IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET B. KWOKA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

C. A. No. 1:17-cv-01157

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Margaret B. Kwoka moves for summary judgment on her claim under the Freedom of Information Act against Defendant Internal Revenue Service (IRS). Attached with this motion are a memorandum in support of the motion and in opposition to the IRS's motion for summary judgment, a statement of undisputed material facts, a response to the IRS's statement of undisputed material facts, proposed order, and the declarations of Margaret B. Kwoka and Patrick D. Llewellyn and exhibits annexed thereto.

Respectfully submitted,

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn
(DC Bar No. 1033296)
Adina H. Rosenbaum
(DC Bar No. 490428)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff

Dated: October 13, 2017

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Margaret B. Kwoka filed this lawsuit under the Freedom of Information Act (FOIA) seeking production of records Defendant Internal Revenue Service (IRS) has unlawfully withheld. The IRS has moved for summary judgment, citing two of FOIA's statutory exemptions and arguing that the need for redactions either results in the creation of a new record or renders production of the records unreasonably burdensome. However, the undisputed material facts establish that no statutory exemptions apply to the requested records and that there is no other basis for withholding them. Accordingly, the Court should enter summary judgment for Professor Kwoka and order the production of the records.

BACKGROUND

Margaret Kwoka is an Associate Professor at the University of Denver Sturm College of Law whose research focuses on government secrecy and agencies' administration of FOIA. Pl.'s Statement of Undisputed Material Facts (Pl.'s Statement) ¶ 1. On January 11, 2017, Professor Kwoka submitted a FOIA request to the IRS for "records reflecting a list or log of FOIA requests

received in Fiscal Year 2015." *Id.* ¶ 2. In particular, Professor Kwoka requested records reflecting the following nine categories of information for each FOIA request submitted to the IRS:

1. The FOIA request identification number;
2. The name of the requester for any third-party request (*i.e.*, requests by those seeking records that are not about themselves);
3. The organizational affiliation of the requester, if there is one;
4. Whether the request was made under the Privacy Act as well as FOIA, or whether a privacy waiver was submitted;
5. The result of each FOIA request;
6. If the request was not granted in full, the reason for the denial or partial denial;
7. The fee category assigned to the request for the purpose of making a determination about the applicability of FOIA fees;
8. Indication of whether a fee waiver was requested and, if so, whether that request was granted; and
9. The dollar amount the IRS charged to the requester for responding to the request, along with the date of the invoice.

Id. ¶ 3.

By letter dated March 8, 2017, and signed by Ron Mele, Disclosure Manager, the IRS partially denied Professor Kwoka's request. *Id.* ¶ 4. Mr. Mele provided Professor Kwoka with a spreadsheet containing records responsive to items 1, 5, 6, and 8 of her request, along with some of the information requested under items 4 and 9. *Id.* ¶ 5. Mr. Mele also told Professor Kwoka that the IRS did not track the data responsive to item 7 and thus the IRS was not providing

responsive records to that part of the request. *Id*. ¶ 7. Finally, Mr. Mele informed Professor Kwoka that the IRS was fully withholding records responsive to items 2 and 3 of her request—the names of third-party requesters and the organizational affiliations of requesters—under FOIA exemptions 3 and 6. *Id.* ¶ 8. To support the assertion of exemption 3, which protects records "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), Mr. Mele stated that the information withheld under exemption 3 "consists of third party tax information, the disclosure of which is prohibited by [26 U.S.C.] section 6103(a)." Pl.'s Statement ¶ 9. As to exemption 6, which exempts records from disclosure where their release be a "clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(3), he stated that the IRS "base[d] the determination to withhold on a balancing of interests between the protection of an individual's right to privacy and [the] public's right to access government information." Pl.'s Statement ¶ 10.

By letter submitted on or about March 27, 2017, Professor Kwoka timely appealed the IRS's denial with respect to the records requested in items 2 and 3 of her request. *Id*. ¶ 11. Professor Kwoka explained that the requested information is "*not* third party tax information," disclosure of which is prohibited by 26 U.S.C. § 6103(a). Pl.'s Statement ¶ 12. Professor Kwoka further explained that she was "requesting information about those who are *making* FOIA requests, not their identity as taxpayers." *Id*. ¶ 13. Additionally, she explained that FOIA exemption 6 does not apply to the requested records because "[t]he name and organizational affiliation of an individual who submitted a FOIA request is not the type of information the disclosure of which would constitute an unwarranted invasion of personal privacy." *Id*. ¶ 14. The appeal cited the Privacy and Security Notice for FOIA Online, which states that information submitted through the website's comment form might be publicly disclosed. *Id*. ¶ 15. The appeal

also cited guidance on the Department of Justice's website stating that "in most cases the release of the name of a FOIA requester would not cause even the minimal invasion of privacy required to trigger the balancing tests of Exemptions 6 and 7(C)." *Id.* ¶ 16.

By letter dated April 11, 2017, the IRS denied Professor Kwoka's appeal. *Id.* ¶ 17. The denial letter restated the IRS's position that the information requested in items 2 and 3 of the request is exempt from disclosure under exemption 3 as "third party return information" and under exemption 6 because the information "has no public interest and a strong privacy interest." *Id.* ¶ 18.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Most FOIA cases are appropriately resolved on motions for summary judgment." *Gillam v. U.S. Dep't of Justice*, 128 F. Supp. 3d 134, 138 (D.D.C. 2015) (citing *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). The agency has the burden of proving that the withheld information comes within one of FOIA's nine statutory exemptions, *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(B), and also has the burden of proving that responding to the request would be an unreasonable burden on the agency, *Hanley v. U.S. Dep't of the Interior*, 925 F. Supp. 2d 34, 45 (D.D.C. 2013) (citing *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 891–92 (D.C. Cir. 1995)). The agency may satisfy its burden by affidavit, *DiBacco v. U.S. Army*, 795 F.3d 178, 195 (D.C. Cir. 2015). Summary judgment on the basis of affidavits is appropriate only if the "affidavits describe the documents and the justifications for

nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption[s], and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Case*, 656 F.2d 724, 738 (D.C. Cir. 1981). This Court reviews the agency's claimed exemptions *de novo*. 5 U.S.C. § 552(a)(4)(B); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

ARGUMENT

FOIA "sets forth a policy of broad disclosure of Government documents in order to ensure an informed citizenry, vital to the functioning of a democratic society." *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (quotation marks omitted). "FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions" applies. *Goldberg v. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

Here, there are essentially three types of information in the requested records that the IRS has withheld: (1) the names of third-party requesters, (2) the organizational affiliations of third-party requesters, and (3) the organizational affiliations of first-party requesters. The IRS has not met its burden of showing that the withheld information falls within exemptions 3 and 6 for any of the three types of information. Moreover, producing responsive records to Professor Kwoka will neither require the creation of new records nor result in an unreasonable burden on the IRS.

I. The Agency Has Not Shown that Exemption 3 Justifies Withholding the Requested Records in Their Entirety.

Exemption 3 protects from disclosure matters that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Here, the IRS relies on a provision of the Internal Revenue Code, 26 U.S.C. § 6103(a), to withhold responsive records. Defendant's Mot. for

Summ. J., Doc. 9 (IRS Br.), at 10–12. Section 6103(a), however, does not apply to the responsive records.

As the IRS explains, § 6103(a) is an exemption 3 statute. *See Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997). The provision prohibits the government from disclosing "any return or return information" unless otherwise authorized, and it defines "return information" to include "a taxpayer's identity." 26 U.S.C. § 6103(b)(2)(A). In addition, another statutory provision addresses the procedure for obtaining "return information" of another person. *See* IRS Br. at 11 (citing 26 U.S.C. § 6103(c), (e)). Because Professor Kwoka did not request "return information" and is not seeking it here, there was no need for her to follow that procedure.

The IRS argues that disclosure of the names and organizational affiliations of third-party FOIA requesters who sought tax records, combined with the publicly available FOIA log for Fiscal Year 2015 on the IRS's website, could be used to "reverse engineer and reveal" a taxpayer's identity, in violation of 26 U.S.C. § 6103(a).[1] IRS Br. at 12. The publicly available FOIA log contains the following information fields: (1) request number, (2) track (simple or complex), (3) "request detail," (4) status (open or closed), (5) received date, (6) closed date, and (7) "information denied." Pl.'s Statement ¶ 21.[2] The "information denied" field appears to more closely reflect the final disposition of the request, as the entries are typically "grant," "partial

[1] The IRS at times appears to argue that non-tax records may implicate § 6103(a). *See, e.g.*, IRS Br. at 9 (stating review of the requested records would include determining "which of those non-tax information requests … implicate tax return information"). Nonetheless, the IRS's argument regarding this exemption is clearly limited to FOIA requests for tax records, *see* IRS Br. at 10–12, and the IRS's own declarant concedes that FOIA requests for non-tax records would not implicate exemption 3, *see* Rowe Decl. ¶ 20, Doc. 9-3 at 8 ("Disclosing the requester names and organizational affiliations with respect only to those requests for non-tax records would not reveal information that is protected under [26 U.S.C.] § 6103.").

