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

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| GRANT F. SMITH, *PRO SE* | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil No. 1:15-cv-00224 (TSC) |
| | ) | |
| CENTRAL INTELLIGENCE AGENCY, | ) | |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

**REPLY MEMORANDUM IN SUPPORT OF**
**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiff Grant F. Smith's lawsuit pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeks disclosure of certain records related to alleged uranium diversion from the Nuclear Materials and Equipment Corporation ("NUMEC") to Israel. Defendant, the Central Intelligence Agency ("CIA"), conducted thorough searches of its non-exempt record repositories in response to Plaintiff's request and found twenty-one responsive records, producing four records as previously released to the public and sixteen records in part as reasonably segregable portions of records subject to FOIA exemptions 1, 3, 6, 7(C), and 7(E). The remaining record was properly withheld in full pursuant to FOIA Exemptions 1 and 3. The CIA, along with the Federal Bureau of Investigation ("FBI"), U.S. Department of State ("State Department"), and U.S. Department of Energy ("DOE"), submitted declarations explaining the bases for the exemptions asserted.

Plaintiff has failed to address Defendant's withholdings in his opposition to Defendant's motion for summary judgment. Instead, Plaintiff focuses on an exception to the CIA Information Act's exemption of certain CIA operational files from the search requirements of the FOIA. However, Plaintiff provides no evidence beyond pure conjecture that the statutory requirements for this exception to the exemption have been triggered. Plaintiff also challenges the CIA's compliance with the decennial review requirements of 50 U.S.C. § 3141(g), but the CIA's exempted operational files were subject to decennial review in April 2015, April 2005, and March 1995 after announcement in the Federal Register. The CIA has discharged its obligations under the FOIA and is entitled to summary judgment.

## ARGUMENT

### I. CIA Conducted Reasonable Searches for Responsive Records.

#### A. CIA Discharged Its Duty to Conduct a Reasonable Search for Records Responsive to Plaintiff's FOIA Request

As explained in detail in Defendant's motion for summary judgment, the CIA conducted searches within the record repositories reasonably likely to have records responsive to Plaintiff's request and therefore conducted reasonable searches pursuant to the FOIA. Def.'s MSJ, ECF No. 17, at 4–7. Plaintiff unpersuasively asserts that Defendant's declarations are conclusory and fail to meet its burden under FOIA. Pl.'s Opp'n, ECF No. 18, at 8–9. Plaintiff notes that "the description of a CIA search is inadequate where the affidavit fails to 'explain in reasonable detail the scope and method of the search conducted by the agency sufficient to demonstrate compliance with the obligations imposed by the FOIA.'" *Id*. (quoting *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007)).

Defendant's declaration submitted by Mary E. Wilson, Acting Information Review Officer for the Litigation Information Review Office, demonstrates precisely the scope and method of search and more than satisfies FOIA's reasonable search standard. Wilson Decl. ¶¶ 23–29; Def.'s MSJ at 4–7. In evaluating the adequacy of a search, courts accord agency affidavits "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citations omitted). Accordingly, a plaintiff bears an "evidentiary burden" to "present evidence rebutting the agency's initial showing of a good faith search." *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (citing *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351–52 (D.C. Cir. 1983)). Although "the Plaintiff presumes bad faith in his FOIA request, until proven

otherwise," Pl.'s Opp'n at 17, the presumption of Defendant's good faith has not been rebutted here.

FOIA requires the agency to make "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 v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of the search is judged not by its results "but by the appropriateness of the methods used" to execute it. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Where affidavits establish that an agency's FOIA search was reasonably calculated to find all responsive records, the agency has satisfied its obligation to conduct an adequate search. *See, e.g., Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006); *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351–52 (D.C. Cir. 1983); *Cooper v. Stewart*, 763 F. Supp. 2d 137, 141-42 (D.D.C. 2011); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 405 F. Supp. 2d 3, 5 (D.D.C. 2005); *see also* Fed. R. Civ. P. 56(c); *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (explaining that the affidavits need not "set forth with meticulous documentation the details of an epic search for the requested records"). Here, the CIA's affidavit establishes that the agency's FOIA search was reasonably calculated to find all responsive records, so the agency has satisfied its obligation to conduct an adequate search.

