

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

GEORGE KATSIAFICAS,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 13-11058-WGY
)	
UNITED STATES CENTRAL)	
INTELLIGENCE AGENCY,)	
)	
Defendant.)	

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

Defendant, the United States Central Intelligence Agency (“CIA”), opposes Plaintiff’s motion for summary judgment and cross-moves for summary judgment pursuant to Fed. R. Civ. P. 56 in this Freedom of Information Act (“FOIA”) case, 5 U.S.C. §552 (“FOIA”). Plaintiff George Katsiaficas made two separate FOIA requests to the CIA: one sought records regarding the coup d’etat of May 16, 1961 in South Korea through which General Park Chung-hee seized power, the other sought records regarding the assassination of the Republic of Korea President Park Chung-hee on October 26, 1979. The CIA processed both requests and released documents to Katsiaficas in response to his requests.

In his complaint, Katsiaficas challenges the adequacy of the CIA’s search for records in response to his request. The only issue before this Court is whether the CIA conducted an adequate search as to the coup request. The CIA filed a motion to dismiss those portions of the complaint related to the assassination documents request because Katsiaficas did not exhaust his administrative remedies as to that request. Finally, in his motion for summary judgment, Katsiaficas challenges, for the first time, the FOIA exemptions the CIA asserted when it withheld

certain information. Katsiaficas did not include a challenge to the CIA's exemptions in his complaint; therefore, the issue of the appropriateness of the CIA's exemptions is not properly before this Court. For the reasons detailed in this memorandum, the CIA is entitled to summary judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS¹

I. Plaintiff's FOIA Requests

1. By letter dated March 4, 2010, Plaintiff George Katsiaficas, a professor at Wentworth Institute of Technology, submitted two FOIA requests to the CIA. Declaration of Martha M. Lutz ("Lutz Decl.") ¶ 6; Exhibit ("Ex.") A.

2. The first request sought "records related, describing, and/or concerning the coup d'etat of May 16, 1961 in South Korea through which General Park Chung-hee seized power" ("Coup Request"). *Id.* at ¶ 6 and Ex. A. Katsiaficas further stated that he was "especially interested in all agency communications in this matter with US Army officer James Hausman, long-time friend and confidant of Park Chung-hee." The Coup Request included a request for "CIA, DIA [Defense Intelligence Agency] and all US government documents related to Park Chung-hee's meetings with US government personnel, and any materials referring to the May 16, 1961 coup d'etat." *Id.* ¶ 6; Ex. A.

3. By letter dated April 8, 2010, the CIA responded to Katsiaficas and provided him with the request reference number F-2010-00766, which had been assigned to the Coup Request. Lutz Decl. ¶ 7; Ex. B.

4. The second request sought "records related, describing, and/or concerning the

¹ In accordance with Local Rule 56.1, Defendant includes the statement of the material facts of record as to which there is no genuine issue to be tried in its memorandum. Although Plaintiff included a "Facts" section in his motion for summary judgment [Doc. 17], it is unclear whether he claims these facts are material and undisputed.

assassination of the Southern Korean President Park Chung-hee on October 26, 1979 in Seoul, South Korea” (“Assassination Documents Request”). Lutz Decl. ¶ 7; Ex. B. The Assassination Documents Request included a request for “CIA, DIA and all US government documents related to the assassination, to his assassin (Korean Central Agency chairman Kim Kae-kyu), to US persons’ meetings with both individuals named above, and to any other materials referring to President Park’s assassination.” Lutz Decl. ¶ 6.

5. On April 8, 2010, the CIA responded by separate letter to Katsiaficas and provided him with the request reference number F-2010-00767, which had been assigned to the Assassination Documents Request. Lutz Decl. ¶ 8; Ex. C. As with the Coup Request, the CIA informed Katsiaficas that, due to the large number of FOIA requests received by the CIA, it was unlikely that he would receive a response within 20 days and that Katsiaficas had the right to consider its honest appraisal of the processing time to be a denial of his request. The CIA stated that Katsiaficas could appeal to the CIA’s Agency Release Panel if he so chose. Id.

6. After receiving both requests, the CIA contacted Katsiaficas by telephone to discuss his requests. Lutz Decl. ¶ 9. Katsiaficas consented to limit his request only to CIA-originated documents. Id.; Ex. D.