[2] Professor Kwoka has included a true and accurate copy of the first five pages of what is identified on the IRS's website as the "IRS FOIA Log" for 2015, as well as the web address where the complete log may be found. *See* Llewellyn Decl. ¶ 1; Llewellyn Decl. Ex. 1.

denial," "no records," "imperfect," "request withdrawn," or the like. *See* Llewellyn Decl. Ex. 1. The "request detail" field contains a number, word, or short phrase that appears to describe the subject of the request, such as "1040," "all records," "collection," or "documents," at least some of which are not immediately decipherable without additional research into the IRS's system, *i.e.* "CAF," "ERO," "IMF," and others. Pl.'s Statement ¶¶ 22–23. Importantly, though, none of the fields contain the name of the subject of the request. *Id.* ¶ 27. Comparison of the records requested by Professor Kwoka and the IRS's publicly available FOIA log reveals the fallacy of the IRS's reliance on exemption 3: Providing the name of a third-party requester will not reveal the name of the subject of the request, which is similarly unavailable in the IRS's publicly available FOIA log, and thus no taxpayer's identity will be revealed. *Compare* Kwoka Decl. Ex. 2 *with* Llewellyn Decl. Ex. 1. Professor Kwoka did not request the subject of any FOIA requests received by the IRS, Pl.'s Statement ¶ 3; *see* Smith Decl. Ex. 1, at 1, Doc. 9-2, and the IRS's responsive records did not contain a field for the subject of the request, *see* Kwoka Decl. Ex. 2. To the extent the responsive records may contain a field for the subject of the request that includes the name of the subject of a third-party requester's FOIA request, Professor Kwoka is not challenging the IRS's authority to redact that name. *See also* Part IV (explaining there is no unreasonable burden on IRS in segregating exempt information).[3]

Using the IRS's own example, then, if "Tom Smith" sent a FOIA request for "Examination" records regarding "Margaret Jones," production of the responsive records combined with the publicly available FOIA log would reveal only that "Tom Smith" requested

[3] Professor Kwoka does not agree that § 6103(b)(2)(A) exempts the name of subject of the request from disclosure. However, as her FOIA request expressly did not seek those names, she concedes the point for purposes of this case.

"Examination" records about an unknown person or entity. Accordingly, under the IRS's own argument, no taxpayer's identity would be revealed.

The IRS obliquely suggests at times that the "return information" that would be revealed extends beyond a taxpayer's identity, *i.e.* the name of the subject of the request. *See, e.g.*, IRS Br. at 12 (identifying "whether the taxpayer's was being examined" and "the nature of the examination" as "return information"). But the IRS cannot seriously contend knowing this information about an anonymous is person is "return information" when the IRS reveals such anonymous information in its publicly available FOIA log. *See* Pl.'s Statement ¶¶ 22–23; Llewellyn Decl. Ex. 1.

Production of responsive records disclosing all requesters' organizational affiliations would similarly not disclose any taxpayer's identity. As an initial matter, the IRS only references Professor Kwoka's request for organizational affiliations in passing, failing to provide the Court with sufficient argument to grant the IRS summary judgment. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments." (internal quotation marks omitted)). Further, the two mentions of Professor Kwoka's request for organizational affiliations in the IRS's summary judgment brief are in reference only to the organizational affiliations of third-party requesters, not first-party requesters. *See* IRS Br. at 12. Professor Kwoka, however, requested the organizational affiliations of all requesters, not just third-party ones. *See* Pl.'s Statement ¶ 3. Thus, the IRS has waived any argument that the organizational affiliations of first-party requesters may be withheld under exemption 3. *See Lindsey v. District of Columbia*, 879 F. Supp. 2d 87, 96 (D.D.C. 2012) (argument not raised in opening brief is waived).

More importantly, disclosure of a third-party requester's or first-party requester's organizational affiliation would not disclose the identity of any taxpayer. Regarding third-party requesters, just as revealing the name of a third-party requester says nothing about the subject of the request, the organizational affiliation of a third-party requester reflects nothing that identifies the subject of the request. Again, if "Tom Smith" of "ABC Corporation" requested "Examination" records regarding "Margaret Jones," the responsive records and the publicly available FOIA log would reveal only that "Tom Smith" of "ABC Corporation" requested "Examination" records about an unknown person or entity. As for first-party requesters, providing their organizational affiliation, with one exception, would not disclose a "taxpayer's identity" under § 6103(a). The IRS has provided no evidence to support that disclosing an organizational affiliation could lead to the identification of the requester, and it stands to reason that such disclosure never would because organizations typically have several individuals affiliated with them. *See, e.g.*, University of Denver Sturm College of Law, Faculty & Staff Directory, http://www.law.du.edu/index.php/directory/full-time-faculty (last visited Oct. 10, 2017) (identifying over 250 faculty and staff at the University of Denver Sturm College of Law, an organization with which Professor Kwoka is affiliated). Because the IRS has provided no evidence that the organizational affiliations of any first-party requesters would be sufficient to identify them personally, this information within the requested records cannot be withheld under exemption 3. Where an individual requests tax records about the organization that is identical to the individual's organizational affiliation as recorded in the IRS's records, Professor Kwoka agrees that specific situation resembles a first-party request for the requester's tax records and the organizational affiliation would be subject to redaction.

In short, the IRS has not met its burden of establishing that the names of third-party FOIA requesters and the organization affiliations of all FOIA requesters would reveal "return information." No combination of information in the requested records and/or the publicly available FOIA log reveals any such information. Accordingly, the Court should grant summary judgment to Professor Kwoka on the applicability of exemption 3.

II. The Agency Has Not Shown that Exemption 6 Justifies Withholding the Requested Records in Their Entirety.

Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Here, the IRS argues that withholding of third-party FOIA requesters' names is justified under exemption 6.[4] IRS Br. at 12–15. Again, the IRS's argument focuses almost entirely on privacy interests of the *subjects* of the FOIA requests, not the third-party requesters themselves—yet Professor Kwoka seeks the names of requesters only, not subjects. For the same reasons previously discussed, disclosure of the names of third-party requesters will not reveal the identity of the subjects of their requests, and thus their privacy interests are not implicated. *See supra* Part I. As to the privacy interests of the third-party requesters themselves, the IRS also cannot justify withholding their names under exemption 6.

The IRS bears the burden of showing that disclosure of the information would constitute a "clearly unwarranted" invasion of privacy. *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 (D.C. Cir. 2015) (quoting 5 U.S.C. § 552(b)(6)). Moreover, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982). Where

[4] The IRS does not argue that disclosure of the organizational affiliations of FOIA requesters implicates exemption 6.

disclosure would compromise only a *de minimis* privacy interest, the exemption does not apply and the information must be disclosed. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 870 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). Where disclosure implicates "anything greater than a *de minimis* privacy interest," *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008), the court balances the public interest in disclosure against the privacy interest that would be compromised by disclosure, *see Consumers' Checkbook, Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1050 (D.C. Cir. 2009). Importantly, exemption 6 "does not categorically exempt individuals' identities … because 'the privacy interest at stake may vary depending on the context in which it is asserted.'" *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006) (quoting *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996)).

With respect to the names of third-party FOIA requesters, no more than a *de minimis* privacy interest is at stake. Indeed, another court in this district specifically considering whether the addresses of third-party FOIA requesters to the IRS should be disclosed concluded that this information is not protected under exemption 6. *See Stauss v. IRS*, 516 F. Supp. 1218, 1223 (D.D.C. 1981). As the court correctly explained, FOIA requesters "freely and voluntarily addressed their inquiries to the IRS, without a hint of expectation that the nature and origin of their correspondence would be kept confidential." *Id.*; *see also Holland v. CIA*, No. 92-1233, 1992 WL 233820, at *15–16 (D.D.C. Aug. 31, 1992) (concluding the identity of a researcher who sought assistance from a government employee was akin to that of a FOIA requester and, thus, release of his name "would not cause even the minimal invasion of privacy necessary to trigger the balancing test" under exemption 6); *cf. Lardner v. U.S. Dep't of Justice*, No. Civ. A. 03-0180 (JDB), 2005 WL 758267, at *18 (D.D.C. Mar. 31, 2005) ("When a citizen petitions his

government to take some action, courts have generally declined to find the identity of the citizen to be information that raises privacy concerns under Exemption 6.").[5]

For decades, the Department of Justice's guidance to federal agencies has recognized that third-party FOIA requesters lack even a minimal privacy interest in their identities as FOIA requesters: "FOIA requesters, except when they are making first-party requests, do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test." Dep't of Justice, Freedom of Information Act Guide, Exemption 6 (2004), https://www.justice.gov/oip/foia-guide-2004-edition-exemption-6; *see also* Dep't of Justice, FOIA Update, Vol. VI, No.1 (Jan. 1, 1985), https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-15 ("[I]t would take an extraordinarily rare and compelling situation for mere identification of a person or entity as a FOIA requester of particular records to rise to level of implicating a privacy interest … protect[a]ble under the FOIA"). As the most recent Department of Justice guidance on exemption 6 explains, the decades-long rule in this Court has been that "FOIA requesters do not ordinarily expect that their names will be kept private." Dep't of Justice, Guide to the Freedom of Information Act, Exemption 6 at 18–19 (Jan. 10, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf.