**B. CIA Was Not Required to Search Operational Records**

The CIA Information Act, 50 U.S.C. § 3141 (formerly 50 U.S.C. § 431), exempts certain CIA operational files from the search, review, publication, and disclosure requirements of the FOIA. 50 U.S.C. § 3141(a); Wilson Decl. ¶¶ 9–12, 30. The statute provides an exception to this exemption for operational files for information concerning, as relevant here:

> the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

50 U.S.C. § 3141(c)(3). For this exception to the exemption to apply, "three questions must be answered in the affirmative." *Morley*, 508 F.3d at 1116. If a court determines that an activity fails to satisfy any one of these three requirements, this activity fails to satisfy the dictates of 50 U.S.C. § 3141(c)(3) and the court need not address the other two factors. *See Morley*, 508 F.3d at 1119 (distinguishing the First Circuit's conclusion in *Sullivan v. CIA*, 992 F.2d 1249, 1255 (1st Cir. 1993), on the third question as unnecessary *dicta* where the court had already concluded that the activity failed to satisfy the second question).

Plaintiff asserts that three parties investigated the CIA whose activity would trigger the exception: the Department of Justice ("DOJ"), the President's national security advisor pursuant to a "presidential directive," and "congressional intelligence committees through the [Government Accounting Office ('GAO')] … on behalf of the entire Congress." Pl.'s Opp'n at 10. However, none of these activities penetrate the statutory operational files exemption.[1] The only alleged investigation that could qualify under the 50 U.S.C. § 3141(c)(3) exception is an investigation by the DOJ, but even if Plaintiff could demonstrate that this activity satisfies the first two *Morley* questions, he cannot show that the activity satisfies the third question—whether

[1] Plaintiff cites *Am. Civil Liberties Union v. U.S. Dep't of Defense*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011), which does not support his argument. There, the court held that after the CIA had properly invoked the operational files exemption, the CIA was not obligated to search its operational files and was only obligated to search and review "relevant documents that ha[d] already been identified and produced to, or otherwise collected by, the CIA's Office of Inspector General." *Id*. at 222.

the investigation was looking into any impropriety or illegal actions in the conduct of an intelligence activity. Def.'s MSJ at 7–11.

The first *Morley* question that must be satisfied is whether the investigating body qualifies as a "congressional intelligence committee" or one of the listed qualifying agencies under the statute. *Morley*, 508 F.3d at 1116. Investigations by the President's national security advisor pursuant to a "presidential directive" or by the GAO, Pl.'s Opp'n at 10, 20–28, would not fall within the scope of the exception, as they are not a qualifying investigating body under the statutory exception.

The statute mentions a "presidential directive" in requiring that an investigation must be "for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity" in order to potentially trigger the exception. 50 U.S.C. § 3141(c)(3). However, this investigation must be conducted by a qualifying organization, and the President or an aide on the President's national security staff would not qualify under the plain language of the statute.

An investigation by the GAO also cannot be shoehorned into the statute's delineated organizations simply because the GAO "works only for Congress." Pl.'s Opp'n at 25. The CIA Information Act defines the term "congressional intelligence committees" as the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives. 50 U.S.C. § 3003(7). The *Morley* court analyzed how narrowly the term "congressional intelligence committee" is drawn consistent with congressional intent, finding that the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities qualified as a congressional intelligence committee as it was a predecessor to the Select Committee on Intelligence of the Senate, but finding that the House Select

Committee on Assassinations did not necessarily qualify because it was the House Select Committee on Intelligence that gave rise to the Permanent Select Committee on Intelligence of the House of Representatives. *Morley*, 508 F.3d at 1116–17. The GAO is not the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, or a predecessor to either of these committees. The fact that the GAO's 1978 investigatory report "was delivered to every committee in Congress, including 'the congressional intelligence committees'" does not so transform it. Pl.'s Opp'n at 26. Even if the GAO's investigation could be considered an investigation by the congressional committee that requested it, the investigation at issue was initiated after a request by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, not by a congressional intelligence committee. Compl. Exh. 11 at 4. "Unfriendly visit[s]" and "demands for CIA briefings" by individual members of Congress, Pl.'s Opp'n at 27–28, also cannot be converted into "an investigation by the congressional intelligence committees" in order to qualify for the exception. Accordingly, the only alleged investigation that could qualify under 50 U.S.C. § 3141(c) is an investigation by the DOJ.