7. On 26 April 2010, the CIA tasked out searches reasonably calculated to identify all CIA records responsive to Katsiaficas’s requests. Lutz. Decl. ¶ 9.

8. On October 13, 2010, Katsiaficas wrote to the CIA via his attorney and requested a response or an estimated time of response with respect to “his FOIA request to the CIA dated April 4, 2010 with receipt acknowledged April 8, 2010.” Lutz Decl. ¶¶ 9, 10; Ex. E. Katsiaficas cited only the request reference number that was assigned to the Assassination Documents Request. Id. The CIA treated this letter as relating only to the Assassination Documents

Request, explicitly included only the reference number of the Assassination Documents Request in the subject line, and responded by letter on November 9, 2010 citing the “request for records regarding ‘the assassination of the South Korean President Park Chung-hee on October 26, 1979 in Seoul, South Korea.’” Id.; Ex. F. The CIA explained that agency policy is to handle FOIA requests on a “first-in, first-out basis” and that such an approach is “most equitable for all requesters.” Lutz Decl. ¶ 10. As such, the CIA was unable to provide a definite date for completion. Id.

9. On February 11, 2011, Katsiaficas, via his attorney, sent another letter to the CIA. Id. at ¶ 11. This letter requested a status update and referred to both request reference numbers and Katsiaficas’s “two FOIA request[s].” Id.; Ex. G. The CIA treated this letter as referring to both the Coup Request and the Assassination Documents Request and responded by letter dated March 2, 2011, citing both request reference numbers and describing both the Coup Request and the Assassination Documents Request. Lutz Decl. ¶ 11; Ex. H. The CIA explained that response time is “predicated on the number and complexity of the requests [the CIA] receive[s].” Id.

10. On March 29, 2011, the CIA provided Katsiaficas with a final response to the Coup Request, consisting of 11 documents with a total of 29 pages. Lutz Decl. ¶ 12; Ex. I. Portions of those documents were redacted, as they contained information that is properly subject to FOIA exemptions b(1) and b(3). Lutz Decl. ¶ 12. The CIA’s final response letter cited only to the request reference number for the Coup Request, F-2010-00766, and explicitly stated that it was a final response to the Katsiaficas’s request for records regarding “the coup d’etat of May 16, 1961 in South Korea through which General Park Chung-hee seized power.” Id. The final response letter further informed Katsiaficas that he had the right to appeal to the Agency Release Panel within 45 days of the date of the letter, 29 March 2011. Id. The final response letter dated

May 29, 2011 related only to the Coup Request. Id. The CIA did not send Katsiaficas a final response letter with respect to the Assassination Documents Request at that time because the request was still being processed. Id.

11. On May 9, 2011, Katsiaficas sent a letter to the CIA purportedly relating to the “FOIA requests of George Katsiaficas dated March 4, 2010” and appealing the CIA’s final response on the basis that it was “unresponsive and insufficient.” Id. ¶ 13; Ex. J.

12. Katsiaficas appears to have misinterpreted the CIA’s final response letter to the Coup Request and attempted, in his letter to the Agency Release Panel, to appeal the CIA’s response to both the Coup Request and the Assassination Documents Request. Lutz Decl. ¶ 14. Noting this mistake, the CIA responded to Katsiaficas’s letter on August 18, 2011 and explained that the Assassination Documents Request “was assigned the reference number F-2010-00767 and is still being processed. Therefore this portion of the request is not being considered in the appeal of F-2010-00766 [the Coup Request].” Id.; Ex. K. The CIA accepted the appeal of the Coup Request and explained that it would be handled on a “first-received, first-out basis.” Lutz Decl. ¶ 14.

13. On July 20, 2012, the CIA provided Katsiaficas with a final response to the Assassination Documents Request, consisting of 4 documents with a total of 10 pages. Lutz Decl. ¶ 15; Ex. L. Portions of those documents were redacted, as they contained information that is properly subject to FOIA exemptions b(1) and b(3). Lutz Decl. ¶ 15. The final response letter also noted that, while Katsiaficas’s request had initially sought DIA and U.S. Government documents, Katsiaficas had agreed pursuant to an April 2012 telephone conversation to limit his request to CIA records. Id. The final response letter further informed Katsiaficas that he had the right to appeal to the Agency Release Panel within 45 days of the date of the letter, 20 July 2012.

Id. The CIA received no letter appealing the final agency response to the Assassination Documents Request. Id.