This DOJ guidance states that "a more recent opinion" from the Seventh Circuit reached a different conclusion, but the 1991 opinion it cites is easily distinguishable. In that case, the Seventh Circuit upheld the FBI's redaction of a high school student's name from a letter to the

[5] In *Stauss*, the court concluded that the lack of a substantial privacy interest resulted in the information not being a "similar file" for exemption 6 purposes under then-governing law. 516 F. Supp. at 1223 (citing *Bd. of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 398 (D.C. Cir. 1980)). Although that aspect of the decision is no longer good law, *see U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595 (1982), the court's analysis of the privacy interest at stake remains valid.

FBI requesting information about the wiretapping of Jimmy Hoffa under exemption 7(c). *Silets v. U.S. Dep't of Justice*, 945 F.2d 227, 230 (7th Cir. 1991) (en banc). Unlike the requested records here, the subject of the third-party's request—Jimmy Hoffa—was publicly released, allowing the high school student to be identified as a person requesting information regarding Mr. Hoffa and potentially subjecting him to harassment on that basis. This out-of-circuit case presents no occasion for the Court to depart from the rule in this Court that third-party FOIA requesters have no substantial privacy interest in their identities.

Against this backdrop, the IRS offers only minimal argument that third-party FOIA requesters have a substantial privacy interest in their identities. For want of any other support, the IRS relies solely on a per curiam decision from the Ninth Circuit to state in conclusory fashion that "third-party FOIA requesters in this case [would] be subject to harassment, stigma, retaliation, or embarrassment if their identities were revealed." IRS Br. at 14 (citing *Prudential Locations LLC v. U.S. Dep't of Hous. & Urban Dev.*, 739 F.3d 424 (9th Cir. 2013) (per curiam), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (en banc)). However, *Prudential Locations*, which involved the withholding of names of whistleblowers to protect them from retaliation, implicated interests not present here. There, the Department of Housing & Urban Development (HUD) received two communications from concerned citizens alleging that Prudential Locations was involved in an illegal mortgage kickback scheme in Hawai'i, both of which resulted in HUD investigations and one of which ended with Prudential Locations paying a $48,000 penalty to HUD. *Id.* at 427. Prudential Locations subsequently filed a FOIA request seeking the identities of the whistleblowers. *Id.* at 427–28. "Given the nature of their communications," the court explained, "[the whistleblowers] appear to have inside knowledge of the mortgage industry in Hawai'i," and

HUD had provided an affidavit explaining that it "promises anonymity to industry insiders who report suspected wrongdoing because of their vulnerability to retaliation such as loss of employment or loss of business." *Id.* at 432. In light of these facts, the court concluded the whistleblowers "could easily be adversely affected if their identities became known." *Id.* The court also noted that Prudential Locations had represented that it would potentially file a civil lawsuit against the whistleblowers for their "sham" complaints, further illustrating the risk of harm was more concrete than speculative. *Id.* These facts are a far cry from involving FOIA requesters "who freely and voluntarily addressed their inquiries to the IRS, without a hint of expectation that the nature and origin of their correspondence would be kept confidential." *Stauss*, 516 F. Supp. at 1223. *Prudential Locations* is simply inapplicable.

Moreover, the IRS provides no explanation as to why third-party FOIA requesters would suffer "harassment, stigma, retaliation, or embarrassment if their identities were revealed." IRS Br. at 14. Again, neither the responsive records nor the publicly available FOIA log reveal the subject of the requests in any detail. *See* Kwoka Decl. Ex. 2; Llewellyn Decl. Ex. 1. Nearly all the "request detail" fields in the publicly available FOIA log are so vague that they provide either no information—"documents," "all records," "multiple," "request for records"—or at most extremely limited information—"examination," "transcripts," "collection"—regarding the request, and the IRS has not explained why disclosure of this information would subject the third-party requester to any harm.

More narrowly, the IRS argues that revealing the identities of third-party FOIA requesters who specifically requested information concerning "innocent spouse relief or about tax fraud on individual returns" would subject those individuals to "'the risk of embarrassment in their official capacities and in their personal lives.'" IRS Br. at 14 (quoting *Moore v. Bush*, 601

F. Supp. 2d 6, 14 (D.D.C. 2009)). As an initial matter, review of the IRS's online FOIA log reveals that "innocent spouse relief" is identifiably linked to approximately 29 FOIA requests and "fraud" relating to individuals is identifiably linked to approximately 7 FOIA requests.[6] Pl.'s Statement ¶¶ 25–26. Even assuming that these are all third-party requests, the IRS's argument applies only to 36 out of the 9,882 FOIA requests at issue and cannot be relied upon to withhold all other third-party FOIA requester names.

As Rowe concedes in his declaration, even under the IRS's own argument, the *purpose* for which these particular requests are made greatly affects the purported privacy interest at stake. *See* Rowe Decl. ¶ 25, Doc. 9-3 (explaining that exemption 6 would not cover requests made for scholarly research or "to make the records available to the public"). But the IRS has provided no evidence of the purpose for which any of these 36 requests were submitted. It provides no evidence, for example, that these requests were not made by professors, or journalists, or others interested in informing members of the public about innocent spouse relief and fraud. In none of those cases, however, would releasing the requester's name reveal anything about the requester's personal life. Accordingly, even for these few categories of requests that the IRS claims implicate significant privacy interests of the third-party requesters themselves, the IRS "has alleged future [embarrassment]" will occur to the third-party requesters "without presenting evidence of the nature or likelihood" of such embarrassment; "[s]uch vague concerns are merely speculative" and, thus, do not implicate a substantial privacy interest for purposes of

[6] There are 20 FOIA requests that reference "innocent spouse" or "spousal relief" in some form, and 9 FOIA requests that reference "8857." Llewellyn Decl. ¶ 3. Form 8857 appears to specifically relate to "Innocent Spouse Relief." *See* IRS, Form 8857, Request for Innocent Spouse Relief (Jan. 2014), https://www.irs.gov/pub/irs-pdf/f8857.pdf.

exemption 6. *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 818 F. Supp. 2d 122, 130 (D.D.C. 2011).[7]

Even if third-party requesters have slightly more than a *de minimis* privacy interest in their names, the Court must still proceed to balance the public interest in disclosure against the privacy interest that would be compromised by disclosure. *Consumers' Checkbook*, 554 F.3d at 1050. Here, disclosure of the names of third-party requesters will shed light on how FOIA operates in the federal government. Pl.'s Statement ¶ 20. Professor Kwoka's research is focused on these issues, and her findings about the use of government resources in responding to FOIA requests has garnered significant attention as evidenced by publications in the Duke Law Journal and the Yale Law Journal, among others, and by mention in The New York Times, an invitation to testify before Congress, and numerous presentations before federal agency personnel. *Id.* ¶¶ 1, 19; *see* Kwoka Decl. Ex. 1. Knowing who is most often using FOIA reveals opportunities for better vehicles for agency information delivery, including proposed reforms at the congressional and executive level, such as the ones that Professor Kwoka herself has advanced. Pl.'s Statement ¶ 20. Indeed, federal agencies are often interested in Professor Kwoka's analysis of their FOIA logs precisely because it sheds light on important government operations. *Id.* ¶ 19. The responsive records will inform the public as to how federal tax dollars are spent and whether such expenditures with regard to the FOIA obligations of agencies are being utilized in the best way to meet the public's needs. *Id.* ¶ 20. But because the IRS has failed to show that disclosure of the requested records would implicate any more than a *de minimis* privacy interest, the Court need not even engage in the balancing test. *NARFE*, 870 F.2d at 874.

[7] For these reasons as well, to the extent the IRS argues requests for these "innocent spouse" forms would reveal the identity of the subject of the request, *i.e.* the non-innocent spouse, such argument is similarly speculative.

Because the IRS has failed to satisfy its burden that disclosure of the requested records would result in a "clearly unwarranted invasion of privacy," the Court should grant summary judgment to Professor Kwoka on this issue.