Even the DOJ investigation, however, does not trigger the exception. Under *Morley*, the second question that must be satisfied is whether the FOIA request at issue "concern[s] the specific subject matter of an investigation by the" qualifying investigating agency. 508 F.3d at 1117. Plaintiff's request for information related to uranium diversion from NUMEC to Israel cannot be considered "central to [the DOJ's] inquiry" into possible criminal offenses arising out of government agencies' failure to act in the face of possible violations of the Atomic Energy Act. *Id.* at 1118. Even if Plaintiff's requested information was "tangentially related" to the DOJ's investigation, "'a congressional investigation that touches on [an intelligence agency's]

conduct in a particular incident or region, standing alone, is not sufficient to warrant the release of all [that agency's] documents' regarding such an incident or region." *Davy v. CIA*, 357 F. Supp. 2d 76, 83 (D.D.C. 2004) (quoting *Sullivan*, 992 F.2d at 1255). However, even if this Court finds that Plaintiff's request concerns "the specific subject matter" of the DOJ's investigation, it does not meet the final requirement necessary to trigger the 50 U.S.C. § 3141(c)(3) exception.

The third and final *Morley* question that must be satisfied is whether "the investigation [was] 'for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.'" *Morley*, 508 F.3d at 1118. Plaintiff provides no evidence that the DOJ's investigation was looking into any impropriety or illegal actions in the conduct of an intelligence activity.[2] *See* Wilson Decl. ¶ 40.

The DOJ investigation focused on "possible criminal offenses arising out of the discrepancy in nuclear materials at the [NUMEC]." Pl.'s Notice, ECF No. 14, Exh. 16 at 1. "Specifically, [the DOJ investigation was] attempting to determine if there [wa]s any individual agency in the Government which knew about a possible violation of the Atomic Energy Act and did nothing about it." Pl.'s Notice Exh. 18 at 1. The investigation was conducted by a "three-man Task Force organized by the [DOJ] Criminal Division." *Id*. The investigation did not seek "to assess the performance of the intelligence agencies," *Morley*, 508 F.3d at 1118, nor was it "a direct investigation into CIA wrongdoing," *Sullivan*, 992 F.2d at 1255. An investigation into potential violations of the Atomic Energy Act is not an investigation into potential violations in the conduct of an intelligence activity that would trigger the 50 U.S.C. § 3141(c)(3) exception.

[2] Plaintiff has submitted a Motion for Leave to File First Amended Complaint to Add Parties in an attempt to find evidence in support of his argument, Pl.'s Opp'n at 28–29, which Defendant has addressed in an opposition to that motion filed concurrently with this reply.

Plaintiff asserts "there is evidence that the US Department of Justice also found investigating CIA improprieties to be within the scope of its investigation as it progressed." Pl.'s Opp'n at 15. Although Plaintiff argues that there is "ample evidence" that the CIA was the specific subject of the DOJ's investigation, Plaintiff can only point to evidence that "does not rule out" such an investigation or to pure conjecture. Pl.'s Opp'n at 16, 21–22, 24–25. The April 1979 memoranda from Mr. Frederick D. Baron and Mr. John C. Keeney to the Attorney General do not provide any additional evidence in support of Plaintiff's theory.[3] The fact that the DOJ's Internal Security Section reviewed CIA documents and prepared a "report on that aspect of the matter" or the suggestion that the DOJ Criminal Division's materials be provided "to an appropriate committee of Congress" simply do not demonstrate that the DOJ's investigation was focused on impropriety in the conduct of an intelligence activity by the CIA.

The DOJ investigation—the only investigation by a qualifying agency under the statutory exception—does not meet the statutory requirement that an investigation be for potential violations in the conduct of an intelligence activity. Accordingly, Plaintiff's requested information does not fall within the scope of an exception that would warrant a search of exempted operational files.

## II. CIA's Operational Files Have Been Subject to Decennial Review and Currently Perform the Functions Set Forth in 50 U.S.C. § 3141(b)

Plaintiff also challenges the CIA's statutory compliance with 50 U.S.C. § 3141(g) in his opposition to Defendant's motion for summary judgment. Plaintiff provides no evidence,

[3] Indeed, if the DOJ attorney copied on the April 25, 1979, memo—Mr. Davitt—was focused on "espionage against the United States by its allies," Pl.'s Opp'n at 24–25, this would support the theory that the DOJ's investigation was focused on potential government agencies' inaction in the face of foreign espionage, not impropriety in the conduct of an intelligence activity by the CIA.

however, that the agency's operational files, including those most likely to contain records responsive to Plaintiff's request, have not been subject to the agency's decennial review process.

