APPENDICES

APPENDIX A

Opinion, Affirmed, U.S. Court of Appeals for the Fifth Circuit, April 1, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11088
(Filed April 1, 2019)

WILLIAM HENRY STARRETT, JR.,

Plaintiff-Appellant

v.

CITY OF RICHARDSON, TEXAS,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-191

Before KING, SMITH, and WILLETT, Circuit Judges,

PER CURIAM:[1]

William Henry Starrett, Jr. filed suit against the City of Richardson, Texas, alleging that the City failed to investigate his claims of harassment. The district court granted the City's motion to dismiss. We AFFIRM.

I.

William Henry Starrett, Jr. brought this action against the City of Richardson, Texas, under state and federal law. He alleges that in 2015, he became aware that the United States Department of Defense and its contractor, Lockheed Martin Corporation, "remotely involved [Starrett] in training, operations, research, and development employing technologies that combine tracking, surveillance, communications, and weapons systems without his knowledge or consent." Starrett alleges that these actions constitute "harassment and business services theft."

Starrett reported the harassment and theft to the Richardson Police Department, emailing them a lengthy report detailing his allegations. Starrett alleges that his report has been mostly ignored.

Separately, a member of Starrett's family called

[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to report Starrett's behavior to the police. Starrett complains that these calls "have been logged with incorrectly detailed health assumptions," including erroneous information about his mental health. Furthermore, Starrett alleges that the family member received follow-up calls from the police department, while Starrett received none. Starrett avers that the harassing behavior is ongoing and the police department's failure to investigate and address the harassment has caused him "to endure pain, suffering, injury, risk, and monumental personal and professional loss."

Starrett brought suit against the City of Richardson asserting, inter alia, violations of his rights under the United States Constitution pursuant to 42 U.S.C. § 1983, violations of his rights under the Texas Constitution, state-law tort claims, and a federal claim for conspiracy to interfere with civil rights under 42 U.S.C. § 1985. The district court, adopting the magistrate judge's report and recommendations and overruling Starrett's objections, dismissed his complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court also denied Starrett's request to amend his pleadings. Starrett appeals the dismissal.[2]

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[2] In his brief on appeal, Starrett also challenges the magistrate judge's recommendation that the district court dismiss the suit for improper service pursuant to Federal Rule of Civil Procedure 12(b)(5). The district court did not adopt this recommendation, however, instead adopting the magistrate judge's recommendation that the

II.

"We review the dismissal of a complaint under Rule 12(b)(6) de novo." *Firefighters' Ret. Sys. v. EisnerAmper, L.L.P.*, 898 F.3d 553, 557 (5th Cir. 2018). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotations omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. But we "are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III.

For the following reasons, we affirm the district court's dismissal of Starrett's complaint. We address each of Starrett's challenges to the district court's order in turn.

Starrett first challenges the dismissal of his 42 U.S.C. § 1983 claims against the City. He argues that the district court erred by finding that his

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complaint be dismissed for failure to state a claim. The district court then denied the City's motion to quash service as moot. Because we agree that the complaint is properly dismissed under Rule 12(b)(6), we find no need to address Starrett's argument that he properly served the City.

allegations against the City were based on respondeat superior. He contends that the district court ignored the City's "liability and vicarious or secondary liability to acts, omissions, and mistakes of agents or other jurisdictions coordinating with or acting upon reports made or created by [the City]."

"It is well established that a city is not liable under § 1983 on the theory of respondeat superior." *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010). But a city may be held liable for acts "directly attributable to it 'through some official action or imprimatur.'" *Id.* (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). Thus, to state a § 1983 claim against the City for violations of his constitutional rights, Starrett must allege facts showing that the City had an "official policy"; that the policy was "promulgated by the municipal policymaker"; and that the policy was "the moving force behind the violation of a constitutional right." *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)).

Starrett complains that the City violated his rights to due process and equal protection because the City refused to investigate and prevent his alleged harassment. But he does not point to an official policy motivating the City's refusal. And even if he did, he has not alleged a constitutional violation. There is no federal constitutional right to compel an investigation. *See Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990) (holding that there is no constitutional right to have someone criminally prosecuted). Nor has Starrett alleged that he has

been treated differently from other similarly situated individuals. *Rountree v. Dyson*, 892 F.3d 681, 685 (5th Cir.), *cert. denied*, 139 S. Ct. 595 (2018). Therefore, the district court appropriately dismissed Starrett's § 1983 claims.

Starrett next argues that his complaint sufficiently alleged that the City had entered into a conspiracy and, therefore, dismissal of his § 1985 claim was in error. Starrett fails to plead this claim with sufficient factual support. *See Twombly*, 550 U.S. at 570. Although he cites § 1985 in his complaint, it is only in passing. In his brief on appeal, Starrett explains that the police department maintained deficient records of his report that Department of Justice investigators visited his home and made certain threats. Even if Starrett had pleaded these facts, they still do not allege that the City engaged in a conspiracy. Therefore, the district court did not err in denying Starrett's claims.

