

**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)

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Electronic Privacy Information Center (“EPIC”) respectfully submits this Notice of Supplemental Authority to inform the Court of the decision by the U.S. Court of Appeals for the D.C. Circuit in *EPIC v. IRS (EPIC I)*, No. 17-5225 (Dec. 18, 2018), attached hereto. The D.C. Circuit’s decision, which arises from an EPIC Freedom of Information Act (“FOIA”) suit to obtain President Trump’s individual tax returns, concludes that “the IRS cannot disregard the plain statutory text [of the FOIA] 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 I*, No. 17-5225, at 9. In so holding, the D.C. Circuit has delivered the final blow the IRS’s Motion to Dismiss in this case, ECF. No. 9, which must be denied.

In *EPIC I*, EPIC seeks President Trump’s “individual income tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian businesses.” *EPIC I*, No. 17-5225, at 3. The IRS “declined to comply with [EPIC’s] request” because the IRS’s FOIA rules purportedly “require[d] that a request for a third party’s tax returns include his consent.” *Id.* (citing 26 C.F.R. § 601.702(c)(5)(iii)(C)). EPIC filed suit,

and the district court granted the IRS's motion to dismiss for "failure to exhaust administrative remedies." *Id.* On appeal, the D.C. Circuit found that 26 U.S.C. § 6103(k)(3), upon which EPIC relied for the ultimate release of the records, was "*sui generis*" and could not be invoked by a FOIA requester. *EPIC I*, No. 17-5225, at 19. But the D.C. Circuit rejected the district court's exhaustion holding. The Court explained that the IRS could not place the burden on EPIC, as a FOIA requester, to demonstrate that the records it sought were non-exempt:

As a starting point, we believe the IRS misunderstands its FOIA disclosure obligations. FOIA unambiguously places on an agency the burden of establishing that records are exempt. 5 U.S.C. § 552(a)(4)(B); *Assassination Archives & Research Ctr.*, 334 F.3d at 57–58. To withhold records, then, the IRS must establish that a requester seeks "returns" or "return. information" subject to the section 6103(a) bar on disclosure. The IRS maintains that its "published rules," however, shift that burden to the FOIA requester. *See* 26 C.F.R. § 601.702(c)(4)(i)(E), (c)(5)(iii)(C). Granted, FOIA allows an agency to establish "published rules" governing "the time, place, fees (if any), and procedures to be followed" in making a FOIA request. *See* 5 U.S.C. § 552(a)(3)(A). But the IRS's above-quoted rules do not speak to these purposes; instead they address a requester's substantive right to records. And FOIA specifically places on the agency the burden of establishing that its records are exempt. *Id.* § 552(a)(4)(B). Neither an agency's "published rules" nor its regulations can modify the Congress's clear command. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). 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 I, No. 17-5225, at 8–9. Thus, the Court held that "exhaustion does not bar review of EPIC's FOIA claims." *Id.* at 10.

The D.C. Circuit's decision leaves no doubt: the IRS's Motion to Dismiss EPIC's Complaint in this matter is baseless and must be denied. Even if the EPIC had not constructively exhausted administrative remedies, Pl.'s Opp'n 7–16, ECF No. 10; even if the IRS were not statutorily estopped from relying on an exhaustion defense, Pl.'s Surreply, ECF No. 13-1; and even if EPIC's request were not already "perfected" under the IRS's FOIA rules, Pl.'s Opp'n 17–

20; the D.C. Circuit’s ruling this week in another FOIA case concerning the IRS makes clear that the agency would *still* be obligated to process EPIC’s request. Under *EPIC I*, the IRS may not require EPIC “to establish that records are not subject to section 6103(a)’s disclosure bar” as a condition of processing. *EPIC I*, No. 17-5225, at 9. Yet that is the exact requirement that the IRS belatedly seeks to impose here. *E.g.*, Def’s Reply 3, ECF No. 12 (citing 26 C.F.R. § 601.702(c)(5)(iii)(B)–(C)) (“EPIC must provide taxpayer consent or demonstrate a qualifying material interest in the returns.”). The IRS has ignored “Congress’s clear command” that “the agency [has] the burden of establishing that its records are exempt.” *EPIC I*, No. 17-5225, at 9. As *EPIC I* has established, EPIC was entitled to processing of its request under the FOIA and § 6103(k)(1), even in the absence of taxpayer consent. EPIC has therefore exhausted its administrative remedies, and the IRS is obligated to proceed with a search for responsive records.

The D.C. Circuit also explained that 26 U.S.C. § 6103(k)(1) is “[o]ne exception [that] *does* allow the public to inspect certain return information.” *EPIC I*, No. 17-5225, at 18 n.9 (emphasis added). The Court placed § 6103(k)(1) in the same category of disclosure provisions as 26 U.S.C. § 6104, which “allow[s] public inspection of limited records related to certain tax exempt organizations and trusts.” *EPIC I* at 18 n.9 (citing § 6104). Section 6104—like § 6103(k)(1)—operates “as an exception to the exception from the general disclosure rule offered by FOIA Exemption 3 and I.R.C. § 6103.” *Tax Analysts v. IRS*, 214 F.3d 179, 183–85 (D.C. Cir. 2000); *see also id.* at 183–85 (holding that records, if subject to “inspection” under § 6104(a)(1)(A), “must be disclosed” pursuant to a FOIA request).

EPIC brings the D.C. Circuit’s ruling before the Court now as *EPIC I* was only recently decided.

Respectfully Submitted,

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