

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY	)	
INFORMATION CENTER,	)	Case No. 1:17-cv-00670-JEB
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	
_____	)	

**INTERNAL REVENUE SERVICE’S MOTION TO DISMISS**

Defendant Internal Revenue Service (the “Service”) moves to dismiss Counts I through V of Plaintiff’s Complaint. As grounds for this motion, the Service states that Plaintiff Electronic Privacy Information Center’s (“EPIC”) Freedom of Information Act (“FOIA”) claims in Counts I, II, and III must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because EPIC failed to exhaust its administrative remedies. EPIC’s Administrative Procedures Act (“APA”) claims in Counts IV and V must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because the FOIA precludes simultaneous judicial review under the APA. Alternatively, EPIC’s APA claim in Count IV should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because EPIC lacks standing, and both EPIC’s APA claims in Counts IV and V should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because EPIC fails to state claims upon which relief can be given.

A supporting memorandum of law, the declaration of Michael C. Young, the exhibits

attached to Mr. Young's declaration, and a proposed order are included with this motion.

Dated: June 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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	)	
Defendant.	)	
_____	)	

**INTERNAL REVENUE SERVICE’S MEMORANDUM IN SUPPORT  
OF ITS MOTION TO DISMISS**

Defendant Internal Revenue Service (the “Service” or “IRS”) submits this memorandum in support of its motion to dismiss Counts I through V of the complaint. Plaintiff Electronic Privacy Information Center’s (“EPIC”) FOIA claims must be dismissed because EPIC failed to provide President Donald J. Trump’s written consent to release his tax returns with its FOIA requests, as required by 26 U.S.C. § 6103(c) and the applicable FOIA Treasury regulations. Because EPIC failed to perfect its FOIA requests, Counts I through III should be dismissed for failure to exhaust administrative remedies. EPIC’s APA claims, Counts IV and V, must be dismissed because the FOIA precludes simultaneous judicial review under the APA. Alternatively, EPIC’s APA claims must be dismissed because EPIC lacks standing and because EPIC fails to state claims upon which relief can be given.

### SUMMARY OF ARGUMENT

EPIC filed this action pursuant to the Freedom of Information Act (“FOIA”) and the Administrative Procedures Act (“APA”), seeking the release of President Trump’s tax returns and tax return information.<sup>1</sup>

EPIC requested copies of President Trump’s tax returns in two separate requests for records dated February 16, 2017, and March 29, 2017. In Counts I through III of the complaint, EPIC alleges under the FOIA that: (I) the Service failed make a determination regarding EPIC’s requests for records; (II) the Service failed to take reasonable steps to release information not exempt from disclosure; and (III) the Service has wrongfully withheld the agency records requested by EPIC.

EPIC’s FOIA claims fail because EPIC has not submitted to the Service a perfected FOIA request that complies with the Service’s FOIA regulations. Specifically, because EPIC’s First and Second Records Requests seek a third party’s tax return information, EPIC was required to obtain the taxpayer’s written authorization and provide it to the Service along with its requests. It has not done so or even alleged that it has done so.

The Service is prohibited from disclosing tax returns and tax return information under 26 U.S.C. § 6103(a), unless another provision of Title 26 allows it.<sup>2</sup> One such provision is subsection 6103(c), which allows the disclosure of third-party tax return information, but only upon written consent of the taxpayer. To overcome this general bar on disclosure of taxpayer information in FOIA requests, 26 C.F.R. § 601.702(c)(5)(iii)(C) allows the Service to respond to

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<sup>1</sup> EPIC also seeks costs and attorneys’ fees. The issue of costs and attorney’s fees is premature as plaintiff has not moved for costs and attorneys’ fees at this time.

<sup>2</sup> In fact, disclosure of return information to a third party, without the proper authorization, could result in criminal and civil penalties. *See* 26 U.S.C. § 7213(a)(1); 26 U.S.C. § 7431.

a proper FOIA request for third-party taxpayer information when the request includes a “properly executed power of attorney, Privacy Act consent, or tax information authorization.” EPIC failed to provide this required written consent, and thus failed to perfect its FOIA request. As such, EPIC failed to exhaust its administrative remedies, and the Court must dismiss Counts I, II, and III pursuant to Fed. R. Civ. P. 12(b)(6).