Next, Starrett contends that the district court erred in finding that he failed to notify the City of his state tort claims. The Texas Torts Claims Act requires a plaintiff seeking to recover in tort against a "governmental unit" to provide the defendant with notice of his or her tort claim within six months of the incident giving rise to the claim. Tex. Civ. Prac. & Rem. Code Ann. § 101.101(a); *see also* § 101.001(3)(B) (defining "governmental unit" to include cities). The district court found that the incident giving rise to Starrett's claim occurred in November 2015, when Starrett's family member contacted the police department with "incorrect and illegally maintained information." Starrett protests

that he did not have knowledge of the City's incorrect call logs until October 18, 2017, and that he provided appropriate notice to the City in December 2017. In making this argument, Starrett attempts to invoke the discovery rule, a rule Texas appellate courts have declined to apply to § 101.101's notice provision. *See Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 848 (Tex. App.—Amarillo 2011, no pet.) (collecting cases). Therefore, Starrett did not provide timely notice of his tort claims to the City.

In the alternative, Starrett challenges the district court's finding that the City is immune from tort liability, noting that the Texas Torts Claims Act specifically states that a municipality will be liable for "police and fire protection and control." Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(1). But the Texas legislature must still waive immunity from suit before Starrett can pursue a claim against the City. *See Smit v. SXSW Holdings, Inc.*, 903 F.3d 522, 530 (5th Cir. 2018). The Act waives governmental immunity for personal injury "so caused by a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code. Ann. § 101.021(2). To the extent Starrett claims that the City's unkempt records have caused him personal injury, this argument is without merit. In interpreting the Act, we have held that information within records is not "tangible" within the meaning of the Act. *Campbell v. City of San Antonio*, 43 F.3d 973, 979 (5th Cir. 1995) (citing *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175 (Tex. 1994)). Therefore, the district court properly dismissed Starrett's tort claims.

Finally, Starrett challenges the district court's dismissal of his request for declaratory and injunctive relief. In his complaint, Starrett sought a declaration that the police department should investigate the crimes he reported; an injunction directing the City to restrict the availability of records related to Starrett that he claims are incorrect; and an injunction directing the police department to correct their records pertaining to Starrett. Declaratory judgments and injunctions are merely remedies, not causes of action. *Reyes v. N. Tex. Tollway Auth., (NTTA)*, 861 F.3d 558, 565 n.9 (5th Cir. 2017); *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752 n.3 (5th Cir. 1996). Because Starrett's complaint fails to state a claim upon which relief could be granted, he cannot sustain his requests for declaratory and injunctive relief.

For these reasons, the district court appropriately dismissed Starrett's complaint.

IV.

In the alternative, Starrett argues that the district court should have afforded him leave to amend his complaint rather than dismissing it with prejudice. We review a district court's denial of leave to amend for abuse of discretion. *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016). Although Federal Rule of Civil Procedure 15(a) requires the trial court to grant leave to amend "freely . . . when justice so requires," we have also recognized that "a district court need not grant a futile motion to amend." Legate, 822 F.3d at 211. "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered

futile if it would fail to state a claim upon which relief could be granted." *Id.*

Even if the district court had allowed Starrett to amend his complaint, amendment would have been futile. Starrett does not describe what amendments he would make to his complaint in his brief before this court, although he told the district court that he wished to "join individual Defendant employee parties in their official capacity." Starrett's vague reference to unidentified "individual Defendants" is insufficient to demonstrate that he could cure the defects in his complaint. Therefore, we affirm the district court's denial of leave to amend.

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.

Judgment, Affirmed, U.S. Court of Appeals for the Fifth Circuit, April 1, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11088
D.C. Docket No. 3:18-CV-191

(Filed April 1, 2019)

WILLIAM HENRY STARRETT, JR.,

Plaintiff-Appellant

v.

CITY OF RICHARDSON, TEXAS,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before KING, SMITH, and WILLETT, Circuit Judges,

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Judgment, U.S. District Court, August 10, 2018

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:18-CV-191-L

WILLIAM HENRY STARRETT, JR.,

Plaintiff,

v.

CITY OF RICHARDSON, TEXAS,

Defendant.

JUDGMENT

(Filed 08/10/18)

This judgment is issued pursuant to the court's order, dated August 10, 2018. It is, therefore **ordered, adjudged, and decreed** that Plaintiff William Henry Starrett, Jr. ("Plaintiff") take nothing against Defendant City of Richardson, Texas ("Defendant") with respect to any claims and requests for relief asserted by him against Defendant in this action; that Plaintiff's claims against Defendant and this action are dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted; that all reasonable and allowable costs as to these claims are taxed against Plaintiff; and that all relief not granted herein is

denied.

Signed this 10th day of August, 2018.

[Illegible]

Sam A. Lindsay
UNITED STATES DISTRICT JUDGE

Order – Adopting Magistrate Judge Irma Carrillo Ramirez's Recommendation, U.S. District Court, August 10, 2018

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:18-CV-191-L

WILLIAM HENRY STARRETT, JR.,

Plaintiff,

v.