The CIA's operational files exempted by 50 U.S.C. § 3141(a), as defined by § 3141(b), were subject to decennial review in April 2015, April 2005, and March 1995 after announcement in the Federal Register. *See* 80 Fed. Reg. 21,704 (Apr. 20, 2015); 69 Fed. Reg. 76,449 (Dec. 21, 2004); 59 Fed. Reg. 40,339 (Aug. 8, 1994). Defendant has not searched its operational files for documents responsive to Plaintiff's request, so Defendant cannot provide evidence that a decennial review of such files has been conducted beyond evidence that a decennial review of all of the agency's exempted operational files has been conducted. However, such specific evidence is not required by 50 U.S.C. § 3141(g)(3).

The CIA has met its burden under the FOIA by demonstrating by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in 50 U.S.C. § 3141(b). *See* 50 U.S.C. § 3141(f)(4)(A); Wilson Decl. ¶¶ 30–35. Defendant has provided evidence via sworn affidavit that the CIA follows specific processes and procedures to ensure that the agency's operational files, including those most likely to contain records responsive to Plaintiff's request, currently perform the functions set forth in 50 U.S.C. § 3141(b).[4] Wilson Decl. ¶ 35. These include a process for the decennial

[4] Plaintiff asserts that, "the CIA's intimation that it processed the Plaintiff's 2010 FOIA request under a Division that did not even come into existence until 2015" shows that Defendant's declaration that proper decennial reviews were conducted "should be presumed false until proven otherwise." Pl.'s Opp'n at 31. In generally describing the CIA's records systems and FOIA processes, Defendant noted that "FOIA requests submitted to the CIA come to the Information Management Services ('IMS') group within the Directorate of Digital Innovation, Agency Data Office." Wilson Decl. ¶ 6. That statement is correct, although Plaintiff is also correct that IMS was located in the office of the Chief Information Officer, which was part of the DIR Area, at the time Plaintiff's FOIA request was received in 2010. Regardless, the location of the IMS within the CIA would not have affected the processing of Plaintiff's FOIA request. *See id*. ¶¶ 7–8.

review of exempted operational files, which results must be reviewed by an agency-wide Operational File Validation Team and must be approved by the Director of the CIA. *Id.* ¶¶ 32–33. These also include an agency regulation detailing procedures for designating or eliminating the designation of operational files in order to maintain the integrity of the CIA's exempted operational files. *Id.* ¶ 31. In addition, the CIA Directorates follow internal procedures to ensure that operational files are opened and maintained for appropriate purposes. *Id.* ¶ 34. Plaintiff has not demonstrated that these processes and procedures have not been followed, and Defendant has made the required showing under the FOIA that the agency's operational files, including those most likely to contain records responsive to Plaintiff's request, have been subject to decennial review and currently perform the functions set forth in 50 U.S.C. § 3141(b). *See* 50 U.S.C. § 3141(f)(4)(A).

## III. CIA Properly Withheld Exempt Information Under Applicable FOIA Exemptions.

The CIA withheld sixteen records in part and one record in full, pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E). *See* Wilson Decl. ¶ 29 & Exh. F; Hardy Decl. ¶ 6; Hackett Decl. ¶ 6; Stein Decl. ¶ 8 & Attach. 1. For the reasons described in Defendant's motion for summary judgment, all of these withholdings are justified, and summary judgment should be granted to the CIA. *See* Def.'s MSJ at 12–27.

Plaintiff does not contest Defendant's argument that all of its withholdings pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E) are justified in the records it has produced. As a result, Defendant's argument should be treated as conceded with respect to these withholdings. *See Franklin v. Potter*, 600 F. Supp. 2d 38, 60 (D.D.C. 2009) (treating defendant's argument in

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Plaintiff also disputes certain of the facts contained in Defendant's Statement of Material Facts but includes no references to the parts of the record relied on to support his statements in opposition as required by Local Civil Rule 7(h)(1).

summary judgment motion as conceded where plaintiff failed to address it in plaintiff's response); *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004); *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149 (D.D.C. 2002) ("[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded, even when the result is dismissal of the entire case.") (citation omitted).[5] Plaintiff's *pro se* status does not immunize him from the consequences of failing to substantively address an argument in a dispositive motion. *See, e.g.*, *Stubbs v. Law Office of Hunter C. Piel, LLC*, No. 15-1129, 2015 WL 7777266 (D.D.C. Dec. 2, 2015) (treating defendants' motions to dismiss as conceded and dismissing case where *pro se* plaintiffs' responses to defendants' motions did not address the substance of specific arguments the defendants had raised); *Hardaway v. District of Columbia*, No. 14-1273, 2015 WL 5138711 (D.D.C. Aug. 31, 2015) (treating claim as conceded where *pro se* plaintiffs made no mention of the issue in their opposition to the defendant's motion to dismiss); *Yelder v. Gates*, No. 09-1301, 2010 WL 2521718 (D.D.C. June 22, 2010) (finding arguments in defendant's motion to dismiss were conceded where *pro se* plaintiff did not oppose these arguments in her opposition brief).