In Counts IV and V of the complaint, EPIC alleges that the Service violated the APA by closing EPIC’s FOIA requests, and by failing to seek permission from the Joint Committee on Taxation to release the requested records. EPIC’s APA claims fail because the FOIA provides an adequate remedy in this case. A trial court has subject matter jurisdiction over an APA claim only if “there is no other adequate remedy in a court.” 5 U.S.C. § 704. Here, the FOIA provides a “special and adequate review procedure” for obtaining President Trump’s tax return information which precludes APA review. *Citizens for Responsibility and Ethics in Washington (“CREW”) v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1246 (D.C. Cir. 2017). While EPIC must still obtain the proper disclosure authorization before it is entitled to President Trump’s tax returns,<sup>3</sup> the relief contemplated under the FOIA provides an adequate remedy in this case, and so the Court must dismiss EPIC’s APA claims pursuant to Fed. R. Civ. P. 12(b)(1).

Alternatively, EPIC’s APA claims should be dismissed under Fed. R. Civ. P. 12(b)(1) because EPIC lacks standing, and EPIC’s APA claims should be dismissed under Fed. R. Civ. P. 12(b)(6) because they fail to state claims upon which relief can be granted.

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<sup>3</sup> In order to be permitted access to President Trump’s tax return information, EPIC must submit a perfected FOIA request that includes authorization to receive third-party tax return information. *See* 26 U.S.C. § 6103(c), 26 C.F.R. § 601.702(c)(5)(iii)(C). Once the Service receives a perfected request, it may still withhold records or portions of records pursuant to a lawful FOIA exemption under 5 U.S.C. § 552(b), including section 552(b)(3) with 26 U.S.C. § 6103.

## **BACKGROUND**

### **A. The February 16, 2017 Records Request**

Ms. Eleni Kyriakides, on behalf of EPIC, submitted a request for records to the Service dated February 16, 2017 (“First Records Request”). (Complaint, Dkt. No. 1, ¶ 36; Declaration of Michael Young (“Young Decl.”) ¶ 4). The First Records Request sought “all of Donald J. 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.” (Compl. ¶ 37; Young Decl. ¶ 4).

The Service received the First Records Request on February 16, 2017, and assigned it case number F17048-0017. (Young Decl. ¶ 6). The Service timely responded to the First Records Request by letter dated March 2, 2017. (Compl. ¶ 39; Young Decl. ¶ 8). In the letter, the Service stated that the information EPIC sought was confidential tax return information of a third party. (Young Decl. ¶ 8). The Service informed EPIC that the request for the third party return information was “incomplete” and could not be processed unless it “furnish[ed] a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate” pursuant to the Treasury Regulations. (Young Decl. ¶ 8). The Service stated that it was “closing [EPIC’s] request as incomplete with no further action” because the required authorizations were not provided. (Compl. ¶ 40; Young Decl. ¶ 8).

### **B. The March 29, 2017 Records Request**

Mr. John Davisson, on behalf of EPIC, submitted a second request for President Trump’s tax return information to the Service dated March 29, 2017 (“Second Records Request”). (Compl. ¶ 41; Young Decl. ¶ 10). The Second Records Request sought “all of Donald J. 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.” (Compl. ¶ 42; Young Decl. ¶ 10).

The Service received the Second Records Request on March 29, 2017. (Young Decl. ¶ 12). EPIC characterizes the Second Records Request as “an appeal and renewed FOIA request,” (Compl. ¶ 41). But, the Service treated the Second Records Request as a new FOIA request and assigned it case number F17089-0037 because the Service’s response to the First Records Request was not a determination, and thus, no appeal rights attached. (Young Decl. ¶¶ 9, 12).