III. Professor Kwoka's Request Does Not Require the IRS to Create New Records.

Despite having already produced to Professor Kwoka an Excel spreadsheet containing most of Professor Kwoka's initially requested information but withholding from the spreadsheet the information responsive to two parts of her request, the IRS now claims that responding to Professor Kwoka's request would require it to produce new records. *See* IRS Br. at 6–8. The IRS's own declarants, however, concede that the IRS, in fact, has a list of all FOIA requesters and their organizational affiliations. *See* Smith Decl. ¶ 9b, Doc. 9-2 (explaining that the IRS data analyst provided Smith with "the requester name and organizational affiliation, if any, with respect to all 9,882 FOIA requests"); Rowe Decl. ¶ 17, Doc. 9-3 (explaining that Rowe "reviewed the list of names and organizational affiliations with respect to all FOIA requests received in Fiscal Year 2015"). Simply because the requested records may contain exempt information that the agency wishes to redact does not mean producing the requested records will require the agency to create a "new" record.

"It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request." *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982). But "[t]he argument that a document with some information deleted is a 'new document,' and therefore not subject to disclosure, has been flatly rejected." *Id.* (citing *Long v. IRS*, 596 F.2d 362, 366 (9th Cir. 1979) (holding the "mere deletion" of certain information from responsive records does not result in the creation of a "new record" under FOIA)). Moreover, accepting the argument that redaction of exempt information results in the creation of a new

record not subject to disclosure would violate the terms of FOIA itself, which requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record *after deletion of the portions which are exempt under this subsection*." 5 U.S.C. § 552(b) (emphasis added).

Here, the IRS argues that it does not maintain a list exclusively of third-party FOIA requesters and requiring it to produce such a list would cause it to create a new record. IRS Br. at 7. As noted above, however, there is no dispute that the IRS maintains a list of all FOIA requesters, including third-party requesters. Thus, the agency has a responsive record that can be released. To be sure, the record also contains some non-responsive information—the names of first-party requesters—but that is often true of responsive records and does not make the record non-responsive. Indeed, the D.C. Circuit recently held that once a responsive record has been identified—in this case, the list of all FOIA requesters' names and organizational affiliations—FOIA compels disclosure of the *entire* record, including the non-responsive portions, "except insofar as the agency may redact information falling within a statutory exemption." *Am. Immigration Lawyers Ass'n v. Ex. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) (*AILA*). Here, the IRS may determine it needs to redact the first-party requesters' names from that list, and Professor Kwoka does not challenge that redaction, but that redaction process does not result in the creation of a new record. Accordingly, the presence of exempt information implicates only whether non-exempt information is reasonably segregable from exempt information in the responsive records, not whether redaction causes the creation of a "new record.[8]

[8] The IRS attempts to make much of the fact that Professor Kwoka used the term "information" in identifying the requested records she sought. *See* IRS Br. at 7–8. But as the D.C. Circuit has explained, "[i]n the context of a record containing exempt information . . . the 'focus of FOIA is

Because producing the responsive records—with proper redactions as necessary—will not cause the IRS to create a "new record" under FOIA, the Court should grant summary judgment to Professor Kwoka on this issue.

IV. Production of the Responsive Records Would Not Result in an Unreasonable Burden on the IRS.

In arguing that production of the requested records would result in an unreasonable burden, the IRS conflates several concepts in its brief, including that the responsive information is not "reasonably segregable" from exempt information and that the IRS would be forced to engage in an "unreasonably burdensome search" to identify or locate the responsive records. IRS Br. at 9. The focus of the reasonable segregability analysis is typically whether the exempt and non-exempt information are "inextricably intertwined," such that the exempt information cannot be sufficiently redacted. *See Johnson v. Ex. Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (explaining the agency had provided an affidavit discussing "a line-by-line review of each document withheld in full" and stating "no documents contained releasable information which could be reasonably segregated from nonreleasable portions"). Here, the responsive records contain two lists—the names of FOIA requesters and the organizational affiliations of FOIA requesters—with each list consisting of discrete information for each FOIA request. Thus, redaction of the exempt information from the non-exempt information would be a straightforward task. Additionally, the IRS's search has already uncovered all of the responsive records, namely, its "Automated Freedom of Information Act" (AFOIA) system containing the responsive records and the FOIA requests themselves. *See* IRS Br. at 2, 9–10. Accordingly, there is no dispute regarding either the agency's ability to identify the responsive records through a

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information, not documents.'" *AILA*, 830 F.3d at 677 (quoting *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1997)). And the IRS's response to her request makes clear that it had no difficulty understanding what records she sought.

reasonable search nor the feasibility of redacting the exempt information from the non-exempt information. The only question is whether the agency's review of the records to determine proper redactions would result in an undue burden on the agency.

Here, the IRS has not carried its burden of showing that reviewing the responsive records to redact exempt information would be an undue burden. Courts finding an unreasonable burden on an agency have typically been faced with far more voluminous and complicated requests than the one at issue here, including in those cases on which the IRS relies. For example, in *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce* (*AFGE*), the request would have required the agency to search "virtually every file contained in over 356 branch and division offices," such that the court concluded responding would require the agency "to locate, review, redact, and arrange for inspection a vast quantity of material" that was unreasonably burdensome. 907 F.3d 203, 206, 209 (D.C. Cir. 1990). And in *Sack v. Central Intelligence Agency*, the court concluded a request for "all records that pertain in whole or in part" to a list of closed investigations and reports across "all years" and "all classifications" would unreasonably burden the agency. 53 F. Supp. 3d 154, 164–65 (D.D.C. 2014). Importantly, the cases relied upon by the IRS concerned whether the requester had provided a sufficiently specific request, as required under 5 U.S.C. § 552(a)(3)(A), to reasonably allow the agency to conduct a search for responsive records at all. *See AFGE*, 907 F.3d at 209 (holding the request did not "reasonably describe[]" the requested records); *Sack*, 53 F. Supp. 3d at 164–65 (same); *Armstrong v. Bush*, 139 F.R.D. 547, 553 (D.D.C. 1991) (concluding the requester's initial request did not "reasonably describe the records sought"). The cases do not concern the amount of time it would take the agency to review discrete and reasonably defined records. Whereas those cases concern the use of agency resources for an "all-encompassing fishing expedition"

that "reduce government agencies to full-time investigators on behalf of requesters," *Sack*, 53 F. Supp. 3d at 163, this case is no "fishing expedition." The IRS has easily located the responsive records and challenges only the effort required to review those records for proper redactions.

Cases discussing the burden on an agency to review responsive documents make clear that requiring the IRS to segregate exempt from non-exempt information is reasonable here. In *Public Citizen, Inc. v. Department of Education*, the court rejected an agency's contention that the required search would be unduly burdensome, even though it required the agency to search 25,000 paper files and would be "costly and take many hours to complete." 292 F. Supp. 2d 1, 6 (D.D.C. 2003). Further, in *Nation Magazine v. U.S. Customs Service*, the court found that requiring an agency to search an entire year's worth of files that were neither "indexed nor cross indexed" for a single memorandum would not result in an undue burden. 937 F. Supp. 39, 44 (D.D.C. 1996). Courts reaching the contrary conclusion have dealt with far more voluminous records. *See, e.g.*, *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978) (finding search would result in an "unreasonable burden" where it required "a page-by-page search through 84,000 cubic feet of documents" (internal quotation marks omitted)); *People for the Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 13 (D.D.C. 2006) (finding search would result in an "unreasonable burden" where it required manual search of 44,000 files and each file ranged from "ten to as many as 200,000 pages" in 93 different locations). As such, for the IRS to review 9,882 records to redact exempt information would fit readily within the type of review found to be reasonable by this Court and the D.C. Circuit.

Even so, this Court should not rely on the IRS's claim that review of the responsive records will require "approximately 2,196 person-hours" based on the review of 4.5 requests per

hour for all of the 9,882 FOIA requests. Rowe Decl. ¶ 15, Doc. 9-3.[9] First, the IRS has failed to explain why determining whether a request is a first-party or third-party request for tax records will always require review of the FOIA request or the AFOIA system rather than simply the IRS's publicly available FOIA log. For example, the log appears to include several FOIA requests for "Internal Documents" or "Internal Forms," and none of the IRS's arguments can plausibly be read to cover those FOIA requests. Pl.'s Statement ¶ 24. Similarly, the log includes multiple FOIA requests labeled as "Oath of Office," "Public Information," "FOIA," and "Routine Procedure," none of which would implicate any of the exemptions claimed by the IRS and would, thus, not require any review of the underlying FOIA requests. *Id.* Removing these requests and any others for which the IRS's subject descriptions make clear the requester's name and organizational affiliation could not implicate the claimed exemptions would reduce considerably the number of FOIA requests to be reviewed by the IRS.[10]

Second, the IRS's claim that it would take it 10–15 minutes to compare the name and subject of a FOIA request and determine whether the request is a third- or first-party request is unreasonable. The IRS concedes that the estimated amount of time required results entirely from limitations in the IRS's AFOIA system as "there is considerable delay in the AFOIA system for loading time when accessing a FOIA case and associated documents." Rowe Decl. ¶ 15, Doc. 9-3. The IRS has not provided any information in its declarations regarding the amount of time it

[9] Although Rowe included this information in his declaration, he based this estimation on information provided to him by Corrina Smith regarding the AFOIA system and the amount of time review would take, not on his own personal knowledge. Rowe Decl. ¶ 15, Doc. 9-3. Although Smith provided her own declaration, she failed to include any information regarding the amount of time search of the responsive records would require. *See* Smith Decl., Doc. 9-2. Accordingly, although the IRS discusses the amount of time review would take, it has not presented evidence from any declarant with personal knowledge of the issue.