[5] *See also Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) ("Judges are not expected to be mindreaders," so a "litigant has an obligation to spell out its arguments squarely and distinctly … or else forever hold its peace.") (citation omitted); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver" and a party's "silence" in response to an argument leads to the conclusion that a point is conceded); *Chubbuck v. Indus. Indem.*, No. 91-35091, 1992 WL 11294, at *1 (9th Cir. 1992) ("By failing to respond to this argument, we conclude Chubbuck has indeed conceded the point.").

## CONCLUSION

For the above reasons and the reasons set forth in Defendant's motion for summary judgment, this Court should grant the CIA's motion for summary judgment.

Dated: February 11, 2016

Respectfully submitted,

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**MEMORANDUM IN OPPOSITION TO**
**PLAINTIFF'S MOTION FOR LEAVE TO FILE**
**FIRST AMENDED COMPLAINT TO ADD PARTIES**

Defendant in this Freedom of Information Act ("FOIA") case, the Central Intelligence Agency ("CIA"), moved for summary judgment six weeks ago, on December 28, 2015. *See* ECF No. 17. Defendant's motion for summary judgment and accompanying evidence establishes that the agency's search was reasonable and fully complied with FOIA and the agency properly withheld sixteen records in part and one record in full, pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E). This motion for summary judgment was filed pursuant to the Court's October 29, 2015, minute order ("October 29 Order") following the parties' third joint status report and October 29, 2015, status conference with the Court. *See* ECF No. 12.

Now, in an attempt to find evidence that "would have added to the mountain of inculpatory evidence" in support of his opposition to Defendant's motion for summary judgment on the basis that an exception to the CIA Information Act's exemption for operational files applies in this case, ECF No. 28 at 28,[1] Plaintiff has asked the Court for leave to fundamentally alter this case. Plaintiff's proposal would transform this nearly-concluded action concerning the

[1] Defendant has addressed Plaintiff's opposition to its motion for summary judgment in a reply filed concurrently with this opposition.

adequacy of the CIA's search into a new, broader case including the adequacy of the Department of Justice's ("DOJ") response to a separate FOIA request that Plaintiff submitted to the DOJ on February 16, 2011. Plaintiff is free to bring these claims against the DOJ through the filing of a new complaint, but they cannot and should not be shoehorned into this case, thereby prejudicing Defendant CIA and delaying resolution here.

The Court should, therefore, deny Plaintiff's motion to amend, and proceed to Defendant's pending motion for summary judgment.

## I. Standard of Review

Plaintiff files his Motion for Leave to File First Amended Complaint to Add Parties pursuant to Federal Rules of Civil Procedure 15 and 21.[2] "[I]n practical terms[,] there is little difference between [Rules 15, 20, and 21]." *Boyd v. District of Columbia*, 465 F. Supp. 2d 1, 3 n.3 (D.D.C. 2006) (quoting *Oneida Indian Nation of N.Y. State v. Cty. of Oneida*, 199 F.R.D. 61, 72 (N.D.N.Y. 2000)). In this Circuit, "it is well established that after a responsive pleading has been served, the standards for adding parties are the same whether the motion is made under Rule 15 or Rule 21." *Id*. at 3 n.3 (quoting *Wiggins v. Dist. Cablevision, Inc.*, 853 F. Supp. 484, 499 n.29 (D.D.C. 1994)).

Under Rule 21, the Court may "at any time, on just terms, add or drop a party" from an action. Fed. R. Civ. P. 21. Under Rule 20, defendants may be joined in one action if: (1) any right to relief is asserted against them "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences," and (2) "any question of law or fact

[2] Although Plaintiff describes his proposal to amend the complaint "to add parties" as "an amended supplemental complaint" pursuant to—among other things—Rule 15(d), a party's motion for summary judgment filed pursuant to a court order is not a "transaction, occurrence, or event that happened after the date of the pleading" contemplated by Rule 15(d). Fed. R. Civ. P. 15(d).

common to all defendants will arise in the action." Fed. R. Civ. P. 20. Under Rule 15, after the deadline for amending as a matter of course has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Leave should be freely given when justice requires, but in deciding whether to allow a party to amend a complaint, courts may consider "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

## II. The Court Should Deny Plaintiff's Motion for Leave to File First Amended Complaint to Add Parties

Whether viewed as a Rule 20 request for joinder or as a Rule 15(a) motion for leave to amend, the Court should deny Plaintiff's motion because the DOJ does not meet the Rule 20 requirements for a defendant who may be joined in this proceeding. Even if the DOJ could be joined as a defendant in this case, Plaintiff unduly delayed seeking leave to add the DOJ as a defendant and such amendment would be prejudicial at this late stage.