In a letter dated April 6, 2017, the Service responded to EPIC’s Second Records Request. (Compl. ¶¶ 47-49; Young Decl. ¶ 14). The Service denied EPIC’s characterization of the Second Records Request as an “appeal” and specifically stated that it would “not consider an appeal of an incomplete FOIA request that cannot be processed due to the inability of the requester to establish a right to the disclosure of the records requested.” (Young Decl. ¶ 15). The Service further reiterated that the request for the third party return information could not be processed until EPIC “furnish[ed] a properly executed power of attorney, Privacy Act consent, or tax information authorization, as appropriate” pursuant to the Treasury Regulations. (Young Decl. ¶ 14). The Service informed EPIC that it was “closing [EPIC’s] request as incomplete with no further action” because the required authorizations were not provided. (Compl. ¶¶ 48-49; Young Decl. ¶ 16).

EPIC has not provided a properly executed power of attorney, Privacy Act consent, or tax authorization to the Service that would permit it to receive the President Trump’s tax return information. (Young Decl. ¶¶ 5, 11). Tellingly, EPIC has not alleged that it provided the Service with the required consent from President Trump to receive records regarding his tax return information, to the extent those records exist. (*See* Complaint, generally).



## STANDARDS OF REVIEW

### A. Standard of Review under Fed. R. Civ. P. 12(b)(1)

A motion under Fed. R. Civ. P. 12(b)(1), “presents ‘a threshold challenge’ to the court’s jurisdiction.” *Morrow v. United States*, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987)). The court must “assume the truth of all material factual allegations in the complaint and ‘construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.’” *Am. Nat’l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). The plaintiff must establish subject matter jurisdiction by a preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int’l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). In evaluating a Rule 12(b)(1) motion, “the court may consider materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case.” *Shekoyan*, 217 F. Supp. 2d at 63.

### B. Standard of Review under Fed. R. Civ. P. 12(b)(6)

Under Fed. R. Civ. P. 12(b)(6), a party may challenge the sufficiency of a complaint on the ground that it “fail[s] to state a claim upon which relief can be granted.” “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Patrick v. District of Columbia*, 179 F. Supp. 3d 82, 86 (D.D.C. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

A claim has facial plausibility when the pleaded factual content “allows the court to draw the reasonable inference that the [defendant] is liable for the misconduct alleged.” *Patrick*, 179 F. Supp. 3d at 89 (citing *Iqbal*, 556 U.S. at 678). When ruling on Rule 12(b)(6) motions to dismiss, the court may examine documents incorporated into the complaint by reference, matters

of which a court may take judicial notice, and other “documents upon which the plaintiff’s complaint necessarily relies,” even if produced by the defendant. *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009); *see also, Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *but see* FED. R. CIV. P. 12(d) (holding that “if, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”).

#### ARGUMENT

### **I. THE COURT SHOULD DISMISS COUNTS I, II, AND III BECAUSE EPIC FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.**

#### **A. EPIC Was Not Authorized to Request and Receive President Trump’s Tax Return Information, and Therefore It Has Not Exhausted Its Administrative Remedies.**

The FOIA grants federal courts jurisdiction to “enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). However, before seeking judicial review under the FOIA, the requester must first exhaust his or her administrative remedies. *Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004); *Oglesby v. Dep’t of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990). Exhaustion is required in FOIA cases “so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.” *Flaherty v. President of the United States*, 796 F. Supp. 2d 201, 206 (D.D.C. 2011).

The Court of Appeals for the District of Columbia Circuit has held that the exhaustion requirement is a jurisprudential doctrine rather than a jurisdictional prerequisite. *Hildalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003); *Marino v. DOJ*, 993 F. Supp. 2d 1, 11 (D.D.C. 2013). When a Plaintiff does not exhaust its administrative remedies before filing suit, the suit is properly dismissed under Rule 12(b)(6). *Marino*, 993 F. Supp. 2d at 11.

EPIC's FOIA claim fails on its face because it has not submitted to the Service a perfected FOIA request that complies with the Service's FOIA regulations. Specifically, because EPIC's First and Second Records Requests seek a third party's tax return information, EPIC was required to obtain the taxpayer's written authorization and provide it to the Service along with its requests. It has not done so or even alleged that it has done so. Accordingly, EPIC failed to exhaust its administrative remedies, and Counts I, II, and III must be dismissed.