CITY OF RICHARDSON, TEXAS,

Defendant.

ORDER

(Filed 08/10/18)

On July 27, 2018, United States Magistrate Judge Irma Carrillo Ramirez entered the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report"), recommending that the court grant, pursuant to Federal Rules of Civil Procedure 12(b)(6), Defendant City of Richardson, Texas's ("Defendant" or "City of Richardson") Motion to Dismiss for Improper Service or Process and Failure to State a Claim or Alternatively a Motion to Quash Service ("Motion to Dismiss") (Doc. 7), filed February 16, 2018, and

dismiss with prejudice Plaintiff William Henry Starrett, Jr.'s ("Plaintiff") federal claims brought pursuant to 42 U.S.C. §§ 1983, 14141, 1988 and his state law claims for alleged violations of the Texas Constitution, defamation and libel, negligence, negligent employment practices, negligent infliction of emotion distress, and declaratory relief under the Texas Declaratory Judgment Act.[3] In addition, the magistrate judge recommended that the court *sua sponte* dismiss with prejudice pursuant to Rule 12(b)(6) Plaintiff's claims under 42 U.S.C. § 1985 and claims for declaratory and injunctive relief under federal and Texas law. The magistrate judge noted that pro se plaintiffs are generally given several opportunities to amend their pleadings but recommended that Plaintiff not be allowed to amend his pleadings because, although he had not previously amended his pleadings,

> [i]t does not appear that he could successfully state a claim for relief even if provided an opportunity to amend . . . His claims under § 1983 are based on respondeat superior and actions that do not constitute constitutional violations, and his

[3] The magistrate judge also determined that service of process was improper and dismissal without prejudice was appropriate under Rule 12(b)(5). Alternatively, the magistrate judge concluded that, even assuming service was proper, Plaintiff failed to state a claim for relief upon which relief could be granted. Having determined that Plaintiff's claims fail under Rule 12(b)(6), the magistrate judge did not address Defendant's alternative motion to quash, which the court denies as moot.

> state law claims are either unrecognized or barred by immunity. Additionally, to the extent he seeks injunctive relief under state law, it does not appear that he can successfully state a claim for such relief.

Report 30.

Plaintiff, who is proceeding pro se, filed objections to the Report on August 9, 2018 (Doc. 12). Plaintiff's objections also include a response to the magistrate judge's *sua sponte* motion to dismiss with prejudice his remaining claims, and a request to amend his pleadings. In support of twenty-two pages of objections, Plaintiff submitted a sixteen-page appendix. Plaintiff's objections focus primarily on the magistrate judge's legal determinations, while the materials included in his appendix pertain to factual matters. Plaintiff disagrees with the magistrate judge's determinations that service was improper. He also contends that his claims, as currently pleaded, are sufficient to state a claim upon which relief can be granted under state and federal law. Plaintiff's objections and response to the *sua sponte* motion to dismiss, however, demonstrate a fundamental misunderstanding of the law in general and in particular with respect governmental immunity, and are insufficient to overcome any factual or legal basis for dismissal set forth in the Report, which the court determines are correct.

Plaintiff asserts that, if the court accepts the magistrate judge's findings and conclusions, he should be allowed to amend his pleadings because "a district court may not sua sponte dismiss a

complaint where the filing fee has been paid unless the court gives the plaintiff the opportunity to amend the complaint." Pl.'s Obj. 21 (quoting *Apple v. Glenn*, 183 F.3d 477, 479-80 (6th Cir. 1999)). Plaintiff requests that he be given "an opportunity to cure any defects, amend, join individual Defendant employee parties in their official capacity." Pl.'s Obj. 21.

The court is bound by Fifth Circuit and Supreme Court precedent, not Sixth Circuit authority. The Fifth Circuit had held that "[l]eave to amend should be 'freely give[n] . . . when justice so requires.'" *Stem v. Gomez*, 813 F.3d 205, 215 (5th Cir. 2016) (quoting Fed. R. Civ. P. 15(a)(2)). Here, Plaintiff requests an opportunity to amend his pleadings to "cure any defects," but most of the defects identified by the magistrate judge are incurable. Moreover, other than the conclusory statement quoted above, Plaintiff fails to explain how he would cure any of the defects noted in the Report. The court, therefore, believes that Plaintiff has stated his "best case" and cannot improve upon or supplement the allegations as pleaded with respect to the claims asserted by him against the City of Richardson, and any attempt at amending these claims would be futile and unnecessarily delay the resolution of this action.