### A. The DOJ Is Not a Defendant Who May Be Joined in This Proceeding under Rule 20(a)

The DOJ does not meet the Rule 20(a) requirements for permissive joinder in this proceeding.[3] First, to satisfy the "same transaction or occurrence" prong of Rule 20(a), the claims against the defendants must be logically related. *See Davidson v. D.C.*, 736 F. Supp. 2d 115, 119 (D.D.C. 2010) ("[A]ll 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence.")

[3] Although Plaintiff implies that the DOJ is already involved in this proceeding as counsel to Defendant CIA, the DOJ's representation of a client agency does not make the DOJ party to a case.

(quoting *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)). This logical relationship test must remain flexible because "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Disparte v. Corp. Exec. Bd.*, 223 F.R.D. 7, 10 (D.D.C. 2004) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966)). However, a movant cannot join parties "who simply engaged in similar types of behavior ... [but are] otherwise unrelated; some allegation of concerted action ... is required." *Spaeth v. Mich. State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 53 (D.D.C. 2012) (citation omitted). The second prong of Rule 20(a) requires that there be some common question of law or fact as to all of the defendants, although it does not require "that all legal and factual issues be common" among them. *Disparte*, 223 F.R.D. at 11 (citing *Mosley*, 497 F.2d at 1334). "Common issues of law does not mean common issues of an area of the law," and the fact that a plaintiff's different claims "are premised on the same legal theory is insufficient" to show a common question of law under Rule 20(a)(2)(B). *Spaeth*, 845 F. Supp. 2d at 54 (citations omitted).

On May 13, 2010, Mr. Smith submitted a FOIA request to the CIA seeking "declassification and release of all cross referenced CIA files related to uranium diversion from the [NUMEC] to Israel." Compl. Exh. 6. The request stated that it "include[d], but is not limited to CIA content provided for publication in the now declassified 1978 GAO report titled 'Nuclear Diversion in the U.S.? 13 Years of Contradiction and Confusion.'" *Id.*

On September 10, 2010, the CIA's Information and Privacy Coordinator sent Mr. Smith a letter acknowledging receipt of his request, discretionarily waiving the fees for his request, and noting that "[t]he CIA Information Act, 50 U.S.C. § 431, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA." Compl.

Exh. 7. On August 28, 2013, the CIA's Information and Privacy Coordinator sent Mr. Smith a final response to his request. Compl. Exh. 8. In the letter, the CIA informed Mr. Smith that it had completed its search for records responsive to his request, but that all responsive material was currently and properly classified and exempt from disclosure pursuant to FOIA Exemptions 1 and 3. *Id.* The CIA also searched its database of previously released material and located and produced four documents totaling eleven pages which were responsive to Mr. Smith's request. *Id.* On September 19, 2013, Mr. Smith administratively appealed this final response, and the CIA's Agency Release Panel denied Mr. Smith's administrative appeal on March 28, 2014. Compl. Exhs. 10, 11. On February 13, 2015, Mr. Smith filed the instant action challenging the CIA's final response to his FOIA request.[4]

Assuming, for purposes of this motion, that the facts in Plaintiff's proposed amended complaint are true, on February 16, 2011, Mr. Smith submitted a FOIA request to the DOJ seeking "a copy of the Criminal Division's information pertaining to allegations of cover-ups by governmental agencies of the NUMEC case." ECF No. 19-2, Exh. 16. The request stated that it "include[d] any relevant investigation files, correspondence, interview transcripts and other cross referenced information" in addition to "any final report" by the "task force." *Id.* On February 25, 2011, the Chief of the DOJ's Freedom of Information Act/Privacy Act Unit sent Mr. Smith a letter acknowledging receipt of his request and notifying him that the request was routed to the Federal Bureau of Investigation and National Security Division for processing. ECF No. 19-2, Exh. 17. On March 9, 2011, the DOJ advised Plaintiff via telephone that "all Criminal Division