1. EPIC's Records Request Does Not Comply with the Service's Regulations Governing Requests for Third Parties' Tax Return Information.

The FOIA requires requests to be made "in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A). It directs agencies to promulgate their own regulations to "carry out the provisions" of the Act. 5 U.S.C. § 552(a)(4)(A)(i). The Service promulgated its FOIA regulations at 26 C.F.R. § 601.702.

The Service's FOIA regulations contain special requirements for requesting information protected by a non-disclosure statute. Specifically, when an individual requests records containing information "the disclosure of which is limited by statute or regulations (as, for example . . . *section 6103 and the regulations thereunder*)" the request itself must "establish the identity and the right of the person making the request to the disclosure of records in accordance with paragraph (c)(5)(iii) of this section." 26 C.F.R. § 601.702(c)(4)(i)(E) (emphasis added). For example, when the requester seeks his or her own information, the request must confirm the requester's identity. 26 C.F.R. § 601.702(c)(5)(iii)(A)-(B). When the requester seeks the protected information of *another* person – as EPIC seeks here – the requester must provide the Service with a "properly executed power of attorney, Privacy Act consent, or tax information

authorization,<sup>4</sup> as appropriate.” 26 C.F.R. § 601.702(c)(5)(iii)(C). Unless a requester submits the required written consent to the Service, the materials and information protected by section 6103 – including the tax returns that EPIC seeks here – are not subject to disclosure under the FOIA.

EPIC has not alleged that it provided the Service with a “properly executed power of attorney . . . or tax information authorization,” along with its First or Second Records Requests or at any point thereafter, as required by 26 C.F.R. § 601.702(c)(5)(iii)(C). EPIC admits that it received the Service’s March 2, 2017, and April 6, 2017 letters, which advised it to submit a power of attorney or tax information authorization, and which informed it that the failure to do so would render its request incomplete. (Compl. ¶¶ 40, 48-49; Young Decl. ¶¶ 8, 14). But EPIC did not do so.

EPIC cannot avoid this requirement because all of the information it has requested is prohibited from disclosure by section 6103 of the Internal Revenue Code. Section 6103 – which is explicitly referenced by the FOIA regulations – limits the disclosure of taxpayers’ “returns” and “return information.” Return information is defines broadly as:

A taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, **or any other data**, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof)

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<sup>4</sup> Under the Treasury Regulations, a tax information disclosure is a “separate written document pertaining solely to the authorized disclosure . . . [that] must be signed . . . and dated by the taxpayer who filed the return or to whom the return information relates. At the time it is signed and dated by the taxpayer, the written document must also indicate – (i) the taxpayer’s identity information described in section 6103(b)(6) ; (ii) the identity of the person or persons to whom the disclosure is to be made; (iii) the type of return (or specified portion of the return) or return information (and the particular data) that is to be disclosed; and (iv) the taxable year or years covered by the return or return information.” 26 C.F.R. § 301.6103(c)-1(b)(1)(i)-(iv) .

of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2) (emphasis added); *see also* 6103(c) (requiring authorization for disclosure of third party tax information). Section 6103’s broad definition of “return information” reaches records the Service gathered or generated in connection with even the possible existence of a person’s liability. It also reaches records of law enforcement requests for tax returns and records “mentioning or referring to” such requests. *Id.* (return information includes “whether the taxpayer’s return was . . . subject to other investigation); *see also, Snider v. United States*, 468 F.3d 500, 507 (8th Cir. 2006) (disclosure of fact that taxpayer was subject of criminal tax investigation prohibited because the fact of whether taxpayer’s return was subject to “other investigation” constituted return information).<sup>5</sup>

2. EPIC’s Failure to Provide the Service with Written Authorization Renders Its Requests Imperfect and Constitutes a Failure to Exhaust Administrative Remedies.

