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19 IN THE UNITED STATES DISTRICT COURT  
 20 THE NORTHERN DISTRICT OF CALIFORNIA  
 21 SAN FRANCISCO DIVISION

22 PUBLIC.RESOURCE.ORG., a California non-	)	Case No. 13-cv-02789 WHO
23 profit organization,	)	
	)	<b>JOINT CASE MANAGEMENT</b>
24 Plaintiff,	)	<b>STATEMENT</b>
	)	
25 v.	)	Date: June 18, 2014
	)	Time: 2 p.m.
26 UNITED STATES INTERNAL REVENUE	)	Dept: Courtroom 2, 17th Floor
27 SERVICE,	)	
	)	
28 Defendant.	)	

1 Plaintiff Public.Resource.Org, Inc. and Defendant United States Internal Revenue Service  
2 respectfully submit the following Joint Case Management Statement.

3 1. Jurisdiction and Service: Plaintiff contends that this Court has federal question  
4 jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), 702, and 704, and 28 U.S.C. §  
5 1331. Defendant contends that 5 U.S.C. § 552(a)(4)(B) does not provide subject matter  
6 jurisdiction here. All parties have been served and there are no disputes regarding personal  
7 jurisdiction or venue.

8 2. Facts: On March 11, 2013, Plaintiff filed a request under the Freedom of  
9 Information Act, 5 U.S.C. § 552, *et seq.* (“FOIA”) with Defendant for the electronically filed  
10 Form 990s for nine tax-exempt charitable organizations. IRS Form 990, “Return of Organization  
11 Exempt from Income Tax,” is used to assist Defendant in enforcement of the rules governing the  
12 tax-free status that is granted to nonprofit organizations. Among other information, a Form 990  
13 details revenues and expenses, assets and liabilities, and additional information including  
14 compensation paid to executives, unrelated business income, whether the organization engages in  
15 lobbying activities, and the stated accomplishments of the organization. Plaintiff’s FOIA request  
16 specifically sought the records in the Modernized e-File (“MeF”) format used for the electronic  
17 filing of the forms through the Internet, or other machine-readable format.

18 On March 19, 2013, Defendant denied Plaintiff’s request, stating that Form 990 records are  
19 exempt from FOIA and must be requested through a separate procedure, the IRS Form 4506-A,  
20 “Request for Public Inspection or Copy of Exempt or Political Organization IRS Form.” Plaintiff  
21 sought reconsideration through a letter from its counsel on April 12, 2013, stating that the Form  
22 4506-A procedure is inadequate because it only provides for releases of Form 990 data in “raw” or  
23 “alchemy” format, in which the original Form 990 data has been converted from MeF into an  
24 image file. Plaintiff contends that this reformatting makes the data extremely difficult to analyze.

25 On May 1, 2013, Defendant declined to reconsider the denial of Plaintiff’s FOIA request.  
26 Defendant stated in a letter to Plaintiff’s counsel that “Form 990 data in the MeF format do not  
27 constitute a recognizable record, but rather a continuous string of numbers that includes  
28 confidential return information. Our existing process for providing releasable copies of Form 990

1 is to convert the MeF data into a PDF format and withhold confidential return information from  
2 the resulting form.” Defendant, the letter continued, “does not have an existing process to convert  
3 the releasable portion of Form 990 back into MeF (or other machine readable) format. For these  
4 reasons, we are unable to provide the requested records in MeF format because they are not  
5 readily reproducible in a form that also complies with IRC section 6103(c).” Plaintiff filed this  
6 lawsuit on June 18, 2013, seeking declaratory and injunctive relief under FOIA and the  
7 Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (“APA”).

8 The principal factual issue in dispute is whether the Form 990 data that is the subject of  
9 Plaintiff’s FOIA request is readily reproducible, with any legally permissible or mandated  
10 redactions, in machine-readable format, which Plaintiff would define as excluding information  
11 stored as a graphic file like the TIFF images produced by Defendant.

12 3. Legal Issues: The disputed points of law are: (a) whether Defendant’s refusal to  
13 make the records available promptly in the format requested by Plaintiff violates FOIA, and in  
14 particular 5 U.S.C. § 552(a)(3)(B), which requires that a federal agency “shall provide the record  
15 in any form or format requested by the person if the record is readily reproducible by the agency in  
16 that form or format”; and (b) whether Defendant’s determination that IRS Form 990s filed  
17 electronically by nonprofit organizations and received and maintained in MeF format are not  
18 agency “records” under FOIA, and/or that they are identical to non-machine-readable versions of  
19 Form 990s that Defendant treats as routinely available documents not subject to FOIA, is arbitrary  
20 and capricious and inconsistent with law in violation of the APA, 5 U.S.C. § 706(2)(A).