[4] Following an additional review of its classification determinations, on August 31, 2015, the CIA released sixteen documents in segregable form with redactions made largely on the basis of FOIA Exemptions 1 and 3. *See* Wilson Decl. ¶¶ 28–29; Plaintiff's Notice of Supplemental Exhibits, ECF No. 14, at Exh. 19. The CIA also withheld information on the basis of FOIA Exemptions 1, 3, 6, 7(C), and 7(E) after consultation with the FBI, State Department, and DOE. *See* Wilson Decl. ¶ 29; Hardy Decl. ¶ 4; Hackett Decl. ¶ 6; Stein Decl. ¶ 8.

counterespionage material was transferred to the National Security Division" in 2006. ECF No. 19-1 ¶ 64. On September 27, 2011, the DOJ National Security Division's FOIA Coordinator sent Mr. Smith a final response to his request. ECF No. 19-2, Exh. 20. In the letter, the DOJ informed Mr. Smith that it had completed its search for records responsive to his request, but that it did not locate any responsive records. *Id.* On September 30, 2011, Mr. Smith administratively appealed this final response, and the DOJ's Office of Information Policy denied Mr. Smith's administrative appeal on September 6, 2012, following a second search of the National Security Division's records. ECF No. 19-2, Exhs. 21, 23.

The DOJ's response to Plaintiff's February 16, 2011, FOIA request would not meet the first prong of the Rule 20(a) requirements for permissive joinder. Plaintiff's FOIA requests to the CIA and DOJ related generally to the alleged uranium diversion from the NUMEC to Israel and the government's response to this alleged diversion. In addition, the agencies' responses to Plaintiff's FOIA requests were not the results that Plaintiff desired. However, the two requests and the agencies' responses are otherwise unrelated and there has been no allegation of concerted action between the two agencies. *See Spaeth*, 845 F.Supp.2d at 53. There is no assertion of a right to relief jointly against the CIA and the DOJ arising out of a common underlying transaction or occurrence which would permit joinder of the DOJ in this case.

The DOJ's response to Plaintiff's February 16, 2011, FOIA request would also not meet the second prong of the Rule 20(a) requirements for permissive joinder. Plaintiff's opposition to Defendant's motion for summary judgment focuses on the adequacy of the CIA's search and an exception to the CIA Information Act's exemption of certain CIA operational files from the search requirements of the FOIA. Pl.'s Opp'n MSJ at 7–28. Plaintiff also challenges the CIA's compliance with the decennial review requirements of 50 U.S.C. § 3141(g). *Id*. at 29–34. The

CIA Information Act's exemption for operational files and the CIA's decennial review of documents subject to that exemption, as well as the CIA's unopposed withholdings subject to FOIA exemptions 1, 3, 6, 7(C), and 7(E), would not be questions of law or fact common to the DOJ's response to Plaintiff's FOIA request. As such, joinder of the DOJ in this proceeding is not permissible.

**B. Even if Joinder Were Permitted, Plaintiff Unduly Delayed Requesting Amendment and It Would Prejudice Defendant**

Even if joinder were permitted here, the Court should deny Plaintiff's motion because Plaintiff has unduly delayed requesting the addition of the DOJ to this proceeding and because joinder of the DOJ would cause undue delay and prejudice to Defendant CIA. *See Foman*, 371 U.S. at 182; *Hoffmann v. United States*, 266 F. Supp. 2d 27, 33–35 (D.D.C. 2003), *aff'd*, 96 F. App'x 717 (Fed. Cir. 2004).

Plaintiff filed his motion to amend almost twelve months after his original complaint and more than six weeks after Defendant CIA moved for summary judgment. The purpose of this motion to amend is to find support for Plaintiff's argument that a 1978–79 DOJ investigation triggers an exception to the CIA Information Act's exemption for operational files from the requirements of the FOIA.[5] Plaintiff has known of Defendant's reliance on this statutory exemption since September 10, 2010. Compl. Exh. 7 (noting that "[t]he CIA Information Act, 50 U.S.C. § 431, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA"). In addition, Plaintiff raised the issue of

[5] Plaintiff provides no evidence that the DOJ's investigation was looking into any impropriety or illegal actions in the conduct of an intelligence activity such that the investigation would trigger the exception to the exemption. Although Plaintiff argues that there is "ample evidence" that the CIA was the specific subject of the DOJ's investigation, Plaintiff can only point to evidence that "does not rule out" such an investigation or to pure conjecture. Pl.'s Opp'n MSJ at 16, 21–22, 24–25.