A request for records is perfected only if it “conforms in every respect” with the Service’s rules and procedures. 26 C.F.R. § 601.702(c)(1)(i). A nonconforming request is not perfected, and therefore relieves the agency of any obligation to search for records, or provide a determination to the requester. *Walsh v. F.B.I.*, 905 F. Supp. 2d 80, 84 (D.D.C. 2012) (“Under FOIA, an agency’s obligations to provide information do not begin until the agency receives a valid request.”); *see also, Hull v. IRS*, No. 09-cv-00024, 2010 U.S. Dist. LEXIS 78004, at \*12-13 (D. Co. Aug. 3, 2010), *aff’d*, *Hull v. IRS*, 656 F.3d 1174, 1192 (10th Cir. 2011). The failure to

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<sup>5</sup> Indeed, information regarding whether or not a taxpayer has even filed a return is itself prohibited from disclosure under Section 6103. *Housley v. I.R.S.*, 697 F. Supp. 2d 3, 4 (D.D.C. 1988) (information concerning “the fact of filing and the potential audit of tax returns of taxpayers other than [the plaintiff]” was prohibited from disclosure by federal employees under Section 6103 “except as authorized by the taxpayer.”).

submit a perfected request also amounts to a failure to exhaust administrative remedies that precludes judicial review. *Id.*; *Dale v. I.R.S.*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002) (“An agency’s obligations commence upon receipt of a valid request; failure to file a perfected request therefore constitutes failure to exhaust administrative remedies.”).

Because EPIC did not provide the taxpayer’s written authorization for disclosure of its tax return information, it did not perfect its First and Second Records Requests. This means that: (1) the Service’s 20-day statutory period to substantively respond to the request never began to run; (2) the Service did not search (and was not required to search) for any potentially responsive records; and (3) the Service never issued an adverse determination such as withholding of any records from disclosure in response to the Records Request. 26 C.F.R. § 601.702(c)(1)(i).

This, in turn, also means that EPIC failed to exhaust its administrative remedies before filing this action. *See Kalu v. IRS*, No. 14-998, 2015 WL 4077756, at \*5-6, 2015 U.S. Dist. LEXIS 85277, at \*16 (D.D.C. July 1, 2015) (dismissing FOIA claim against Service where Plaintiffs’ attorney failed to submit properly executed power of attorney to Service); *Hull* 2010 U.S. Dist. LEXIS 78004, at \*12-13, *aff’d*, *Hull*, 656 F.3d at 1192 (dismissing FOIA claim where neither the plaintiff nor her representative submitted the required third party authorization); *Scaiife v. IRS*, No. 02-1805, 2003 U.S. Dist. LEXIS 22661, at \*7-8 (D.D.C. Nov. 20, 2003) (same); *Brace v. Dept. of Treas.*, No. 99-2713, 2000 U.S. Dist. LEXIS 14781 (D.D.C. Sept. 12, 2000) (same). EPIC therefore cannot maintain its FOIA claims against the Service, and the Court must dismiss Counts I through III under Rule 12(b)(6). *Id.*; *see also, Walsh*, 905 F. Supp.2d at 84 (“Failure to file a perfected request therefore constitutes failure to exhaust administrative remedies”); *Dale*, 238 F. Supp. 2d at 107 (dismissing case where plaintiff “failed to comply with the administrative requirements of the FOIA”).

**II. THE COURT SHOULD DISMISS COUNTS IV AND V BECAUSE THE FOIA PROVIDES AN ADEQUATE REMEDY IN THIS CASE.**

**A. The Court Lacks Jurisdiction to Adjudicate EPIC's APA Claims because the FOIA Provides an Adequate Remedy.**

A trial court has subject matter jurisdiction over an APA claim only if “there is no other adequate remedy in a court.” 5 U.S.C. § 704. Here, the FOIA provides a “special and adequate review procedure” for obtaining President Trump’s tax return information which precludes APA review. *CREW*, 846 F.3d at 1246. Because the FOIA provides an “adequate remedy” in this case, the Court must dismiss EPIC’s APA claims pursuant to Fed. R. Civ. P. 12(b)(1).

**B. The Availability of an Adequate Remedy under the FOIA Precludes Judicial Review under the APA.**

EPIC’s APA claims also fail for another, independent reason. The APA provides for judicial review only when “there is no other adequate remedy in a court[.]” 5 U.S.C. § 704; *see generally, Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (“Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.”). Courts have overwhelmingly concluded that the FOIA remedy under 5 U.S.C. § 552(a)(4)(B) is adequate to displace an APA cause of action requesting similar relief.