14. On February 19, 2014, the CIA sent Katsiaficas a letter resolving his appeal of the final agency response to the Coup Request. Lutz Decl. ¶ 17; Ex. M. The CIA's Agency Release Panel, charged with handling appeals of final responses under FOIA, reviewed the final agency response to the Coup Request. Lutz Decl. ¶ 17. It determined that the portions previously withheld from the 11 documents released to Katsiaficas in response to the Coup Request were properly withheld under FOIA exemptions (b)(1) and (b)(3), and the material denied in its entirety was properly denied on the basis of FOIA exemptions (b)(1) and (b)(3). Id. The Agency Release Panel further informed the Plaintiff that it had located two additional documents that might be of interest to him, both of which had been released previously to the public, and provided those documents as enclosures to the February 19, 2014 letter. Id.

II. The CIA's Search For Records

A. CIA's Records Systems

15. All FOIA requests submitted to the CIA come to the Information and Privacy Coordinator, Information Management Services ("IMS"). Lutz Decl. ¶ 18. Once a FOIA request is received, and under the direction and supervision of the CIA Information and Privacy Coordinator, experienced IMS professionals analyze the request and determine which CIA components reasonably might be expected to possess responsive records. Id. IMS then transmits a copy of the request to each relevant component. Id.

16. All CIA components are contained within one of five directorates or office clusters: the National Clandestine Service ("NCS"), the Directorate of Intelligence ("DI"), the

Directorate of Science and Technology (“DS&T”), the Directorate of Support (“DS”), and the Director of CIA Area (“DIR Area”). Id. at ¶ 19.

17. The NCS is the organization within the CIA responsible for the clandestine collection of foreign intelligence from human sources. Id. at ¶ 20. The NCS’s records system contains information on persons who are of foreign intelligence or counterintelligence interest to CIA and other U.S. Government agencies. Id. Appropriately trained personnel conduct FOIA searches of the NCS’s records system as part of their normal responsibilities. Id.

18. The DI is the CIA component that analyzes, interprets, and forecasts foreign intelligence issues and world events of importance to the United States. Id. at ¶ 21. The DI is also responsible for the production of finished intelligence reports for dissemination to policymakers in the U.S. Government. Id. Appropriately trained personnel regularly conduct FOIA searches of the DI records system as part of their normal responsibilities. Id.

19. The DS&T is the CIA component responsible for creating and applying technology to fulfill intelligence requirements. Id. at ¶ 22. Appropriately trained personnel regularly conduct FOIA searches of the DS&T’s records system as part of their normal responsibilities. Id.

20. The DS provides the CIA with mission-critical services, including the protection of CIA personnel, security matters generally, facilities, communications, logistics, training, financial management, medical services, and human resources. Id. at ¶ 23. It maintains records on all current and former CIA employees, whether employed in a contract or staff capacity, as well as other individuals for whom security processing or evaluation has been required. Id. Appropriately trained personnel regularly conduct FOIA searches of the DS’s records system as part of their normal responsibilities. Id.

21. The DIR Area is a cluster of offices directly responsible to the Director of CIA, such as the Office of General Counsel, the Office of Inspector General, and the Office of Congressional Affairs, and is distinct from the Agency's main directorates. Id. at ¶ 24. Appropriately trained DIR Area personnel regularly conduct FOIA searches of the DIR Area systems of records as part of their normal responsibilities. Id.

22. Because the CIA's records systems are decentralized and compartmented, each directorate IRO must determine which components within the directorate might reasonably be expected to possess records responsive to a particular request and then work with personnel within each of those components to devise a search strategy tailored to the component's configuration of its records systems and unique characteristics of that configuration. Id. at ¶ 25. This process includes identifying which of the records systems subject to FOIA provisions to search as well as which search tools, methods, and terms to employ. Id. In many of the components, the information management professionals conducting FOIA searches are the same professionals searching records in support of the component's daily mission. Id.

23. The CIA employees who performed the necessary searches for the FOIA request below: (a) have access to the pertinent records; (b) are qualified to search those records; and (c) regularly search those records in the course of their professional duties. Id. at 26.

B. CIA's Search for Records Responsive to the Plaintiff's Coup Request

24. The CIA processed the Coup Request following the same procedures as set forth above. Id. at ¶ 27. That is, the request was received by IMS, reviewed by IMS professionals expert in the tasking of records searches, and tasked to the directorates reasonably likely to have records that are subject to the FOIA and Privacy Act and are responsive to the request. Id.