21 4. Motions: Defendant filed a motion to dismiss Plaintiff’s Complaint pursuant to  
22 Federal Rule of Civil Procedure 12(b)(6), which is set for hearing on June 18, 2014. If this action  
23 proceeds, the parties anticipate filing cross motions for summary judgment.

24 5. Amendments to Pleadings: Plaintiff does not currently anticipate any amendments  
25 to its Complaint.

26 6. Evidence Preservation: The parties have conferred and reviewed the Court’s ESI  
27 Guidelines and taken reasonable and proportionate steps to preserve evidence relevant to the  
28 issues reasonably evident in this action.

1           7.     Disclosures: Because of Defendant's pending dispositive motion, and given the  
2 nature of this FOIA action, the parties agree that any questions concerning discovery and initial  
3 disclosures, including whether discovery and initial disclosures are appropriate, shall be deferred  
4 pending a decision by the Court on Defendant's pending motion.

5           8.     Discovery: Please refer to the statement regarding disclosures above.

6           9.     Class Actions: This is not a class action.

7           10.    Related Cases: There are no related cases as defined under the Local Rules.

8           11.    Relief: Plaintiff requests that the Court grant the following relief:

- 9           a.     Declare under the APA that Defendant's policy that MeF-formatted Form 990s that  
10           it receives and maintains in MeF or other machine-readable form are not agency  
11           records subject to FOIA is arbitrary, capricious, and not in accordance with law;
- 12           b.     Permanently enjoin Defendant from refusing to produce Form 990 records in a  
13           machine-processable format in response to future FOIA requests for this  
14           information;
- 15           c.     Declare under FOIA that Defendant's failure and refusal to produce the requested  
16           Form 990 records in a machine-processable format sought by Plaintiff violates  
17           FOIA;
- 18           d.     Enjoin Defendant from withholding the MeF-formatted (or otherwise machine-  
19           readable) Form 990s for the nine nonprofit organizations that Plaintiff requested  
20           through its FOIA request, and order Defendant to make those records available to  
21           Plaintiff in MeF or other machine-processable format within 15 days of the Court's  
22           decision in this matter;
- 23           e.     Award Plaintiff its reasonable attorney's fees and costs; and
- 24           f.     Grant such other relief as the Court may deem just and proper.

25           12.    Settlement and ADR: The parties participated in an in-person mediation session  
26 with the Court-appointed mediator on January 24, 2014, and three follow-up telephonic mediation  
27 sessions on February 10, 2014, March 5, 2014, and April 1, 2014. The parties were unable to  
28 agree upon a settlement at mediation.

1 13. Consent to Magistrate Judge: The parties do not consent to a magistrate judge.

2 14. Other References: The parties do not believe that this case is suitable for any other  
3 reference.

4 15. Narrowing of Issues: Should this action proceed, the parties anticipate that this  
5 matter will be resolved in its entirety by cross-motions for summary judgment.

6 16. Expedited Trial Procedure: The parties do not believe that this matter is  
7 appropriate for expedited trial procedures.

8 17. Scheduling: N/A.

9 18. Trial: The parties anticipate that should this matter proceed, it will be resolved  
10 through the parties' cross-motions for summary judgment.

11 19. Disclosure of Non-party Interested Entities or Persons: Plaintiff is concurrently  
12 filing its Certification of Interested Entities or Persons, which states that other than the named  
13 parties, there are no interested entities or persons as defined under Civil L.R. 3-15. Defendant is a  
14 governmental agency, and therefore it is exempt from this requirement under Civil L.R. 3-15(a).

15 20. Other Matters: None.

16 DATED this 11th day of June, 2014.

DAVIS WRIGHT TREMAINE LLP

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21 By: /s/ Yonatan Gelblum  
22 YONATAN GELBLUM  
23 Attorneys for Defendant United States  
24 Internal Revenue Service

**ATTESTATION PURSUANT TO GENERAL ORDER 45**

25 I, Thomas R. Burke, hereby attest that concurrences in the filing of this document have  
26 been obtained from each of the signatories.

/s/ Thomas R. Burke  
Thomas R. Burke