“When considering whether an alternative remedy is ‘adequate’ and therefore preclusive of APA review, [courts] look for ‘clear and convincing evidence’ of ‘legislative intent’ to create a special, alternative remedy and thereby bar APA review.” *CREW*, 846 F.3d. at 1244 (*citing Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009)). The D.C. Circuit has found the requisite legislative intent where Congress has provided “an independent cause of action or an alternative review procedure.” *Id.* (*citing El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep’t. of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005)). The requisite intent also exists where the statute provides for *de novo* district court review of a claim. *Id.* (*citing El Rio*, 396

F.3d at 1270 (“[W]here a statute affords an opportunity for *de novo* district-court review, the court has held that APA review was precluded because Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA.”); *see also*, *Envtl. Defense Fund v. Reilly*, 909 F.2d 1497, 1506 (D.C. Cir. 1990).

In *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Justice*, the D.C. Circuit conclusively held that the FOIA offers an “adequate remedy” within the meaning of 5 U.S.C. § 704. *CREW*, 846 F.3d. at 1245. The Court held that the FOIA’s “special and adequate review procedure[s],” including *de novo* review, “exhibit[ed] all of the indicators we have found to signify Congressional intent.” *Id.* at 1245.

Consistent with this framework, courts within this Circuit have overwhelmingly concluded that litigants cannot bring APA claims when the type of relief they seek is available under the FOIA itself. *Harvey v. Lynch*, 123 F. Supp. 3d 3, 7-8 (D.D.C. 2015); *see also*, *CREW*, 846 F.3d. at 1244; *Richardson v. Bd. of Governors*, No. 16-867, 2017 U.S. Dist. LEXIS 48916 (D.D.C. Mar. 31, 2017); *Johnson v. United States*, No. 16-72, 2017 U.S. Dist. LEXIS 31232 (D.D.C. Mar. 3, 2017); *Lieberman v. U.S. Dep’t of Trans.*, No. 15-1178, 2016 U.S. Dist. LEXIS 180505, at \*13 n.6 (D.D.C. Dec. 31, 2016); *Cause of Action Inst. v. Eggleston*, No. 16-871, 2016 U.S. Dist. LEXIS 173426, at \*22-27 (D.D.C. Dec. 15, 2016); *Blank Rome LLP v. Dep’t of the Air Force*, No. 15-1200, 2016 U.S. Dist. LEXIS 128209, at \*42-43 (D.D.C. Sept. 20, 2016); *Manna v. U.S. Dep’t. of Justice*, No. 15-794, 2016 U.S. Dist. LEXIS 125230, at \*11-14 (D.D.C. Sept. 15, 2016); *Pawelski v. FBI*, No. 14-940, 2014 U.S. Dist. LEXIS 172108, 1-2 n.1 (D.D.C. Dec. 12, 2014); *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 452 (D.D.C. Sept. 16, 2014); *Odland v. FERC*, 34 F. Supp. 3d 3, 23 (D.D.C. Mar. 27, 2014); *Am. Chemistry Council*,



*Inc. v. Dep't. of Health & Human Servs.*, 922 F. Supp. 2d 56, 66 (D.D.C. 2013); *Pub. Employees for Env'tl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 317 (D.D.C. 2012); *EPIC v. NSA*, 795 F. Supp. 2d 85, 95 (D.D.C. 2011) (“APA claims arising out of an agency’s response to a FOIA request must be dismissed when they seek relief that can be obtained through a FOIA claim itself”); *Feinman v. FBI*, 713 F. Supp. 2d 70, 76 (D.D.C. 2010); *Kenney v. U.S. Dep't. of Justice*, 603 F. Supp. 2d 184, 190 (D.D.C. 2009); *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 111-112 (D.D.C. 2005).