Plaintiff also requests to "join individual Defendant employee parties in their official capacity." Pl.'s Obj. 21. This request appears to be in response to the magistrate judge's determination with respect to his request for relief under the Texas Declaratory Judgment Act that claims of this kind cannot be brought against a governmental

entity that retains immunity from suit and, instead, "must be brought against state actors in their official capacity." Report 25 (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009)). Even assuming that Plaintiff would be able to cure his request for relief under the Texas Declaratory Judgment Act for alleged violations of the Texas Constitution, any such amendment would merely correct his pleading of a state law claim. When deciding whether to exercise supplemental jurisdiction over state law claims under 28 U.S.C. § 1367(c)(3),[4] a district court considers "'judicial economy, convenience, fairness, and comity,' *and specifically whether it 'has dismissed all claims over which it has original jurisdiction.'" Stem*, 813 F.3d at 216 (citations omitted and emphasis added). As the court agrees with the magistrate judge's recommendation that all claims asserted by Plaintiff against the City of Richardson, including

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[4] Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). Other factors include "judicial economy, convenience, fairness, and comity." *Brookshire Bros. Holding, Inc. v. Dayco Prod., Inc.*, 554 F.3d 595, 601-02 (5th Cir. 2009). When analyzing supplemental jurisdiction, "no single factor is dispositive." *Id.* at 602. Generally, "a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial." *Id.*

his federal claims over which it has original jurisdiction, should be dismissed with prejudice under Rule 12(b)(6), it sees no reason to continue exercising supplemental jurisdiction over Plaintiff's request for relief under the Texas Declaratory Judgment Act for alleged violations of the Texas Constitution for purposes of allowing him to join new parties against whom such relief may or may not be appropriate. Moreover, judicial economy, convenience, fairness, and comity would not be served by allowing Plaintiff to amend his pleadings to join new parties because he does not identify the individuals he seeks to join as parties; it is unclear whether he knows the identity of such persons at this time; and any claim against the unidentified parties under the Texas Declaratory Judgment Act for alleged violations of the Texas Constitution or any other violation of state law can be brought by him in a separate state court action.

Accordingly, having reviewed the pleadings, Defendant's Motion to Dismiss, Plaintiff's response to the Motion to Dismiss, the Report and *sua sponte* motion to dismiss by the magistrate judge, Plaintiff's objections to the Report and response to the *sua sponte* motion to dismiss, and having conducted a de novo review of the portions of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge are correct, and accepts them as those of the court. Accordingly, the court **grants** Defendant's Motion to Dismiss (Doc. 7); **grants** the magistrate judge's *sua sponte* motion to dismiss; **overrules** Plaintiff's objections; **denies** Plaintiff's request to amend his pleadings; **and dismisses**

with prejudice all claims asserted by Plaintiff against the City of Richardson in this action pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

It is so ordered this 10th day of August, 2018.

[Illegible]

Sam A. Lindsay
UNITED STATES DISTRICT JUDGE

Magistrate Judge Irma Carrillo Ramirez's Recommendation – U.S. District Court, July 27, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:18-CV-0191-L

WILLIAM HENRY STARRETT, JR.,

Plaintiff,

v.

THE CITY OF RICHARDSON, TEXAS,

Defendant.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

(Filed 07/27/18)

By *Order of Reference* filed March 1, 2018 (doc. 10), this *pro se* case has been referred for full case management. Before the Court for recommendation is Defendant City of Richardson, Texas' Motion to Dismiss for Improper Service of Process and Failure to State a Claim or Alternatively a Motion to Quash Service and Brief in Support, filed February 16, 2018 (doc. 7). Based on the relevant filings and applicable law, the motion should be **GRANTED**, and the plaintiff's remaining claims should be dismissed *sua sponte*.

I. BACKGROUND

On January 25, 2018, William Henry Starrett, Jr., (Plaintiff) filed this *pro se* lawsuit against the City of Richardson (Defendant) asserting claims under 42 U.S.C. §§§ 1983, 1985, and 14141, and "under [the] law of agency or the [d]octrines of [r]espondeat [s]uperior or [c]ommand [r]esponsibility each where so applicable" for violations of the Fifth and Fourteenth Amendments of the United States Constitution, as well as state law claims for violations of sections 24 and 30 of Article 1 of the Texas Constitution, libel and defamation, negligence, negligent employment practices, and negligent infliction of emotional distress. (doc. 3 at 1-2, 10-17 (italics added).)[5] He "brings his action to obtain relief from the negligent and wrongful acts and omissions of Richardson Police Department [(RPD)] acting as civil authority under Defendant." (*Id.* at 2.) He seeks declaratory and injunctive relief, "compensatory, assumed, statutory, and punitive damages, including trebling to be proven," and "reasonable attorney's fees, costs, and other expenses as permitted by 42 U.S.C. § 1988." (*Id.* at 2, 17-18.)

Plaintiff alleges that on November 8, 2015, he became aware "that he had been remotely involved in training, operations, research, and development

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[5] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

employing technologies that combine tracking, surveillance, communications, and weapons systems without his knowledge or consent." (*Id.* at 4.) "[T]hese systems and software offer capability for remotely interacting with or maintaining communications with a human subject . . . ." (*Id.*) He alleges that his remote involvement continues to this day. (*Id.* at 7.) Before he could "fully articulate details relating to these conditions and conduct . . . a family member contacted [RPD] and officers were dispatched to [his] home." (*Id.* at 4-5.)[6] When RPD officers visited Plaintiff's home, he explained that he was suffering electronic harassment and stated that "individuals remotely identified themselves and their involvement in the 'Jade Helm' exercises," and an officer then "said something very near to: 'we [are not] a part of that but if you need help, let us know.'" (*Id.* at 5.)