[10] Other categories of records would likely be excluded from review, but the IRS's failure to provide any explanation of the subject matter descriptions on its online FOIA log prevents Professor Kwoka or the Court from making that determination. *See* Pl.'s Statement ¶ 23.

would to take to actually *read* the requests to determine if they are first-party FOIA requests for tax records, *see* Smith Decl., Doc. 9-2; Rowe Decl., Doc. 9-3, and any suggestion by the IRS that it would take more than 15–20 *seconds* to read a FOIA request and determine its subject lacks credibility. Even assuming a generous 30 seconds to read the request and mark the name on a list as "exempt" if necessary, the actual *working* time required to comply with request is, at most, just over 82 hours (9,882 requests x 30 seconds/request = 82.35 hours).

In addition, if the electronic database makes the review process too slow, the IRS has not explained why it cannot review the paper files for these FOIA requests—either from the original submission or from printing the requests. Under the IRS's current records disposition schedule, the IRS is not authorized to destroy paper copies of FOIA requests that resulted in a full or partial denial or where there was an appeal from a denial of an imperfect request until six years after the IRS's reply. *See* Pl.'s Statement ¶¶ 28–29. Although the IRS is authorized to destroy paper copies of fully granted requests or imperfect requests with no appeal two years after the IRS's reply, Pl.'s Statement ¶ 29, the IRS has provided no evidence that it has done so. Accordingly, for at least the requests that resulted in some form of denial or an appeal—and potentially for all of the FOIA requests—the IRS could manually review those records, drastically reducing or eliminating the delay caused by the AFOIA system. Moreover, even if paper review is inexplicably unavailable and the IRS analyst must wait another 12 to 13 minutes for the next request to load on the AFOIA system, the IRS has failed to offer evidence that, or explain why, the IRS analyst cannot undertake other tasks during that time.

Finally, to allow the IRS to rely on the limitations of its AFOIA system would undermine Congress's attempt to integrate government transparency into the digital age with the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments), 110 Stat. 3048

(1996) (codified at 5 U.S.C. § 552). In passing the E-FOIA Amendments, Congress specifically found that "[g]overnment agencies should use new technology to *enhance* public access to agency records and information." *Id.* § 2(a)(6) (emphasis added). To accomplish the goal of "improv[ing] public access to agency records and information," *id.* § 2(b)(2), Congress expanded the statutory definitions of both "record" and "search" to explicitly include electronic means of record-keeping and searching, and required agencies to produce records "in any form or format requested … if the record is readily reproducible by the agency in that form or format." *Id.* §§ 3, 5(4) (codified at 5 U.S.C. § 552(a)(3), (f)). In other words, electronic searches and databases are intended to be used to *increase* access, not as a tool to block access to responsive records. The Court should thus not allow the IRS to hide behind its electronic database and excuse its obligations to produce responsive records under FOIA.

CONCLUSION

For the above stated reasons, the Court should deny the IRS's motion for summary judgment and grant summary judgment to Professor Kwoka. In so doing, the Court should order the entry of a production schedule whereby the IRS will be required to produce all of the responsive records to Professor Kwoka expeditiously.

Dated: October 13, 2017

Respectfully submitted,

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn
(DC Bar No. 1033296)
Adina H. Rosenbaum
(DC Bar No. 490428)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET B. KWOKA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

C. A. No. 1:17-cv-01157

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff Margaret B. Kwoka is an Associate Professor at the University of Denver Sturm College of Law whose research focuses on government secrecy and agencies' administration of the Freedom of Information Act (FOIA). Kwoka Decl. ¶ 1.
2. On January 11, 2017, Professor Kwoka submitted a FOIA request to the IRS for "records reflecting a list or log of FOIA requests received in Fiscal Year 2015." Smith Decl. Ex. 1, at 1, Doc. 9-2.
3. Professor Kwoka's FOIA request specifically requested records reflecting the following nine categories of information: (1) the FOIA request identification number; (2) the name of the requester for any third-party request (*i.e.*, requests by those seeking records that are not about themselves); (3) the organizational affiliation of the requester, if there is one; (4) whether the request was made under the Privacy Act as well as FOIA, or whether a privacy waiver was submitted; (5) the result of each FOIA request; (6) if the request was not granted in full, the reason for the denial or partial denial; (7) the fee category assigned to the request for the purpose of making a determination about the applicability of FOIA fees; (8) indication of whether a fee waiver was requested and, if so, whether the request

was granted; and (9) the dollar amount charged to the requester for responding to the request, along with the date of the invoice. Smith Decl. Ex. 1, at 1, Doc. 9-2.

4. By letter dated March 8, 2017, and signed by Ron Mele, Disclosure Manager, the IRS partially denied Professor Kwoka's request. Smith Decl. Ex. 2, Doc. 9-2.
5. Mr. Mele provided Professor Kwoka with a spreadsheet containing records responsive to items 1, 5, and 6 of her request, along with some of the information requested under items 4 and 9. Kwoka Decl. ¶¶ 5–6; *see* Kwoka Decl. Ex. 2; Smith Decl. Ex. 2, at 1–2, Doc. 9-2.
6. None of the information contained within the responsive records Professor Kwoka received from the IRS includes the name of the person or entity that is the subject of the FOIA request. Kwoka Decl. ¶ 7; *see* Kwoka Decl. Ex. 2.
7. Mr. Mele also told Professor Kwoka that the IRS did not track the data responsive to item 7 and thus the IRS was not providing responsive records to that part of the request. Smith Decl. Ex. 2, at 2, Doc. 9-2.
8. Mr. Mele informed Profressor Kwoka that the IRS was fully withholding records responsive to items 2 and 3 of her request—the names of third-party requesters and the organizational affiliations of requesters—under FOIA exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with the Internal Revenue Code (IRC) section 6103(a), as well as under FOIA exemption 6, 5 U.S.C. § 552(b)(6). Smith Decl. Ex. 2, at 1–2, Doc. 9-2.
9. Mr. Mele stated that the information withheld under exemption 3 "consists of third party tax information, the disclosure of which is specifically prohibited by IRC section 6103(a)." Smith Decl. Ex. 2, at 2, Doc. 9-2.

10. Mr. Mele also stated that "FOIA exemption (b)(6) exempts from disclosure files, the release of which would clearly be an unwarranted invasion of personal privacy," and that the IRS "base[d] the determination to withhold on a balancing of interests between the protection of an individual's right to privacy and [the] public's right to access government information." Smith Decl. Ex. 2, at 2, Doc. 9-2.
11. By letter submitted on or about March 27, 2017, Professor Kwoka timely appealed the IRS's denial with respect to the records requested in items 2 and 3 of her request. Smith Decl. Ex. 3, Doc. 9-2.
12. Professor Kwoka explained that the requested information is "*not* third party tax information" whose disclosure is prohibited by IRC section 6103(a). Smith Decl. Ex. 3, at 2.
13. Professor Kwoka further explained that she was "requesting information about those who are *making* FOIA requests, not their identity as taxpayers." Smith Decl. Ex. 3, at 2.
14. Professor Kwoka also explained that FOIA exemption 6 does not apply to the requested records because "[t]he name and organizational affiliation of an individual who submitted a FOIA request is not the type of information the disclosure of which would constitute an unwarranted invasion of personal privacy." Smith Decl. Ex. 3, at 2.
15. Professor Kwoka's appeal cited the Privacy and Security Notice for FOIA Online, which states that information submitted through the website's comment form might be publicly disclosed. Smith Decl. Ex. 3, at 2.
16. Professor Kwoka's appeal also cited guidance on the Department of Justice's website stating that "in most cases the release of the name of a FOIA requester would not cause

even the minimal invasion of privacy required to trigger the balancing tests of Exemptions 6 and 7(C)." Smith Decl. Ex. 3, at 2–3.

17. By letter dated April 11, 2017, the IRS denied Professor Kwoka's appeal. Smith Decl. Ex. 4, Doc. 9-2.

18. The denial letter restated the IRS's position that the information requested in items 2 and 3 of the request is exempt from disclosure under exemption 3 as "third party return information" and under exemption 6 because the information "has no public interest and a strong privacy interest." Smith Decl. Ex. 4, at 2–3.