**C. EPIC’s APA Claims Must Be Dismissed because They Seek Relief Available under the FOIA.**

The ultimate relief EPIC seeks under both the FOIA and the APA is the release of President Trump’s tax returns.<sup>6</sup> Because the FOIA’s review procedure provides for the release of records as a possible remedy, EPIC’s APA claims must be dismissed.

EPIC seeks the following relief in the complaint: “(A) Hold unlawful and set aside the IRS’ rejection of EPIC’s FOIA Request; (B) Order Defendant to immediately conduct a reasonable search for all responsive records; (C) Order Defendant to take all reasonable steps possible to release nonexempt records; and (D) Order Defendant to disclose to Plaintiff all responsive, non-exempt records.”<sup>7</sup> (Complaint, p. 14, “Requested Relief”). This relief is specifically available through the FOIA. Indeed, EPIC invoked the FOIA in both requests for records it submitted to the Service. The fact that EPIC cannot receive these materials unless it submits to the Service the proper form does not undermine the conclusion that FOIA provides

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<sup>6</sup> See Complaint, ¶ 1 (“This is an action . . . for injunctive and other appropriate relief to secure the release of agency records requested by Plaintiff[.]”).

<sup>7</sup> Plaintiff also seeks an order that the requested records are produced without the assessment of fees, that the Court grant EPIC’s request for a fee waiver, and to aware EPIC its costs and reasonable attorney’s fees. (See Complaint, p.14, “Requested Relief”).

EPIC's sole remedy. The "determination that FOIA is the proper vehicle for [a plaintiff's] claim is entirely distinct from the question whether [the plaintiff] is entitled to relief." *CREW*, 846 F.3d at 1246.

If EPIC exhausts all administrative remedies under the FOIA, it can obtain a *de novo* review of the agency's withholdings, and request that the Court "enjoin [the Service] from withholding agency records and [] order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Consequently, the Court must dismiss EPIC's APA claims because the FOIA provides the same remedy.

**III. THE COURT SHOULD DISMISS EPIC'S APA CLAIMS BECAUSE EPIC LACKS STANDING UNDER THE APA TO CHALLENGE THE ALLEGED WITHHELD AGENCY ACTION.**

EPIC's APA claim in Count V alleges that the Service unlawfully withheld agency action by "fail[ing] to seek permission from the Joint Committee on Taxation to release the records EPIC has requested." (Compl. ¶¶ 71-73). Count V should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because EPIC has failed to establish that it is an "aggrieved party" under the APA, and thus lacks standing under the APA to challenge the Secretary's inaction.

To establish "aggrieved" status under the APA, EPIC must show "that it has suffered an injury in fact traceable to the Commission's ruling and redressable by a decision in [EPIC's] favor; that the interest thereby abridged was arguably within the zone protected or regulated by the constitutional or statutory guaranty in question; and that Congress has not manifested an intent to withhold judicial review from the class to which the petitioner belongs." *Water Transp. Ass'n v. I.C.C.*, 819 F.2d 1189, 1193-94 (D.C. Cir. 1987); *see also*, *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 499 (D.C. Cir. 1994). EPIC fails to establish how it has suffered an injury in fact by the alleged inaction or why it is in the zone of interest of Section 6103(k)(3). There is

also no indication that Congress intended there to be judicial review of agency inaction under Section 6103(k)(3). As such, EPIC has failed to establish standing under the APA.

**IV. THE COURT SHOULD DISMISS EPIC’S APA CLAIMS BECAUSE THEY FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GIVEN.**

**A. EPIC Fails to Allege Any Facts to State a Plausible Claim that the Service’s Actions Were Arbitrary and Capricious.**

Count IV of EPIC’s complaint fails to allege *any* facts to plausibly show that the Service’s decision to close EPIC’s First and Second Records Requests were arbitrary, capricious, an abuse of discretion, not in accordance with the law, or short of statutory right under 5 U.S.C. §§ 706(2)(a) or (c).

Under the APA, the Court may review a challenge to a final agency action by an aggrieved party, *see* 5 U.S.C. §§ 702, 704, but the Court may only set aside a final agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard of review governs the Court’s review of an agency’s decision in the absence of an alternative standard in the agency’s organic statute. *See Friedman v. Sebelius*, 686 F.3d 813, 827 (D.C. Cir. 2012). This is a “deferential” standard, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007), which “presume[s] the validity of agency action,” *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999), and precludes the Court from substituting its judgment for that of the agency. *See Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Court “will not disturb the decision of an agency that has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013) (quotations and citation omitted).