25. During this time period, the CIA conducted searches reasonably calculated to uncover all CIA records responsive to the Katsiaficas's requests. Id. at ¶ 28. In particular, the CIA took the following steps in response to the Coup Request:

- a. The CIA tasked the Directorate of Intelligence ("DI") to search relevant Agency-wide and DI records systems. Id. These DI searches are structured in such a way as to locate both DI analytical finished intelligence product, and intelligence reports drafted by the National Clandestine Service ("NCS") that are disseminated to the U.S. Intelligence Community and not exempt from search under FOIA's Operational Files Exemption. Id. Therefore, this search was designed to locate responsive documents for both the DI and NCS, the CIA components believed to possess documents responsive to this request. Id.
- b. The DI applied broad search terms designed to locate all responsive documents created between 1 January 1961 and 1 January 1962. Id. These search terms were created by individuals with expertise in each records-keeping system and in light of the particular search mechanisms available in each database. Id.
- c. Within the CIA's database of previously-released documents, the CIA searched for all documents released in part or in full containing "chunghee" or "chung hee" within 15 words of "coup." Id. Similarly, within the DI's primary research and analysis database, the CIA searched for all documents containing: (1) "chunghee" or "chung hee," (2) "coup," and (3) "korea." Id. Within the CIA's archived records database, the CIA searched for all documents containing: (1) "park," (2) "korea," and (3) "coup." Within the CIA's Intelligence Publications Index and its

database containing disseminated intelligence products that pre-date 1967, the CIA searched for all documents containing the term “park.” Id.

26. The CIA located 20 documents using these search terms: 5 of those documents were determined to be non-responsive, and the CIA reviewed the remaining 15 to determine what, if any, information should be properly withheld under exemptions to FOIA. Id. at ¶ 29. The CIA determined that 11 documents could be released in part or in full, and that 4 documents must be withheld entirely pursuant to FOIA exemptions b(1) and b(3). Id.

27. On consideration of Katsiaficas’s appeal, the CIA affirmed that, of the 15 previously-located records, 4 must be withheld in full pursuant to FOIA exemptions b(1) and b(3), and 11 could be released with redactions pursuant to FOIA exemptions b(1) and b(3). Id. at ¶ 30. The DI did not believe that any additional searches needed to be run on DI databases, but in order to ensure that all responsive records had been located, the DI requested that the NCS be directly tasked on appeal. Id. The NCS did not limit this search by timeframe. Id. The NCS located 4 records, 2 of which were deemed to be non-responsive. Id. The remaining 2 records had been previously released, and the CIA provided Katsiaficas with copies of those records as previously released. Id.

ARGUMENT

A. The Summary Judgment Standard.

FOIA actions are “generally and most appropriately” adjudicated through summary judgment. National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement, 811 F. Supp. 2d 713, 732-733 (S.D.N.Y. 2011) (citing Bloomberg L.P. v. Board of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009)); Miscavige v. Internal Revenue Serv., 2 F.3d 366, 369 (11th Cir.1993). Summary judgment may be granted to the government in a FOIA case if “the agency proves that it has fully discharged its obligations

under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.” Fischer v. Dep’t of Justice, 596 F. Supp. 2d 34, 42 (D.D.C. 2009) (quoting Greenberg v. U.S. Dep’t of Treasury, 10 F. Supp. 2d 3, 11 (D.D.C. 1998)). An agency must show that it has “made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” Olesky v. U.S. Dep’t of Def., 658 F. Supp. 2d 288, 294 (D. Mass. 2009) (quoting Oglesby v. U.S. Dep’t of Army, 920 F.2d. 57, 68 (D.C. Cir. 1990)). An agency’s search is not necessarily inadequate if it fails to locate existing documents. Id. at 298. In the end, after conducting a search, the agency must demonstrate that all relevant documents have been produced, cannot be located, or fall under an exemption to discharge its duty under the FOIA. Gillin v. IRS, 980 F.2d 819, 821 (1st Cir. 1992). Summary judgment in FOIA cases routinely are granted solely on the basis of agency affidavits. Crooker v. Tax Div. of U.S. Dep’t of Justice, 1995 WL 783236 at *10 (D. Mass. 1995). Indeed, agency declarations “are afforded a presumption of good faith” and an adequate affidavit “can be rebutted only ‘with evidence that the agency’s search was not made in good faith.’” See SafeCard Servs., Inc. v. Sec. & Exch. Comm’n, 926 F.2d 1197, 1200 (D.C.Cir.1991) (quoting Defenders of Wildlife v. U.S. Dep’t of Interior, 314 F. Supp. 2d 1, 8 (D.D.C. 2004)).

