in the executive branch’ as used in § 2286(a) is not an ‘establishment in the executive branch’ within the meaning of § 552(f).”).

Finally, the IRS’s misreading of *EPIC v. IRS I* cannot be squared with the long line of D.C. Circuit cases holding that return information subject to public “inspection” must be

disclosed pursuant to a FOIA request. *See Lehrfeld*, 132 F.3d at 1467; *Tax Analysts I*, 214 F.3d at 183; *Landmark Legal Found.*, 267 F.3d at 1137; *Tax Analysts III*, 410 F. 3d at 717. As explained above, the use of “inspection” in (k)(1) simply clarifies that the IRS must permit full examination of the covered records; it does not silently exclude FOIA requests as an avenue of disclosure. Had Congress used the words “upon written request” in (k)(1), *EPIC v. IRS I*, 910 F.3d at 1243, that phrase might have suggested a *lesser* disclosure obligation—one that could be satisfied by the IRS purely through the FOIA without establishing any in-person inspection files. Instead, Congress used more capacious language, requiring the IRS to permit “inspection” of accepted offers-in-compromise without qualification. Accordingly, the IRS discloses (k)(1) records both under the FOIA and through Public Inspection Files at IRS field offices. *See* Form 15086; 26 C.F.R. § 601.702(d)(8). Thus, the IRS’s reading of *EPIC v. IRS I* fails completely.

E. The IRS cannot avoid its disclosure obligations by deliberately misconstruing EPIC’s FOIA Request.

The IRS repeatedly mischaracterizes the scope of EPIC’s FOIA request in an attempt to drag it outside the disclosure mandate of § 6103(k)(1). These efforts are unavailing. And even if EPIC’s FOIA Request called for records beyond the scope of (k)(1), the agency may not use that fact as a basis to withhold other records that *are* subject to disclosure under (k)(1).

EPIC’s FOIA Request is carefully crafted to track the disclosure requirement of (k)(1).⁸ EPIC’s request solely demands “accepted offers-in-compromise” and “return information . . . necessary to permit inspection of [the] accepted offer[s]-in-compromise.” Compl. Ex. 1 at 1–2. This is exactly the type information that (k)(1) opens to public inspection, notwithstanding § 6103(a). Additionally, EPIC—using the language of Executive Order 10,386—proposes certain

⁸ Bizarrely, after attacking EPIC for requesting too broad a class of records, the IRS faults EPIC’s FOIA Request for too *closely* “mimic[ing] the statutory authorization” of (k)(1). IRS Mem. 11 n.8. The agency does not explain how this could be considered a flaw.

categories of information and records that might fit the above description “**as applicable.**” Compl. Ex. 1 at 1–2. (emphasis added). In other words, if a particular type of information or record is not “necessary” to permit inspection of an offer-in-compromise sought by EPIC’s FOIA Request, EPIC’s demand is not “applicable” to that type of information or record. Finally, EPIC’s FOIA Request identifies individual IRS documents, such as a Form 7249, that might satisfy EPIC’s request. Compl. Ex. 1 at 1.

Having received EPIC’s perfected FOIA Request, the IRS’s obligation is clear. It must conduct a reasonable search of agency records and disclose to EPIC all non-exempt responsive documents (here, accepted offers-in-compromise and any return information “necessary” to permit inspection thereof). “It is elementary that an agency responding to a FOIA request must conduct[] a search reasonably calculated to uncover all relevant documents, and, if challenged, must demonstrate beyond material doubt that the search was reasonable.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks omitted)).

In carrying out this required process, the IRS may propose precisely which information it believes “necessary” to permit inspection of responsive offers-in-compromise. Perhaps the IRS will assert in its final determination letter that the only applicable return information is Form 7249—a document which the agency has already deemed “necessary” to permit inspection of a given offer-in-compromise. 26 C.F.R. § 601.702(d)(8). Perhaps the IRS, upon conducting the required review, will decide that other return information beyond Form 7249 is “necessary” to permit inspection of a particular offer-in-compromise—a possibility that is expressly envisioned in Executive Order 10,386. It is for the IRS to make such assertions during the FOIA search and review process, and then to “sustain[any] claimed exemption in de novo judicial review.” *Church of Scientology*, 792 F.2d at 150; see also *Ass’n of Retired R.R. Workers v. U.S. R.R. Ret.*

Bd., 830 F.2d 331, 333 (D.C. Cir. 1987) (“The court’s evaluation of an Exemption 3 dispute arises only after the agency charged with administering the statute has reached its own conclusions.”).

But the IRS may not refuse to conduct a search for responsive records simply because it thinks that EPIC’s FOIA Request calls for a mixture of non-exempt and exempt records. This bizarre view of an agency’s FOIA obligations was rejected in *EPIC v IRS I* under the heading of administrative exhaustion:

FOIA specifically places on the agency the burden of establishing that its records are exempt. Neither an agency’s “published rules” nor its regulations can modify the Congress’s clear command. . . . Thus, the IRS cannot disregard the plain statutory text and apply its regulations in a way that forces a requester—like EPIC—to establish that records are not subject to section 6103(a)’s disclosure bar.

EPIC v. IRS I, 910 F.3d at 1238–39 (citations omitted). The IRS may not revive the same discredited doctrine in this case by refusing to conduct a search for responsive records simply because EPIC’s FOIA Request mentions “returns.”