Here, EPIC's complaint fails to allege *any* particularized facts describing why the Service closed the EPIC's First and Second Records Requests. Instead, the complaint simply states that EPIC submitted the First and Second Record Requests, the Service acknowledged receiving the requests, and that the Service subsequently closed the requests as incomplete with no further action. (Compl. ¶¶ 36-49, 66-70.) These sparse allegations fail to put forth facts that plausibly give rise to an entitlement of relief under § 706(2). *See Iqbal*, 556 U.S. at 679. Consequently, the Court should dismiss Count IV for failure to state a claim.

**B. EPIC Does Not Plausibly Allege that the Service Unlawfully Withheld Agency Action.**

Count V of EPIC's complaint fails to state a claim that the Service unlawfully withheld agency action by failing to seek permission from the Joint Commission on Taxation. Section 6103(k)(3) states that "[t]he Secretary [of Treasury]<sup>8</sup> *may*, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer" for "tax administration purposes." 26 U.S.C. § 6103(k)(3) (emphasis added). To the extent that Count V is predicated on this provision, and even assuming EPIC has standing to bring it, Count V must be dismissed for failure to state a claim because the plain language of the statute does not require the Secretary of the Treasury to take specific actions, including to "seek permission from the Joint Commission on Taxation to release the records EPIC has requested." (Compl. ¶ 72). It is solely in the Secretary's discretion both to seek approval by the Joint Committee on Taxation, and then, if that approval is received, to release that information if he believes doing so would be useful for "tax administration purposes." Nor

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<sup>8</sup> Notably, the statute references only the Secretary of the Treasury, who is not a party to this case. *See* 26 U.S.C. § 7701(a)(11).

has EPIC alleged that release of the information is “necessary for tax administration purposes,” as § 6103(k)(3) requires.

Section 706(1) of the APA “grants judicial review only if a federal agency has a ‘ministerial or non-discretionary’ duty amounting to ‘a specific, unequivocal command.’” *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)). In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court “set out the limits the APA places upon judicial review of agency inaction.” *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1097-1099 (D.C. Cir. 2015) (citing *Norton*, 542 U.S. at 61). Relevant here, “the Court held that ‘a claim under [section] 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action *that it is required to take.*’” *Id.* at 1098 (emphasis added).

Here, nothing in 26 U.S.C. § 6103(k)(3) compels the Secretary to seek permission from Congress to disclose taxpayer information—any agency action contemplated by § 6103(k)(3) was entirely discretionary. As such, EPIC has failed to allege that the Service failed to take a discrete agency action that it is *required* to take, and the Court should dismiss Count V for failure to state a claim.

**V. EPIC’S FOIA AND APA CLAIMS FAIL UPON ADDITIONAL GROUNDS THAT THE SERVICE RESERVES THE RIGHT TO ASSERT AS AFFIRMATIVE DEFENSES.**

If the Court denies the Service’s motion in whole or part, the Service will respond to the remaining allegations in EPIC’s complaint and assert certain affirmative defenses, including, but not limited to:

- EPIC’s FOIA claims fail to state a claim upon which relief can be given.
- Even if EPIC had submitted a perfected FOIA request by submitting the requisite written third party authorization, the Service may withhold any responsive records or portions

thereof that are exempt from disclosure pursuant to the exemptions contained in the FOIA, 5 U.S.C. § 552(b).

- The Court lacks jurisdiction under both the FOIA and the APA to compel the Service to surrender its discretion in disclosing the records sought, and to seek permission from the Joint Commission on Taxation to release the records EPIC has requested.
- EPIC is neither eligible nor entitled to an award of attorney's fees and costs.

### CONCLUSION

For the foregoing reasons, the Internal Revenue Service requests that the Court dismiss EPIC's Complaint in its entirety with prejudice.

Dated: June 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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