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 SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully submits this Surreply solely to respond to the IRS's arguments concerning equitable estoppel, a legal issue which the IRS raised for the first time in its Reply Brief. *See* Reply Supp. IRS Mot. Dismiss ("IRS Reply") 9–10, ECF No. 12.

The IRS contends that EPIC seeks to equitably estop the IRS from "claim[ing] that EPIC did not perfect its request." *Id.* at 9. That is simply false. Nowhere does EPIC state or imply that the IRS should be equitably estopped from anything; indeed, no form of the words "equitable" and "estoppel" even appear in EPIC's Opposition. As EPIC explained at length, it is the FOIA itself—and not any exercise of this Court's equitable authority—which prevents the IRS from prevailing on an untimely claim of imperfection. Pl's Opp'n Def's Mot. Dismiss ("EPIC Opp'n") 7–16, ECF No. 10.

Equitable estoppel, which the IRS notably fails to define, "is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has

detrimentally relied on that litigant's conduct." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988). But equitable estoppel is irrelevant to the Court's consideration of the arguments set out in EPIC's Opposition. First, as EPIC explained, *the FOIA* does not allow the IRS to excuse itself from a processing deadline that was already triggered. This is not a claim in equity; the agency's imperfection and failure-to-exhaust arguments are simply not "available" as a matter of law. *ATC Petroleum, Inc.*, 860 F.2d at 1111; *cf. City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) ("We are, of course, barred by statute from considering this argument if, as the FAA argues, petitioner failed to articulate it before the agency."); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 814 (D.C. Cir. 1998) ("The statute bars us from considering the first argument because it was not raised with the agency during the rulemaking."). Second, although EPIC did detrimentally rely on the IRS's representations, EPIC nowhere argues that such reliance entitles it to equitable estoppel. In suggesting the opposite, the agency is attempting to impose an artificial burden of proof on EPIC. Moreover, the IRS is arguing that any requester acting in reliance on a statutory right is necessarily seeking equitable relief. That is not correct.

It is Congress that has precluded the IRS from relying on an exhaustion defense. Congress has determined that a requester "shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions. . . ." 5 U.S.C. § 552(a)(6)(C)(i). The IRS does not—and could not—contend that it provided any responsive records or issued any determination identifying a flaw in EPIC's request within the twenty days provided by 5 U.S.C. §§ 552(6)(A)(i). When the March 6th deadline passed, EPIC had constructively exhausted its remedies and the IRS was estopped by statute from relying on an exhaustion defense. *See* 5 U.S.C. § 552(a)(6)(C)(i). There is absolutely no

provision in the FOIA permitting an agency to reset the clock after it has already violated a deadline set by Congress.

Congress has also determined that 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)]." 5 U.S.C. § 552(a)(6)(E)(iii). That command—"shall"—is unconditional. The FOIA does not provide a mechanism for an agency, months later, to reverse its position and assert that a request was imperfect. The IRS's duty to "process as soon as practicable" was established by law as soon as the agency granted expedition to EPIC. 5 U.S.C. § 552(a)(6)(E)(iii); *see also* 5 U.S.C. § 552(a)(6)(C)(i) (setting a twenty-day ceiling for processing, expedited or otherwise).

Finally, the IRS's reliance on *Hertzberg v. Veneman*, 273 F. Supp. 2d 67 (D.D.C. 2003), is entirely misplaced. The current dispute is over *processing* of a FOIA request, not the agency's assertion of exemptions (which comes later). *See* IRS Reply 2, 9. The IRS repeatedly conflates these two distinct stages of the FOIA process. In *Hertzberg*, the FOIA requester argued that because representatives of the Department of Agriculture had given "repeated assurances" that the Department was "preparing a comprehensive investigation," the agency could not subsequently withhold relevant records under Exemption 5. *Hertzberg*, 273 F. Supp. 2d at 82–83. EPIC is not arguing that the IRS is estopped from withholding records or (as the IRS presents it) that the agency can "waive taxpayer confidentiality rights under section 6103." IRS Reply 12. EPIC is simply arguing that the IRS is required to *process the request*. In the course of processing the request the agency may, as it well knows, assert various FOIA exemptions and propose which "applicable" categories of tax records fall within the scope EPIC's request (e.g.,

Form 7249). EPIC Opp'n 2–3. That is not in dispute and is entirely irrelevant to the question of whether the agency is obligated to process the request in the first place.

The FOIA precludes the IRS from arguing at this stage that EPIC failed to exhaust administrative remedies. The FOIA's twenty-day processing deadline was long ago triggered and violated by the IRS. No exercise of equitable power is required to hold the IRS to its prior representations in accordance with the Act. Congress has dictated, as a matter of law, that EPIC's administrative remedies were exhausted as soon as the agency breached its processing obligations, making judicial review available.

For this reason, and the reasons set forth in EPIC's Opposition, the IRS's Motion to Dismiss should be denied.

Respectfully Submitted,

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