

**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)

**STATUS REPORT AND MOTION TO ADOPT A SCHEDULE FOR
FURTHER PROCEEDINGS**

Plaintiff Electronic Privacy Information Center (“EPIC”) respectfully submits this Status Report and Motion to Adopt a Schedule for Further Proceedings. Because Defendant Internal Revenue Service (“IRS”) has failed to serve a timely answer in this Freedom of Information Act (“FOIA”) case—and has thus conceded the facts alleged in EPIC’s Complaint—EPIC urges the Court to follow its ordinary practice at the conclusion of the pleading process and to set a schedule for the disclosure of nonexempt records by the agency. In support of this Motion, EPIC states as follows:

1. EPIC filed a Complaint in this case on April 17, 2018, ECF No. 1, and served the Complaint on the U.S. Attorney for the District of Columbia on April 24, 2018. Aff. of Mailing, ECF No. 5-1. As a result, the IRS had thirty days to “serve an answer or otherwise plead to [EPIC’s] complaint[.]” 5 U.S.C. § 552(a)(4)(C).

2. The Court subsequently granted the IRS an extension of time in which to respond to EPIC's Complaint, ordering the IRS to "file its response to Plaintiff's complaint by June 15, 2018." Minute Order (May 21, 2018).

3. On June 15, 2018, the IRS—rather than filing an answer—moved to dismiss EPIC's complaint under Fed. R. Civ. P. 12(b)(6). Mot. Dismiss, ECF No. 9.

4. On June 29, 2018, EPIC filed an Opposition to the IRS's Motion to Dismiss, ECF No. 10. EPIC explained 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 also filed a Reply in support of the agency's Motion, ECF No. 12.

5. EPIC subsequently moved the Court for leave to file a Surreply concerning the IRS's newly-raised collateral estoppel arguments. Mot. Leave File Surreply, ECF No. 13. The IRS opposed that Motion. Opp'n Pl.'s Mot. Leave File Surreply, ECF No. 14. Upon the IRS's filing of that Opposition—on July 12, 2018—the IRS's Motion to Dismiss was fully briefed.

6. On December 18, 2018, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *EPIC v. IRS*, 910 F.3d 1232 (D.C. Cir. 2018), a separate FOIA suit to obtain President Trump's individual tax returns.

7. 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 argued 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.

8. On December 21, 2018, the Court ordered the IRS to “file a submission in response to Plaintiff’s Notice of Supplemental Authority setting forth Defendant’s position on the impact of the D.C. Circuit’s decision in *Electronic Privacy Information Center v. Internal Revenue Service*, 17-5225 (Dec. 18, 2018), on the instant case by January 10, 2019.” Minute Order (Dec. 21, 2018). At the request of the IRS, the Court extended the IRS’s response deadline to February 11, 2019. Minute Order (Dec. 21, 2018).

9. 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.*

10. The IRS also announced its apparent 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).” 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 (now withdrawn) Motion to Dismiss.

11. As a result of the IRS’s voluntary withdrawal of its own Motion to Dismiss, the agency has failed to “serve an answer or otherwise plead to [EPIC’s] complaint” within the time allowed

by law and this Court's orders. 5 U.S.C. § 552(a)(4)(C); *see also* Minute Order (May 21, 2018). The 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.

12. Although the Federal Rules of Civil Procedure allow a party 14 days to file a responsive pleading after “the court *denies* the motion [to dismiss] or *postpones* its disposition until trial,” this rule offers no relief to a defendant who—having filed a motion to dismiss in lieu of an answer—unilaterally withdraws its own motion many months later upon recognizing that the motion is likely to fail. Fed. R. Civ. P. 12(a)(4)(A) (emphasis added). Were it otherwise, a motion to dismiss could simply become a tool to delay the pleading process: a filing undertaken with no significant chance of success and later withdrawn at the defendant's convenience, without repercussion. The Rules do not permit this result. *Cf. Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 860–61 (D.C. Cir. 2015) (“Indeed, moving to amend on the eve of trial bears the hallmarks of gamesmanship, defeating the orderly character of litigation the Federal Rules of Civil Procedure seek to foster.”).