In August 2016, Plaintiff provided a 31-page report that "documented the ongoing harassment and business services theft" to RPD investigation team members by electronic mail." (*Id.*) It "described the conduct and conditions that Plaintiff had been required to endure" and included information such as operation names, names of individuals, and a vehicle description with the license plate number. (*Id.*) He subsequently received an email from an RPD staff member informing him that he was working on the investigation and wanted to meet. (*Id.* at 6.)

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[6] Although unclear from his complaint, it appears that RPD was contacted twice and dispatched officers to Plaintiff's home on both occasions. (doc. 3 at 3-5.)

Plaintiff informed the staff member that he could not answer questions in person or by phone, but "was available upon request for written comment." (*Id.*) Plaintiff routinely followed up "[o]ver the following days, weeks, then months" but received no further response. (Id.) He claims he has notified the RPD of the "ongoing crimes involving military" a number of times between 2015 and 2017. (*Id.*)

On September 12, 2017, Plaintiff submitted an "Open Records Request" to RPD and received only two incident reports detailing the phone calls from his family member and subsequent police visits in November 2015. (*Id.* at 3-4, 7.)[7] Plaintiff alleges that each call to RPD "was incorrectly recorded as if health problems were the primary factor in the need for a report," and the first call report did not include his explanations and statements to officers regarding the electronic harassment against him. (*Id.* at 5.)[8] According to the call logs, "both call histories were immediately closed and . . . it seems that no further investigation has taken place in any way." (*Id.*) It was only through the information received from his request that he discovered:

> 1) how these error-filled call histories are being negligently maintained; 2) that an investigation into the electronic harassment brought by military exercises as reported at the time and months after was not conducted; and 3) how

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[7] Plaintiff appears to have received the information from his open records request on October 18, 2017. (doc. 3 at 3.)

[8] Plaintiff notes that the second call log included information not contained in the first call log. (doc. 3 at 5.)

> these factually incorrect and obviously damaging assumptions related to characterizations of any health diagnosis, where there are none, have apparently impeded vital further investigation by [RPD] and other civilian authorities after Plaintiff's many subsequent comprehensive attempts to report, by postal and electronic mail, conditions and conduct remotely involving his person and property against his consent.

(*Id.* at 3-4.) On January 5, 2018, Plaintiff received notice from the RPD regarding a report made by him on November 16, 2017, that was "also logged with critical inaccuracies . . . and contained no reassurances of an investigation, questions, or requests for clarification." (Id. at 7.) He alleges that these "records are presumably to also be maintained and either have been or will be negligently acted upon." (*Id.*)

Plaintiff asserts that the lack of assistance from the RPD led him to contact "the Texas Military Department, Lockheed Martin Corporation, and the United States Department of Defense . . . ." (*Id.*) The Office of the Inspector General for the defense department allegedly admitted knowledge and awareness of the past and ongoing conduct involving Plaintiff, and affirmed that it was not going to investigate the issue, "effectively deferr[ing] any investigation . . . back to [the] local city and state police. (*Id.* at 7-8.)

On April 7, 2017, Plaintiff filed a lawsuit against multiple defendants, including the Lockheed Martin Corporation and various

departments of the United States government, alleging "73 distinct causes of action based on allegations that [the defendants] conspired to forcefully use him as a test subject for military exercises and mind experiments." *Starrett v. Lockheed Martin Corp.*, No. 3:17-CV-00988-D-BT, 2018 WL 1399177, at *1 (N.D. Tex. Mar. 9, 2018), *adopted by*, 2018 WL 1383398 (N.D. Tex. Mar. 19, 2018). He hoped to "end this protracted ordeal and initiate recovery from injury and loss." (doc. 3 at 8.) Plaintiff's claims in that action were eventually dismissed without prejudice, and his appeal from that decision remains pending. *See Starrett v. Lockheed Martin Corp.*, No. 3:17-CV-00988-D, 2018 WL 1383398, at *1 (N.D. Tex. Mar. 19, 2018).

Plaintiff alleges that the violations of law against him "have been (and continue to be) remotely perpetrated against [him] while he is at home and out on errands," and "[a]s a direct and

proximate result of the conditions, conduct, and correlative crimes that have gone without investigation, corrective action, and due process of law by civil and military authority, [he] has and continues to endure pain, suffering, injury, risk, and monumental personal and professional loss." (doc. 3 at 8-9.)

On February 16, 2018, Defendant filed its motion seeking to dismiss Plaintiff's claims for improper service of process and failure to state a claim, or alternatively, to quash service. (doc. 7.) Plaintiff filed his response on February 20, 2018. (doc. 9.) The motion is now ripe for recommendation.

II. RULE 12(B)(5)[9]

Defendant moves to dismiss under Rule 12(b)(5) on grounds that Plaintiff "served his summons on 'City of Richardson'" and failed to properly prove service by properly signed affidavit, and the record does not "reflect that the person who sign[ed] the receipt of delivery is the addressee or an agent otherwise capable of receiving service." (doc. 7 at 1-2.)