19. Professor Kwoka has published or has forthcoming articles concerning the use of government resources in responding to FOIA requests in the Yale Law Journal and Duke Law Journal, and her work on FOIA has been cited by numerous other media outlets, including the New York Times. She has also been invited to testify before Congress and has made numerous presentations before federal agency personnel regarding FOIA. Federal agencies are often interested in Professor Kwoka's analysis of their FOIA logs precisely because it sheds light on important government operations. Kwoka Decl. ¶ 3; *see* Kwoka Decl. Ex. 1.

20. Disclosure of the responsive records will shed light on how FOIA operates in the federal government. Knowing who is most often using FOIA reveals opportunities for better vehicles for agency information delivery, including proposed reforms at the congressional and executive level, such as the proposals that Professor Kwoka herself has advanced. Moreover, the responsive records will inform the public as to how federal tax dollars are spent and whether such expenditures with regard to the FOIA obligations of agencies are being utilized in the best way to meet the public's needs. Kwoka Decl. ¶ 4.

21. The IRS maintains a publicly available FOIA log for Fiscal Year 2015 (2015 IRS FOIA Log) on its website, which contains the following seven fields of information for the FOIA requests listed: (1) Request Number, (2) Track, (3) Request Detail, (4) Status, (5) Received Date, (6) Closed Date, and (7) Information Denied. Llewellyn Decl. ¶ 1; Llewellyn Decl. Ex. 1, at 1.
22. The "Request Detail" field contains a number, word, or short phrase that describes the subject of each FOIA request, such as "1040," "all records," "collection," or "documents." Llewellyn Decl. ¶ 2.
23. The level of detail provided in the "Request Detail" field varies: Many of the terms provide no information specific to the request—"documents," "all records," "multiple," "request for records," and others; some of the terms provide limited information—"examination, transcripts," "collection," and others; and at least some are not immediately decipherable without additional research into the IRS's system—"CAF," "ERO," "IMF," and others. Llewellyn Decl. ¶ 2.
24. Several of the FOIA requests contained in the 2015 IRS FOIA Log concern "Internal Documents" or "Internal Forms." There are also multiple FOIA requests concerning "Oath of Office," "Public Information," "FOIA," and "Routine Procedure." Llewellyn Decl. ¶ 3.
25. The 2015 IRS FOIA Log contains approximately 29 FOIA requests that are identifiably linked to "innocent spouse relief." Llewellyn Decl. ¶ 4.
26. The 2015 IRS FOIA Log contains approximately 7 FOIA requests that are identifiably linked to "fraud" relating to individuals. Llewellyn Decl. ¶ 5.

27. None of the information contained within the 2015 IRS FOIA Log includes the name of the person or entity that is the subject of the FOIA request. Llewellyn Decl. ¶ 6.

28. The IRS maintains a publicly available records control schedule for "provid[ing] mandatory records disposition instructions for each major business function." The IRS's records control schedule includes information concerning the disposition of FOIA case files and related records, including the underlying FOIA requests and subsequent correspondence between the requester and the IRS. Llewellyn Decl. ¶ 7; Llewellyn Decl. Ex. 2, at 2–5.

29. The IRS's records control schedule provides that the IRS is authorized to destroy paper copies of fully granted requests or imperfect requests with no appeal two years after the IRS's reply, and the IRS is authorized to destroy paper copies of requests that have at least a partial denial or result in an appeal 6 years after the IRS's reply or final determination, at the earliest. Llewellyn Decl. Ex. 2, at 2–5.

Respectfully submitted,

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn
(DC Bar No. 1033296)
Adina H. Rosenbaum
(DC Bar No. 490428)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff

Dated: October 13, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET B. KWOKA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

C. A. No. 1:17-cv-01157

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff Margaret B. Kwoka responds to Defendant Internal Revenue Service's (IRS) Statement of Undisputed Facts, Doc. 9-1, below. Professor Kwoka has reproduced each of the IRS's numbered statements followed by her response to each statement.

1. By letter dated January 11, 2017, Plaintiff Margaret B. Kwoka, [sic] submitted a request to the IRS's Disclosure office in Atlanta, Georgia. The letter was received by the IRS on January 11, 2017. Plaintiff's request sought a specialized list or log of FOIA requests received by the IRS in Fiscal Year 2015. Specifically, plaintiff requested a list or log that includes the following data fields:

    a. The FOIA request identification number (1tem 1" [sic]);

    b. The name of the requester for any third-party request (i.e., requests by those seeking records that are not about themselves) ("Item 2");

    c. The organizational affiliation of the requester, if there is one ("Item 3");

d. Whether the request was made under the Privacy Act as well as FOIA, or whether a privacy waiver was submitted ("Item 4");

e. The result of each FOIA request ("Item 5");

f. If the request was not granted in full, the reason for the denial or partial denial ("Item 6");

g. The fee category assigned to the request for the purpose of making a determination about the applicability of FOIA fees ("Item 7");

h. Indication of whether a fee waiver was requested and, if so, whether that request was granted ("Item 8"); and

i. The dollar amount the IRS charged the requestor for responding to the request, along with the date of the invoice ("Item 9").

PLAINTIFF'S RESPONSE: Objection to this statement for failure to include "references to the parts of the record relied on to support the statement." LCvR 7(h)(1). Disputed that Professor Kwoka requested a "specialized list or log." Professor Kwoka requested "records reflecting a list or log of FOIA requests received in Fiscal Year 2015" that reflected nine specific categories of information about the FOIA requests. Smith Decl. Ex. 1, at 1, Doc. 9-2. Otherwise, undisputed.

2. Plaintiff's FOIA request was assigned to the IRS Disclosure office in Hartford, Connecticut. (Smith Decl. ¶ 2.)

PLAINTIFF'S RESPONSE: Undisputed.

3. On January 19, 2017, Corrina R. Smith was assigned to handle plaintiff's request.

   PLAINTIFF'S RESPONSE: Objection to this statement for failure to include "references to the parts of the record relied on to support the statement." LCvR 7(h)(1). Otherwise, undisputed.

4. Ms. Smith is a Government Information Specialist in the Internal Revenue Service (IRS) Office of Privacy, Government Liaison and Disclosure (Disclosure) in Lanham-Seabrook, Maryland. She has held this position since March 2017. (Smith Decl. ¶ 1.)

   PLAINTIFF'S RESPONSE: Undisputed.

5. As part of her official duties, Ms. Smith processes and coordinates searches for documents responsive to Freedom of Information Act requests. (Smith Decl. ¶ ¶ 1-2.) As part of Ms. Smith's official duties, she was assigned to this case to process plaintiff's FOIA request. (Smith Decl. ¶ 5.)

   PLAINTIFF'S RESPONSE: Undisputed.

6. On September 12, 2016, the plaintiff filed the instant complaint. (Docket No. 1.)

   PLAINTIFF'S RESPONSE: Disputed. Professor Kwoka filed the complaint in this case on June 14, 2017. Doc. 1.

7. Because the FOIA request was seeking information regarding FOIA requests made to the IRS, Smith contacted IRS Data Services to help her locate and extract responsive data from the Automated Freedom of Information Act ("AFOIA") system. (Smith Decl. ¶ 7.)

   PLAINTIFF'S RESPONSE: Undisputed.

8. AFOIA is the management system used by Disclosure to capture scanned documents and data for all Disclosure casework. When a request is first received by Disclosure's Centralized Processing Unit, an employee in the Centralized Processing Unit will date stamp or mark the request by hand with the date received, determine the type of request using the definitions found in the FOIA, input the request into AFOIA, and assign the request to a caseworker. (Smith Decl. ¶ 8.)

   PLAINTIFF'S RESPONSE: Undisputed.

9. On March 3, 2017, the IRS Data Services specialist provided Ms. Smith with data extracted from the AFOIA system, including data responsive to items 1, 2, 3, 4, 5, 6, 8 and 9 of plaintiff's request. The data was provided with respect to the 9,882 FOIA requests which were received by the IRS in Fiscal Year 2015. (Smith Decl. ¶ 9.)

   PLAINTIFF'S RESPONSE: Undisputed.

10. The IRS data specialist did not provide Ms. Smith with any data in response to item 7 because the IRS does not have an automated way to track the fee category assigned to the request. (Smith Decl. ¶ 9a.)

    PLAINTIFF'S RESPONSE: Undisputed.

11. The IRS data specialist also explained to Ms. Smith that the IRS does not have an automated process for distinguishing third-party requests (i.e., requests by those seeking records not about themselves) from first-party requests. The IRS data specialist therefore provided Ms. Smith with the requester name and organizational affiliation, if any, with respect to all 9,882 FOIA requests, even though plaintiff had asked for the requester's name and organizational affiliation only with respect to third-party requests. (Smith Decl. ¶ 10.)

PLAINTIFF'S RESPONSE: Disputed that Professor Kwoka "asked for the … organizational affiliation only with respect to third-party requests." Professor Kwoka requested the organizational affiliations for all requesters. Smith Decl. Ex. 1, at 1, Doc. 9-2. Otherwise, undisputed.