13. The Rules are similarly clear about the consequence of the IRS's failure to timely serve an answer or responsive pleading: “An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6); *see also Reyes v. Kimuell*, 270 F. Supp. 3d 30, 32 n.1 (D.D.C. 2017) (citing Fed. R. Civ. P. 8(b)(6)) (“Because Mr. Kimuell has not responded, the Court treats the allegations of the complaint as admitted, except as to the amount of damages.”); *Casanova v. Marathon Corp.*, 256 F.R.D. 11, 16 (D.D.C. 2009) (“If a timely answer to a complaint is not filed, it has to follow from Rule 8 that all the allegations in the complaint are deemed

admitted.”); *Seifert v. Winter*, 555 F. Supp. 2d 3, 6 n.2 (D.D.C. 2008) (“Because the defendant did not file an answer to the plaintiff’s complaint, the Court will treat all of the facts alleged in the complaint as true pursuant to Federal Rule of Civil Procedure 8(b)(6).”).

14. Having failed to file a timely answer or other responsive pleading, the IRS has therefore admitted to all of the factual allegations set forth in EPIC’s Complaint. *See* Fed. R. Civ. P. 8(b)(6).

15. Moreover, the IRS’s failure to file a timely answer or other responsive pleading entitles EPIC to the entry of a default against the IRS. “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed. R. Civ. P. 55(a); *see also* *EPIC v. DOJ*, No. 15-CV-1955 (TSC), 2016 WL 5818422, at *1 (D.D.C. Oct. 5, 2016) (“DOJ failed to timely file its Answer to EPIC’s Complaint, and, after request from EPIC (ECF No. 12), the Clerk entered a default against the DOJ on January 6, 2015.”).

16. Although EPIC does not currently seek a default or default judgment in this matter, EPIC does seek the orderly progression of this case according the established procedures of the Court. With the pleading process now concluded, EPIC respectfully urges the Court to set a mutually practicable schedule for the disclosure of nonexempt records and/or briefing. *See, e.g.*, Minute Order, *EPIC v. DHS*, No. 18-43 (TJK) (D.D.C. Apr. 3, 2018) (“Before the Court in this FOIA case are a complaint and an answer. It is hereby ORDERED that the parties shall meet, confer, and file a joint proposed schedule for briefing or disclosure[.]”); Minute Order, *Shisha v. U.S. Citizenship & Immigration Services*, No. 18-268 (TJK) (D.D.C. July 20, 2018) (same); Minute Order, *Shepherd v. CFPB*, No. 18-268 (TJK) (D.D.C. Oct. 4, 2018) (same).

17. EPIC conferred with IRS on February 12, 2019, to propose the filing of a Joint Status Report and a schedule for the disclosure of records and/or briefing. Counsel indicated that the IRS opposed the filing of a Status Report, that the agency did not believe it had admitted to any facts, and that the agency intended to file a second motion to dismiss.

18. Therefore, consistent with this Court's practice in FOIA cases, EPIC moves the Court to adopt the following schedule:

- a. The IRS shall produce and disclose all nonexempt records responsive to EPIC's FOIA request by no later than March 15, 2019; and
- b. The parties shall file a joint status report by no later than March 29, 2019, proposing a schedule for dispositive motions, if necessary.

19. The adoption of the proposed production schedule will facilitate the efficient resolution of this lawsuit and conserve the Court's resources.

20. The IRS's desire to file a second motion to dismiss at a self-appointed time in the future should not upend 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.

21. It is long past time for the IRS to do what the law requires (and what the agency specifically informed EPIC it would do): conduct a reasonable search for records responsive to EPIC's FOIA request, and promptly disclose all nonexempt records. The Court should reject the IRS's further unfounded attempts at delaying this result.

22. A proposed order reflecting this proposal is attached.

Respectfully Submitted,

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