Rule 12(b)(5) permits a challenge to the method of service attempted by the plaintiff, or to the lack of delivery of the summons and complaint. *See* Fed. R. Civ. P. 12(b)(5); *Coleman*, 969 F. Supp. 2d at 745. Unless the defendant has been served with process in accordance with Fed. R. Civ. P. 4, a federal court lacks personal jurisdiction over the defendant. *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.,*

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[9] Although Defendant also states that it moves to dismiss under Rule 12(b)(4) for insufficient process, its arguments relate only to Plaintiff's method of service. (*See* doc. 7 at 1-2 (stating that Plaintiff failed to properly serve Defendant).) Only its Rule 12(b)(5) arguments are therefore addressed. *See Coleman v. Bank of New York Mellon*, 969 F. Supp. 2d 736, 744–45 (N.D. Tex. 2013) (stating that Rule 12(b)(4) challenges insufficient process, and Rule 12(b)(5) challenges the method of service); *Margetis v. Ray*, No. 3:08-CV-958-L, 2009 WL 464962, at *4 (N.D. Tex. Feb. 25, 2009) (quoting Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1353 (3d ed. 2004)) ("'An objection under Rule 12(b)(4) concerns the form of process rather than the manner or method of its service.'").

Ltd., 484 U.S. 97, 104 (1987); *Pavlov v. Parsons*, 574 F. Supp. 393, 399 (S.D. Tex. 1983). The plaintiff has the burden to ensure that the defendants are properly served with a summons and a copy of the complaint. Fed. R. Civ. P. 4(c)(1); *Carimi v. Royal Carribean Cruise Line, Inc.*, 959 F.2d 1344, 1346 (5th Cir. 1992). "[A] plaintiff's *pro se* status does not excuse any failure to properly effect service of process." *Webb v. Dallas Area Rapid Transit*, No. 3:17-CV-878- M-BN, 2017 WL 4082445, at *2 (N.D. Tex. Aug. 22, 2017), *adopted by*, 2017 WL 4023100 (N.D. Tex. Sept. 13, 2017) (citing *Sys. Signs Supplies v. U.S. Dep't of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990)).

Under the Federal Rules of Civil Procedure, a state or local government is properly served by either "delivering a copy of the summons and of the complaint to its chief executive officer," or by "serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant." Fed. R. Civ. P. 4(j)(2). Under Texas law, any person authorized by Rule 103[10] may serve process by "mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." Tex. R. Civ. P. 106(a)(2). The return receipt must be signed by

[10] In Texas, process "may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court." Tex. R. Civ. P. 103.

the addressee for service to be effective. Tex. R. Civ. P. 107(c); *Ayika v. Sutton*, 378 F. App'x 432, 434 (5th Cir. 2010) (per curiam); *Keeton v. Carrasco*, 53 S.W.3d 13, 19 (Tex. App.—San Antonio 2001, pet. denied). Proof of service must be made to the court by the server's affidavit, unless service is made "by a United States marshal or deputy marshal." Fed. R. Civ. P. 4(l)(1); *Webb*, 2017 WL 4082445, at *2.

Here, Plaintiff addressed the summons to the "City of Richardson." (doc. 5.) He attempted to effect service via certified mail pursuant to Fed. R. Civ. P. 4(e)(1) and Tex. R. Civ. P. 106(a)(2). (*See* docs. 6 at 2, 4-5.) The copy of the signed return does not show that it was signed by either the addressee or the addressee's agent, since neither option was selected and the signature is illegible. (*Id.* at 5.) Plaintiff's attempted service was therefore insufficient. *See* Fed. R. Civ. P. 4(e)(1); *Ayika*,378 F. App'x at 434 (finding that the plaintiff's "attempted service was insufficient under Rule 4" because the defendants' "signatures [did] not appear on the return receipts" as required by Tex.R. Civ. P. 107).

Additionally, the document Plaintiff filed for proof of service is not labeled as an affidavit and does not function as an affidavit because "it was not sworn or 'made under oath before an authorized officer,'" and it "does not qualify as an unsworn declaration because it does not state that it was signed 'under penalty of perjury that the foregoing is true and correct.'" *Webb*, 2017 WL 4082445, at *2 (quoting *Cole v. Shinseki*, No. 12-2969-STA-tmp, 2013 WL 2289257, at *3 (W.D. Tenn. May 23, 2013)). The proof of service is also signed by Plaintiff, rather than the "'individual who served

[D]efendant personally . . . .'" *Id.* (quoting *Danielson v. Human*, No. 3:12-CV-00840-FDW-DSC, 2014 WL 1765168, at *3 (W.D. N.C. May 2, 2014)). His proof of service is therefore not proper under Federal Rule of Civil Procedure 4(l)(1) "because it was not made 'by the server's affidavit.'" *Id.* (citing Rule 4(l)(1) and cases) (finding that proof of service was not proper because the plaintiff failed to comply with Rule 4(l)(1)); *see* Fed. R. Civ. P. 4(l)(1).