the operational files exemption in the parties' Third Joint Status Report on October 5, 2015, and he submitted supplemental exhibits in support of his assertion that an exception to the statutory exemption applies in this case on November 4, 2015. ECF Nos. 12, 14. Plaintiff offers no reason to justify this delay in seeking leave to amend his original complaint until after Defendant's motion for summary judgment has been fully briefed. Nor does he argue that the running of a statute of limitations would preclude him from bringing these amended claims in a separate action. Rather than allow Plaintiff to delay this case to the prejudice of Defendant CIA, the Court should require him to pursue his claims in a separately-filed action against the DOJ.

Moreover, prejudice to Defendant weighs heavily against granting Plaintiff's tardy motion. Plaintiff falls far short of his burden to demonstrate that his proposed amendment does not prejudice Defendant, and the possibility of such prejudice is the "most important factor the Court must consider when deciding whether to grant a motion for leave to amend." *Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006) (noting delay alone is an insufficient ground to deny a motion unless it prejudices the opposing party). Plaintiff has filed an opposition to Defendant's well-founded motion for summary judgment, which is therefore ripe for this Court's review. Defendant should not be forced to face a slow trickle of additional claims encompassing additional FOIA responses by various federal agencies, with Plaintiff presenting them as he imagines new possible sources of evidence in support of his opposition to Defendant's motion.

"[I]t is fairly well established that denying leave to amend is particularly appropriate when a lawsuit is on the verge of final resolution." *Hoffmann*, 266 F. Supp. 2d at 34. Indeed, "[a] plaintiff, quite simply, cannot be permitted to circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens." *Id.* In *Bloche v. Dep't of Def.*, Civ. No. 07-2050, 2009 WL 1330388 (D.D.C. May 13, 2009), this Court rejected a

plaintiff's attempt to supplement his FOIA complaint with new requests where the parties were "less than one month shy of the filing of dispositive motions" and plaintiff awaited the government's *Vaughn* index. *Id.* Plaintiff relies on *Brown v. FBI*, 793 F. Supp. 2d 368 (D.D.C. 2011), but that court allowed the plaintiff to add one additional FOIA claim against an existing defendant, where the defendant had not begun preparing a *Vaughn* index in response to the claims against it and which additional burden would be "relatively miniscule." *Id*. at 10 n.2. Here, as noted, this case is well past that point—Defendant's dispositive motion is ripe for decision today. *Cf. Steinberg v. Dep't of Justice*, No. 1:91cv02740, 1993 WL 385820, at *4 (D.D.C. Sept. 14, 1993) (denying leave to amend where "the litigation has reached such an advanced stage as the briefing and argument of dispositive motions. . . . Given the near-complete resolution of this matter, granting leave to amend the current complaint to address entirely new [FOIA and Privacy Act] requests would stretch the purposes of permitting amendment.").

Such delay at this advanced stage would plainly and unduly prejudice Defendant. *See City of Williams v. Dombeck*, 203 F.R.D. 10, 13 (D.D.C. 2001) ("[T]o allow amendment at this time would protract this litigation and thus, prejudice Defendants."); *Societe Liz, S.A. v. Charles of the Ritz Grp., Ltd.*, 118 F.R.D. 2, 4–5 (D.D.C. 1987). Nor should Plaintiff be permitted to forever forestall summary judgment, avoid final adjudication, and avoid this Court's filing fees by supplementing his Complaint with other FOIA requests. *See Miss. Ass'n of Coops. v. Farmers Home Admin.*, 139 F.R.D. 542, 544 (D.D.C. 1991) ("[P]laintiffs in the instant case would have the sun never set on theirs or any case. Leave to amend here would do far more than allow plaintiff to fully litigate all the legal dimensions of their initial action, it would permit plaintiff to transform their case into something entirely new."). Even if joinder were permitted here under Rule 20—which it is not—the Court should deny Plaintiff's request to amend his

complaint to add the DOJ's response to his February 16, 2011, FOIA request because Plaintiff has unduly delayed requesting the addition of the DOJ to this proceeding and because joinder would be prejudicial to Defendant CIA in this case.

**CONCLUSION**

For all of the foregoing reasons, the Court should deny the Motion for Leave to File First Amended Complaint to Add Parties and proceed to Defendant's pending Motion for Summary Judgment.

Dated: February 11, 2016

Respectfully submitted,

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