The IRS’s concern that it will be unable to protect taxpayer confidentiality while fulfilling EPIC’s FOIA Request is without foundation. IRS Mem. 10–11. First, accepted offers-in-compromise and return information “necessary” to permit inspection are expressly open to the public. § 6103(k)(1). Confirming that such records exist—and disclosing them to EPIC—works no violation of § 6103(a). This distinguishes EPIC’s FOIA Request from the request at issue in *EPIC v. IRS I*, which called solely for records deemed exempt by the court. *EPIC v. IRS I*, 910 F.3d at 1243. Second, if the IRS determines that any particular records or categories of records suggested by EPIC’s request are *not* necessary for (k)(1) inspection, the IRS has no obligation to

disclose or acknowledge the existence of such records.⁹ As the D.C. Circuit has explained, the IRS may assert exemptions on a category-by-category basis under certain circumstances:

If, therefore, the Commissioner's assertion of a Section 6103 exemption rests upon . . . generic grounds, he will ordinarily be able to make the requisite showing with an affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category.

Church of Scientology, 792 F.2d at 152. For example, if the IRS believes that “returns” are categorically beyond § 6103(k)(1)’s reach, the agency could assert that belief in a determination letter—an act which would reveal no return information at all. Or the IRS might simply inform EPIC that it has identified “[X number of] records necessary to permit inspection of the requested offers-in-compromise” without adding any detail about exempt records. EPIC takes no position on the particular framing of the IRS’s determination, except that it must be produced at the conclusion of a reasonable search process and must withstand de novo judicial review.

Finally, although it is too soon to argue about the disclosability of particular categories of records until the IRS has completed the search process required by the FOIA, the IRS’s attempts to preemptively wall off whole categories of records are baseless. First, contra the agency, “returns” are a specific subset of “return information”—not a distinct category. IRS Mem. 8. The statutory term “return information” is meant to cover all possible appearances of sensitive taxpayer information in IRS records, not to create separate classes of records. *Compare* 26 U.S.C. § 6103(b)(1), *with* 26 U.S.C. § 6103(b)(2). And indeed, the exceptionally broad definition of “return information” easily captures tax returns themselves. *See* § 6103(b)(2)(A) (defining “return information” to include “any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return”).

⁹ Though as noted above, this argument is unavailable as to Form 7249, which the IRS has already deemed necessary for inspection.

This relationship between the two statutory terms is apparent from the usage of “return information” later in § 6103. 26 U.S.C. § 6103(c) permits the Treasury Secretary to disclose “return[s]” and “return information” with a taxpayer’s consent, but it notes that “*return information* shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.” § 6103(c) (emphasis added). Presumably Congress intended to prohibit ill-advised disclosures of both return information *and* returns, even though the text of § 6103(c) only mentions “return information.” Yet if the IRS is correct about the meaning of “return information,” § 6103(c) would allow the Secretary to make reckless releases of whole tax returns while simultaneously prohibiting the disclosure of the same taxpayer information in disaggregated form. The only plausible conclusion is that the IRS is wrong, and that “returns” qualify as “return information.” Thus, to the extent that any underlying returns are necessary to permit inspection of an offer-in-compromise, § 6103(k)(1) requires the disclosure of those documents. *See* Exec. Order 10,386.

Second, the IRS’s attempt to invoke *res judicata* to prevent the disclosure of “*any* records arguably” sought in *EPIC v. IRS I* is both groundless and premature. IRS Mem. 2 n.1. As the D.C. Circuit has explained, “FOIA does not limit a party to a single request, and because the records maintained by an [agency] may change over time, a renewal of a previous request inevitably raises new factual questions[.]” *Negley v. FBI*, 169 F. App’x 591, 594 (D.C. Cir. 2006). So too here: EPIC’s FOIA two requests have called for vastly different set of records—the President’s personal returns in *EPIC v. IRS I*; offer-in-compromise records pertaining to the President and hundreds of related business entities in this case. EPIC’s FOIA requests and cases have also relied on two distinct provisions of law for disclosure—discretionary disclosure under § 6103(k)(3) in *EPIC v. IRS I*; mandatory disclosure under § 6103(k)(1) in this case. And EPIC’s

two FOIA requests were filed nearly a year apart, during which time the IRS's records concerning President Trump and related businesses doubtless changed. Because the two cases plainly "do not share the same nucleus of facts, res judicata does not apply."¹⁰ *Negley*, 169 F. App'x at 594 (quotation marks omitted). In any event, the IRS cannot properly raise such an argument for the Court's resolution until the agency has carried out the search process required by the FOIA. *See Ass'n of Retired R.R. Workers*, 830 F.2d at 333.

In sum, nothing about EPIC's FOIA Request permits the IRS to avoid its search and processing obligations under the FOIA.

CONCLUSION

For the above reasons, the Court should deny the IRS's second Motion to Dismiss EPIC's Complaint. Instead, the Court should order the agency to immediately conduct a reasonable search and to promptly release all nonexempt responsive records.

Respectfully Submitted,

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¹⁰ The IRS incorrectly asserts that *EPIC v. IRS I* and this case both arise out of "the President's refusal to disclose tax records." IRS Mem. 2 n.1. In truth, these cases concern two different refusals by the IRS to disclose two different sets of records in response to two different FOIA requests.

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