Rule 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). When the 90–day deadline has not expired, the court may dismiss the action without prejudice for insufficient service of process so the plaintiff may effect proper service. *See Grant–Brooks v. Nationscredit Home Equity Servs. Corp.*, No. 3:01–CV–2327, 2002 WL 424566, at *5 (N.D. Tex. Mar. 15, 2002) (under prior version of Rule 4(m)). Alternatively, the court has discretion to quash service and give the plaintiff an additional opportunity to properly effect service. *Chapman*, 2011 WL 2078641, at *1; *Shabazz v. Serv. Emps. Int'l Union*, No. 3:04–CV–229–M, 2004 WL 1585808, at *2 (N.D. Tex. July 13, 2004) (citation omitted). "[W]hen the time to effect service has expired," however, "the party attempting service has the burden of demonstrating 'good cause' for failure to serve the opposing party." *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 645 (5th Cir. 1994) (citation omitted); *Craddock v. Halverson*, No. 7:04–CV–020–R, 2004 WL 2381715, at *1 (N.D. Tex. Oct.

22, 2004); *see also* Fed. R. Civ. P. 4(m).

Here, the 90–day deadline for serving process has expired. Consequently, Plaintiff must demonstrate "good cause" for his failure to properly serve process on Defendant. *See Kreimerman*, 22 F.3d at 645. He responds only by stating that "service of process was sufficiently proper and valid." (doc. 9 at 2.) He has not attempted to demonstrate good cause for his failure to effect proper service on Defendant, nor has he requested additional time to properly serve Defendant. Dismissal without prejudice under Fed. R. Civ. P. 12(b)(5) is therefore proper. *See Craddock*, 2004 WL 2381715, at *4; *see also Flores v. Koster*, No. 3:11-CV-0726-M-BH, 2013 WL 4874115, at *3 (N.D. Tex. June 28, 2013) (dismissing suit under Rule 12(b)(5) for insufficient service because the plaintiffs "have not attempted to demonstrate good cause for their failure to effect proper service on [d]efendant"); *Gilliam v. Kiere*, No. 3:96-CV-0813-G, 1997 WL 279768, at *4 (N.D. Tex. May 16, 1997) (dismissing suit without prejudice under Rule 12(b)(5) because the plaintiff "has not shown such good cause, or even attempted to do so"). Because dismissal under Rule 12(b)(5) is without prejudice, Defendant's Rule 12(b)(6) arguments for dismissal will also be considered. *See Coleman*, 969 F. Supp. 2d at 746-54 (considering arguments for dismissal under Rule 12(b)(6) even though dismissal under Rule 12(b)(5) was proper).

III. RULE 12(B)(6)

Rule 12(b)(6) allows motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Under the 12(b)(6) standard, a court cannot look beyond the face of the pleadings. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *see also Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). It is well-established that "*pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers." *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981). Nonetheless, regardless of whether the plaintiff is proceeding pro se or is represented by counsel, pleadings must show specific, well-pleaded facts, not mere conclusory allegations to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker*, 75 F.3d at 196.

"[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). Nevertheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555; *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasizing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The alleged facts must "raise a right to relief above the speculative level." *Twombly*, 550

U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (citations omitted). When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570; *accord Iqbal*, 556 U.S. at 678.

A. Collateral Estoppel[11]

Defendant asserts that based on Plaintiff's prior lawsuit, it is entitled to dismissal on the basis of collateral estoppel. (doc. 7 at 6.)

Collateral estoppel, or issue preclusion, is a preclusive doctrine of res judicata. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 466 (5th Cir. 2013) (stating that the "rule of res judicata

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[11] Because collateral estoppel is an absolute bar to a party's claims, this affirmative defense is considered first.

encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion); *see also Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"). The preclusive doctrines of res judicata are affirmative defenses that generally "should not be raised as part of a 12(b)(6) motion, but should instead be addressed at summary judgment or at trial." *American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 F. App'x 662, 664 n.1 (5th Cir. 2004) (citing *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594, 596 n.3 (5th Cir. 1977)) ("Generally, a party cannot base a 12(b)(6) motion on res affirmative defense appears, then dismissal under Rule 12(b)(6) is proper." *Hall v. Hodgkins*, 305 F. App'x 224, 227–28 (5th Cir. 2008) (per curiam) (citing *Kansa Reinsurance Co., Ltd. v. Cong. Mortgage Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994)). As with all affirmative defenses, the burden of proving issue preclusion "rests on the party claiming the benefit of the doctrine." *Patterson v. Dean Morris, L.L.P.*, No. 08-5014, 2011 WL 1791235, at *6 (E.D. La. May 6, 2011) (citation omitted); *accord Taylor*, 553 U.S. at 907.