Otherwise, the FOIA standard for summary judgment is similar to any other action. National Day, 811 F. Supp. 2d at 732. In general, the role of summary judgment is “to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). To make that decision, the Court must view the facts on the record and all reasonable inferences therefrom in a light most favorable to the non-moving

party. Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 (1st Cir. 1999). Where the non-moving party bears the burden of proof on an issue at trial, the moving party need not produce evidence undermining the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Instead, the moving party may point out to the court the "absence of evidence to support the non-moving party's case." Id. The question, then, is not "...whether there is literally no evidence favoring the non-movant, but whether there is any upon which a jury could properly proceed to find a verdict in that party's favor." Caputo v. Boston Edison Co., 924 F.2d 11, 13 (1st Cir. 1991). A party opposing summary judgment must present competent evidence of record that shows a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 262, 256 (1986). "Conclusory allegations, improbable inferences, and unsupported speculation" without actual supporting evidence does not raise a genuine issue of material fact. Medina-Munoz v. R. J. Reynolds Tobacco Co., 895 F.2d 5, 8 (1st Cir. 1990). At bottom, summary judgment is appropriate when there is no dispute as to any material fact and only questions of law remain. See Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996).

B. The CIA is Entitled to Summary Judgment as a Matter of Law.

1. The CIA Conducted an Adequate, Reasonable Search.²

To demonstrate the adequacy of a search, an agency must "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby, 920 F.2d at 68. An adequate search does not mean that every conceivable responsive document will be discovered. See id. (noting

² This memorandum discusses the adequacy of the CIA's search as to the Coup Request only. Katsiaticas did not exhaust his administrative remedies as to the Assassination Documents Request. On February 14, 2014, the CIA filed a motion to dismiss those portions of the Complaint that refer to the Assassination Documents based on lack of subject matter jurisdiction for failure to exhaust administrative remedies. Docs. 22 and 23.

“[t]here is no requirement that an agency search every record system.”); Allen v. United States Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (“While the agency’s search must be reasonably calculated to produce the requested information, FOIA does not impose a requirement that every record be found.”); Weisberg v. Dep’t of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)(“[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.”)

In evaluating the adequacy of a search, courts accord agency declarations “a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” SafeCard Servs., Inc., 926 F.2d at 1200. “Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” Id. at 1201. The statute does not require “meticulous documentation [of] the details of an epic search.” Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). Instead, declarations that “explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.” Id.

As outlined in the Declaration of Martha M. Lutz, Chief of the CIA’s Litigation Support Unit, the CIA conducted an adequate, reasonable search for responsive records in this case. In April 2010, the CIA contacted Katsiaficas by phone, and he agreed to limit his requests to CIA-originated documents. Lutz Decl. ¶ 9. Within a few days of that phone call, the CIA tasked out searches reasonably calculated to identify all CIA records responsive to Katsiaficas’s requests. Id.

The CIA processed the Coup Request following its usual procedures. Lutz Decl. ¶ 27.

The CIA's Information Management Services ("IMS") received Katsiaficas's requests, and IMS professionals expert in the tasking of records searches make appropriate inquiries with the components within the CIA most reasonably likely to have responsive records. Id. This includes identifying the search tools, methods, and terms to employ. Id. at ¶ 25. The CIA employees who performed the necessary searches for the FOIA request below: (a) have access to the pertinent records; (b) are qualified to search those records; and (c) regularly search those records in the course of their professional duties. Id. at ¶ 26.

In response to the Coup Request, the CIA tasked the Directorate of Intelligence ("DI") to search relevant Agency-wide and DI records systems. Id. at ¶ 28(a). This search was designed to locate responsive documents for both the DI and National Clandestine Service, the CIA components believed to possess documents responsive to this request. Id. The DI applied broad search terms designed to locate all responsive documents created between January 1, 1961 and January 1, 1962. Id. at ¶ 28(b). These search terms were created by individuals with expertise in each records-keeping system and in light of the particular search mechanisms available in each database. Id.