12. By letter dated March 8, 2017, the IRS responded to plaintiff's request. Enclosed with the IRS' [sic] letter was an Excel spreadsheet which contained data in response to Items 1, 4, 5, 6, 8, and 9 of plaintiff's request. (Smith Decl. ¶ 10).

PLAINTIFF'S RESPONSE: Disputed to the extent the IRS contends the data provided was fully responsive to items 1, 4, 5, 6, 8, and 9 of Professor Kwoka's request. The records Professor Kwoka received from the IRS contained information responsive to items 1, 5, 6, and 8 of her request, along with some of the information she requested under items 4 and 9 of her request. Kwoka Decl. ¶ 6. Otherwise, undisputed.

13. With respect to item 4, the letter stated that a provision of the Privacy Act requires the IRS to also consider release of the records under FOIA and, therefore, some of the requests submitted under the Privacy Act may have been processed under FOIA. *Id.*

PLAINTIFF'S RESPONSE: Undisputed.

14. With respect to item 4, the letter stated that the IRS FOIA case tracking system does not track whether a privacy waiver was submitted. *Id.*

PLAINTIFF'S RESPONSE: Undisputed.

15. With respect to item 9, the letter stated that the IRS does not issue invoices for FOIA fees. *Id.*

PLAINTIFF'S RESPONSE: Undisputed.

16. In response to item 7, the letter stated that the IRS FOIA case tracking system does not have an automated way to track the fee category assigned to the request. e. [sic] In response to items 2 and 3, the letter stated that the IRS is withholding this information in full under FOIA exemption 3 in conjunction with I.R.C. § 6103(a) and FOIA Exemption 6. (Smith Decl. ¶ 11.)

PLAINTIFF'S RESPONSE: Undisputed.

17. By letter dated March 2, 2017, plaintiff filed an administrative appeal of the initial determination of Disclosure to deny, in part, plaintiffs [sic] request for information.' [sic] Specifically, plaintiff argued that the IRS improperly claimed FOIA exemptions in withholding in full information responsive to items 2 and 3 of plaintiffs [sic] request.

    PLAINTIFF'S RESPONSE: Objection to this statement for failure to include "references to the parts of the record relied on to support the statement." LCvR 7(h)(1). Otherwise, undisputed.

18. By letter dated Apri111, [sic] 2017, the Appeals Office of the IRS in Fresno, California, responded to plaintiff's administrative appeal, stating that after a review their office had determined that the response provided by Disclosure was appropriate. The Appeals Office found that the IRS had properly claimed FOIA exemption 3 in conjunction with 26 U.S.C. § 6103(a) and FOIA Exemption 6 in withholding information responsive to items 2 and 3 of plaintiffs [sic] request. (Exhibit 2 to Smith Decl.)

    PLAINTIFF'S REPSONSE: Undisputed.

19. On June 14, 2017, Plaintiff filed a complaint in this Court, alleging that the IRS had violated the FOIA, 5 U.S.C. § 552, in its handling of plaintiff's FOIA request.

    PLAINTIFF'S RESPONSE: Undisputed.

20. William Rowe is an attorney in the Office of Chief Counsel, Procedure and Administration, Branch 7, Internal Revenue Service (IRS). Mr. Rowe is responsible for coordinating with the

Department of Justice the IRS's defense of the Freedom of Information Act (FOIA) lawsuit in which this declaration is being filed. This matter was assigned to him on June 22, 2017.

PLAINTIFF'S RESPONSE: Objection to this statement for failure to include "references to the parts of the record relied on to support the statement." LCvR 7(h)(1). Otherwise, undisputed.

21. Rowe is familiar with the segregation requirement of 5 U.S.C. § 552(b) for any non-exempt information contained in responsive agency records. (Rowe Decl. ¶ 3.)

PLAINTIFF'S RESPONSE: Disputed to the extent this statement improperly states a legal conclusion that Rowe's understanding of the segregability requirement under 5 U.S.C. § 552(b) is correct under the law. Professor Kwoka disputes as a matter of law that Rowe's and the IRS's determinations regarding segregability were correct. *See* Pl.'s Mot. for Summ. J. at 17–24. Undisputed that Rowe is personally aware that FOIA contains a segregability requirement.

22. Rowe reviewed the records located in response to plaintiff's FOIA request, including those that were withheld from disclosure, either in full or in part. *Id.*

PLAINTIFF'S RESPONSE: Undisputed.

23. During the course of his review of these documents, Rowe determined that the IRS had properly withheld records relating to Items 2 and 3 of Plaintiff's Request. *Id.*

PLAINTIFF'S RESPONSE: Disputed to the extent this statement improperly states a legal conclusion that Rowe's determination that the IRS's withholding was proper under FOIA is

correct under the law. Professor Kwoka disputes as a matter of law that Rowe's and the IRS's determinations regarding the applicability of FOIA exemptions were correct. *See* Pl.'s Mot. for Summ. J. at 5–17. Undisputed that Rowe made a personal determination that the IRS's withholdings were correct.

24. The Service is withholding records responsive to Items 2 and 3 of Plaintiff's FOIA request pursuant to: 1) FOIA exemption 3 in conjunction with 26 U.S.C. § 6103(a); and 2) FOIA Exemption 6. Mr. Rowe has reviewed all records at issue in this litigation and has attempted to make every reasonable segregable non-exempt portion of every responsive record available to the plaintiff. (*Id.*) The Service has withheld in their entirety only those records that fall entirely within a FOA exemption, or those records wherein the portions exempt from disclosure under the FOIA are so inextricably intertwined with nonexempt material as to be non-segregable. (*Id.*).

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states legal conclusions that Rowe's and the IRS's reliance on those exemptions and their determinations of segregability are correct under the law. Professor Kwoka disputes as a matter of law that Rowe's and the IRS's determinations regarding the applicability of FOIA exemptions and non-segregability were correct. Pl.'s Mot. for Summ. J. at 5–24. Undisputed that the IRS relies on FOIA exemptions 3 and 6 to withhold the responsive records and that Rowe and the IRS determined that non-exempt information could not be segregated from exempt information.

25. The IRS receives many requests for both tax records and non-tax records. An example of non-tax records might be a request seeking generic informational material on a provision of the Internal Revenue Code and requests for information on IRS programs, processes, or systems. (Rowe Decl. ¶ 13.) Requesters may also seek non-tax records from the IRS because of personal encounters with the subject matter of the records. *Id.*

PLAINTIFF'S RESPONSE: Disputed that the cited declaration provides any evidence regarding the motivation of specific FOIA requesters or the purpose behind any specific FOIA requests. *See* Rowe Decl. ¶ 13, Doc. 9-3. Otherwise, undisputed.

26. Disclosing the information located in response to items 2 and 3 of plaintiff's request would reveal confidential information, and therefore, the IRS withholds the names and organizational affiliations in full pursuant to FOIA exemption 3 in conjunction with I.R.C. § 6103(a). (Rowe Decl. ¶ 16.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states legal conclusions that disclosure of the requested records would reveal confidential information and implicate FOIA exemption 3 and 26 U.S.C. § 6103(a). Professor Kwoka disputes as a matter of law that the requested records would reveal confidential information and that they may be withheld under FOIA exemption 3 and 26 U.S.C. § 6103(a). Pl's Mot. for Summ. J. at 5–17. Undisputed that the IRS relies on FOIA exemption 3 in conjunction with 26 U.S.C. § 6103(a) to withhold the responsive records.

27. If the names and organizational affiliations of requesters were disclosed, the IRS would reveal tax return information to plaintiff the disclosure of which is prohibited. Specifically,

plaintiff would be able to associate the name and organizational affiliation of the requester with the "subject matter" of the request by referencing the FOIA logs posted to the IRS's FOIA electronic reading room at https://www.irs.gov/uac/irs-foia-logs. For example, the FOIA log on the IRS's FOIA electronic reading room for Fiscal Year 2015 contains many unique subject matter details, not limited to the following: "[Form] 1040"; "[Form] 990"; "[Form] 1023"; "[Form] 1040/1040X"; "[Form] 1120-S Election Documents/Forms"; "[Form] 23C"; "Collection/Examination"; "Notice of Deficiency"; "IRS 6672 Penalty"; and "Partnership Exam File." With regard to a request for tax records, this association would disclose the identity of the taxpayer, as well as potentially whether the taxpayer's return was or is being examined, and the nature of such examination." (Rowe Decl. ¶ 17.)