Moreover, within the CIA's database of previously-released documents, the CIA searched for all documents released in part or in full containing "chunghee" or "chung hee" within 15 words of "coup." Id. at ¶ 28(c). Similarly, within the DI's primary research and analysis database, the CIA searched for all documents containing: (1) "chunghee" or "chung hee," (2) "coup," and (3) "korea." Id. Within the CIA's archived records database, the CIA searched for all documents containing: (1) "park," (2) "korea," and (3) "coup." Finally, within the CIA's Intelligence Publications Index and its database containing disseminated intelligence products that pre-date 1967, the CIA searched for all documents containing the term "park." Id.

Using the above search terms, the CIA located 20 documents: 5 were deemed non-responsive, 4 were withheld entirely based on FOIA exemptions b(1) and b(3), and 11 documents (containing a total of 29 pages) were released to Katsiaficas. *Id.* at ¶¶ 12, 29. The DI did not believe that additional searches needed to be run on DI databases but, to ensure that all responsive records had been located, the DI requested that the NCS be directly tasked on appeal. *Id.* at ¶ 30. The NCS located 4 records, 2 of which were deemed to be non-responsive. *Id.* The remaining 2 records had been previously released, and the CIA provided Katsiaficas with copies of those records as previously released. *Id.*

The Lutz Declaration details the scope and method of the CIA's search in response to the Coup Request. The declaration demonstrates that the CIA made a good faith effort to conduct a search for the requested records, using methods that can be reasonably expected to produce the information requested. The CIA met its burden under the FOIA. Accordingly, the CIA is entitled to summary judgment.

2. Whether the CIA Properly Withheld Documents Pursuant to FOIA Exemptions (b)(1) and (b)(3) is not Properly Before this Court.

Katsiaficas's complaint raised a single cause of action: the adequacy of the CIA's search for records in response to his two FOIA requests. Doc. 1, p. 12. In his motion for summary judgment, however, Katsiaficas challenges the appropriateness of the CIA's asserted exemptions. Doc. 17 at 4-5. This Court may not entertain Plaintiff's argument about the FOIA exemptions because it is a new claim that falls outside the four corners of the Complaint. See Firstenberg v. City of Santa Fe, 696 F.3d 1018, 1024 (10th Cir. 2012) ("we may not rewrite a complaint to include claims that were never presented") (internal quotation marks omitted).

It is well-settled that "[a]t the summary judgment stage, the proper procedure for plaintiff to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A

plaintiff may not amend her complaint through argument in a brief opposing summary judgment.” Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1315 (11th Cir. 2004); Bell v. City of Philadelphia, 275 Fed. Appx. 157, 160 (3d Cir. 2008) (same). Similarly, Katsiaficas may not amend his complaint by challenging, in his own motion for summary judgment, the FOIA exemptions the CIA asserted. At the time he filed his complaint, Katsiaficas had received approximately 39 pages from the CIA. Complaint ¶¶ 4, 6. He was aware that the CIA withheld certain documents and information under FOIA exemptions (b)(1) and (3), yet the Complaint is devoid of any mention of – let alone a challenge to – the exemptions. For these reasons, the Court should not entertain Katsiaficas’s argument about exemptions 1 and 3. If the Court is inclined to indulge Katsiaficas, however, the government respectfully requests the opportunity to file a brief addressing the propriety of the CIA’s exemptions.³

³ A review of Katsiaficas’s challenge to FOIA exemptions 1 and 3 largely would be an exercise in futility. Katsiaficas’s argument rests upon the alleged irrelevance of intelligence information to events that happened over 50 years ago. See Doc. 17 at 5. The First Circuit has held that the passage of time does not impact the validity of the exemptions. In Maynard v. CIA, 986 F.2d 547, 555 n. 6 (1st Cir. 1993), the Court stated, “[w]e do not agree with the district court that merely because the information here is thirty years old, it cannot detrimentally reveal intelligence sources or methods . . . Courts have generally rejected the contention that the mere age of intelligence information rules out Exemption 3.”

CONCLUSION

For the foregoing reasons, the CIA respectfully requests that this Court deny Plaintiff's motion for summary judgment and grant the CIA's cross-motion for summary judgment.

Respectfully submitted,

UNITED STATES OF AMERICA,
By its attorney,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney
United States Attorney's Office
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100
Jennifer.Serafyn@usdoj.gov

Dated: February 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants via First Class Mail.

/s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney

Dated: February 28, 2014