PLAINTIFF'S REPONSE: Disputed. This statement improperly states a legal conclusion that disclosure of the requested records would reveal "return information," including the identity of a taxpayer, in violation of 26 U.S.C. § 6103(a). Professor Kwoka disputes as a matter of law that the requested records would reveal "return information" in violation of 26 U.S.C. § 6103(a). Pl's Mot. for Summ. J. at 5–10. Further disputed that the IRS's online Fiscal Year 2015 FOIA log contains any information identifying the subject of the request. Llewellyn Decl. ¶ 6. Further disputed that releasing the responsive records would lead to the disclosure of any information that would identify the subject of third-party requests, whether a particular person's return was being examined, or the nature of the examination of a particular person's return. Kwoka Decl. ¶ 7; Smith Decl. Ex. 1, at 1, Doc. 9-2. Otherwise, undisputed.

28. Additionally, due to the voluminous amount of requests received in Fiscal Year 2015, the IRS is not able to segregate those subject matter details whose association with requests for tax records would disclose tax information of the person seeking records. (Rowe Decl. ¶¶ 18-19.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states a legal conclusion that the IRS is not able to reasonably segregate properly exempt information from non-exempt information. Professor Kwoka disputes as a matter of law that the IRS cannot reasonably segregate exempt and non-exempt information. Pl.'s Mot. for Summ. J. at 17–24.

29. The IRS does not have an automated process for distinguishing between requests by those FOIA requesters seeking non-tax records from all other requests. As a result, the IRS performed a search of the AFOIA system for the name and organizational affiliation of the requester of each FOIA request received by the IRS in Fiscal Year 2015. (Rowe Decl. ¶ 14.)

PLAINTIFF'S RESPONSE: Undisputed that the IRS does not have an automated process for identifying FOIA requests as "tax records" requests or "non-tax records" requests. Disputed that the IRS does not categorize FOIA requests in the 2015 IRS FOIA Log in ways that reveal at least whether some are "tax records" requests or "non-tax records" requests. Llewellyn Decl. ¶¶ 2–3; 2015 Llewellyn Decl. Ex. 1. Undisputed that the IRS performed a search of the AFOIA system for the name and organizational affiliation of the requester for each FOIA request received by the IRS in Fiscal Year 2015.

30. The IRS would be required to create a new record in order to distinguish the requests for non-tax records and/or first party requests from all other requests, and to create this record

would require the IRS to manually access and review in AFOIA the scanned copy of each FOIA request received by the IRS for Fiscal Year 2015 (the IRS received 9,882 FOIA requests in Fiscal Year 2015). *Id.* The IRS calculates that, because the AFOIA is a slow system that is designed to allow a technician to access only one record at a time, an individual IRS employee could only access 4.5 records per hour, and reviewing all the records for segregability would take approximately 2,196 hours. *Id.* This would create an unreasonable burden on the IRS, thereby making the requested records not reasonably segregable.

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states legal conclusions that the presence of exempt information and the potential need for redactions would require the creation of a new record, would cause an unreasonable burden on the IRS, or would result in the non-exempt information not being reasonably segregable. Professor Kwoka disputes as a matter of law that the presence of exempt information and determining necessary redactions would require the creation of a new record, would cause an unreasonable burden on the IRS, or would result in non-exempt information not being reasonably segregable. Pl.'s Mot. for Summ. J. at 17–24. Disputed that "the AFOIA is a slow system that is designed to allow a technician to access only one record at a time, an individual IRS employee could only access 4.5 records per hour, and reviewing all the records for segregability would take approximately 2,196 hours" because the declarant lacks personal knowledge. *See* Rowe Decl. ¶ 15, Doc. 9-3. Further disputed that the IRS's review of the requested records and/or the underlying FOIA requests to make necessary redactions would take 2,196 working hours because: (1) the cited declaration provides no evidence that this is the only method by which the IRS could review the requested records or the underlying FOIA requests to make

necessary redactions, and IRS records control schedules indicate the IRS has paper copies for some or all of the records at issue, Llewellyn Decl. ¶ 7; Llewellyn Decl. Ex. 2, at 2–4; (2) the cited declaration provides no evidence that the IRS technicians cannot perform other work while waiting during the AFOIA system's "loading time"; (3) the 2015 IRS FOIA Log contains descriptions of several requests that clearly identify them as requests for non-tax records and outside of the topics identified by the IRS as problematic, such that further review is unnecessary, Llewellyn Decl. ¶ 3.

31. The IRS also withholds the names and organizational affiliations of third-party requesters (items 2 and 3 of Plaintiff's request) under FOIA exemption 6. (Rowe Decl. ¶ 19.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states a legal conclusion that the IRS's withholding under exemption 6 is correct under the law. Professor Kwoka disputes as a matter of law that the responsive records may be withheld under exemption 6. Pl.'s Mot. for Summ. J. at 10–17. Undisputed that the IRS relies on FOIA exemption 6 to withhold the responsive records.

32. The name and organizational affiliation of each FOIA requester is personal private information because it pertains to particular individuals. (Rowe Decl. ¶ 21.) FOIA requesters have a significant privacy interest in the requested information because release of the name [sic] and organizational affiliations would not only reveal the names of the individuals who made the FOIA requests to the IRS, but would reveal the "subject matter" of the requests. (Rowe Decl. ¶ 21.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states legal conclusions that the names and organizational affiliations of FOIA requesters are personal private information and that FOIA requesters have significant privacy interests in their names and/or organizational affiliations under exemption 6. Professor Kwoka disputes as a matter of law that the names and organizational affiliations of FOIA requesters are personal private information and that FOIA requesters have significant privacy interests in their names and/or organizational affiliations under exemption 6. Pl.'s Mot. for Summ. J. at 10–17. Disputed that disclosure of the organizational affiliations of requesters or the names of third-party requesters would reveal the identity of the subject of the requests. *See* Kwoka Decl. ¶ 7; Kwoka Decl. Ex. 2; Smith Decl. Ex. 1, Doc. 9-2; Llewellyn Decl. ¶ 6; Llewellyn Decl. Ex. 1.

33. Even the association of requests for non-tax records with the subject matter details available on the IRS FOIA electronic reading room may reveal sensitive information about the requesters. For example, a FOIA requester who submits a FOIA request for generic informational material about identity theft because of personal encounters with identity theft has a significant privacy interest in preventing the requested information from being released to the public. (Rowe Decl. ¶ 22.) The same is true of a FOIA requester who asks for generic

informational material about innocent spouse relief because the requester's spouse failed to report income, reported income improperly, or claimed improper deductions or credits. (Rowe Decl. ¶ 23.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states legal conclusions that disclosure of the names and organizational affiliations of FOIA requesters who request non-tax records would reveal sensitive information about them and would implicate their privacy interests under exemption 6. Professor Kwoka disputes as a matter of law that disclosure of the names and organizational affiliations of FOIA requesters who request non-tax records would reveal sensitive information about them or would implicate their privacy interests under exemption 6. Pl.'s Mot. for Summ. J. at 10–17. Disputed that the cited declaration provides any evidence regarding the motivation of any specific FOIA requesters or the purpose behind any specific FOIA requests. *See* Rowe Decl. ¶¶ 22–23, Doc. 9-3.

34. Included among many other "subject matter- details [sic] that appear to implicate significant privacy interests are those that reference criminal investigations, deceased taxpayers, examinations, fraudulent returns, penalties, grand jury information, and lien and levy information. A request with one of these subject matter details may implicate significant privacy interests even if the request seeks non-tax records. *Id.*

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states a legal conclusion that particular descriptions of FOIA requests implicate privacy interests of the requesters under exemption 6. Professor Kwoka disputes as a matter of law that any of the descriptions of FOIA requests in the IRS's publicly available log implicate privacy interests of the requesters under exemption 6. Pl.'s Mot. for Summ. J. at 10–17. Disputed that the cited

declaration identifies which records contain these descriptions or otherwise indicates where these descriptions are found. *See* Rowe Decl. ¶ 23, Doc. 9-3.

35. Again, as explained in Statements 29-30 above, the IRS cannot reasonably segregate the information in Items 2 and 3 whose disclosure would constitute an unwarranted invasion of privacy of individual taxpayers from those which would not. (Rowe Decl. ¶¶ 14 and 25.)

PLAINTIFF'S RESPONSE: Disputed. This statement improperly states a legal conclusion that the IRS cannot reasonably segregate properly exempt and non-exempt information in the responsive records. Professor Kwoka disputes as a matter of law that the IRS cannot reasonably segregate properly exempt and non-exempt information in the responsive records. Pl.'s Mot. for Summ. J. at 17–24.

36. In order to segregate those records, the IRS would have to manually access all 9,882 responsive records to determine which records would implicate a significant privacy interest.

PLAINTIFF'S RESPONSE: Disputed. The 2015 IRS FOIA Log contains descriptions of several requests that clearly identify them as requests for non-tax records and outside of the topics identified by the IRS as problematic, such that further review is unnecessary. Llewellyn Decl. ¶ 3.

Respectfully submitted,

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn
(DC Bar No. 1033296)
Adina H. Rosenbaum
(DC Bar No. 490428)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff

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