Collateral estoppel "is limited to matters distinctly put in issue, litigated, and determined in the former action." *Next Level Commc'ns LP v. DSC Commc'ns Corp.*, 179 F.3d 244, 250 (5th Cir. 1999) (citation omitted). This doctrine has three elements: (1) the issue at stake is identical to the one involved in the prior action; (2) the issue was actually

litigated in that action; and (3) the determination of the issue was a critical and necessary part of that judgment. *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 583 F.3d 348, 353 (5th Cir. 2009) (citation omitted). Notably, "[i]ssue preclusion may apply even if the claims and the subject matter of the suits differ." *Wright v. Fed. Nat. Mortgage Ass'n*, No. CIV.A. H–12–288, 2012 WL 1190819, at *1 (S.D. Tex. Apr. 9, 2012) (citing *Next Level Commc's*, 179 F.3d at 250). Moreover, the "parties to the suits need not be completely identical, so long as the party against whom [collateral] estoppel applies had the full and fair opportunity to litigate the issue in the previous lawsuit." *Rabo Agrifinance*, 583 F.3d at 353 (citation omitted); *Vines v. Univ. of Louisiana at Monroe*, 398 F.3d 700, 705 (5th Cir. 2005).

Plaintiff is the party against whom the collateral estoppel defense is being asserted. (*See* doc. 7 at 6.) Because he is a party to both actions, this defense may bar his present claims if the essential elements are satisfied. *See Rabo Agrifinance*, 583 F.3d at 353. Plaintiff's claims in this lawsuit are based on alleged acts or omissions of the RPD in failing to investigate or intervene in the alleged conduct by federal and state government departments as well as private corporations, that was the subject of the prior lawsuit. (doc. 3 at 3-10.) He appears to allege that he discovered the RPD's alleged acts or omissions on October 18, 2017, when he received the information as a result of his open records request. (*Id.*) His claims against RPD were not asserted or "actually litigated in that action," nor could they have been because they were apparently discovered after Plaintiff filed the prior

lawsuit on April 7, 2017. *Starrett*, 2018 WL 1399177, at *1.[12] Consequently, the determination of these claims was not "a critical and necessary part" of the judgment. Because the elements of collateral estoppel are not satisfied, this doctrine is inapplicable.[13]

B. 42 U.S.C. § 1983

Defendant argues that Plaintiff's constitutional claims should be dismissed because there is no private right of action to force an investigation, and his suit is based on "the doctrines of *[r]espondeat [s]uperior* and related doctrines." (doc. 7 at 2-4.) Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's

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[12] The judgment in Plaintiff prior lawsuit can be judicially noticed because it is a matter of public record and its contents cannot reasonably be disputed. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (stating that it is proper for a court "to take judicial notice of matters of public record"); *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 831 (5th Cir. 1998) (noting that the district court could take judicial notice of a judgment entered in a different case for the limited purpose of taking as true the action of the court in entering the judgment); *see also* Fed. R. Evid. 201(b)(2) (a court may take judicial notice of a fact when "it can be accurately and readily determined from sources whose accuracy cannot reasonably be disputed").

[13] Defendant's motion only asserts collateral estoppel. (doc. 7 at 6.) The separate but linked preclusive doctrine of claim preclusion is therefore not considered. See *GLF Const. Corp. v. LAN/STV*, 414 F.3d 553, 555 n.2 (5th Cir. 2005) (declining to address claim preclusion *sua sponte*).

'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id.* To state a claim, Plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). Municipalities, including counties and cities, may be held liable under § 1983. *Hampton Co. Nat'l Sur., LLC v. Tunica Cty.*, 543 F.3d 221, 224 (5th Cir. 2008). A municipality may be liable under § 1983 if the execution of one of its customs or policies deprives a plaintiff of his or her constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690–91 (1978); *Jones v. City of Hurst, Tex.*, No. 4:05-CV-798-A, 2006 WL 522127, at *3 (N.D. Tex. Mar. 2, 2006) (citing *Board of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997)). It is well-settled that a municipality cannot be liable under a theory of *respondeat superior*, however. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing cases). Because Plaintiff expressly relies on *respondeat superior* or related doctrines to assert liability against Defendant, (*see* doc. 3 at 2, 10, 18), he fails to state a claim for municipal liability. *See id.* (citing cases); *see Trammell v. Fruge*, 868 F.3d 332, 344 (5th Cir. 2017) (citing *Monell*, 436 U.S. at 691–92) ("a municipality cannot be held liable for constitutional violations committed by its employees

or agents on a theory of vicarious liability").[14]

Moreover, "[u]nder the decisions of the Supreme Court and [the Fifth Circuit], municipal liability under section 1983 requires proof of three elements: a policy maker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Id.* (citing *Monell*, 436 U.S. at 694); *see also Valle v. City of Houston*, 613 F.3d 536, 541–42 (5th Cir. 2010); *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005); *Jones*, 2006 WL 522127, at *3 (citing *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532–33 (5th Cir. 1996)).

Here, Plaintiff alleges that despite his numerous reports describing alleged criminal violations "involving government agencies and their employees," the RPD, under Defendant's authority, has denied him "intervention, investigation, and due process of law" in violation of his Fifth and Fourteenth Amendment rights, and these violations "have been and are being conducted pursuant to one

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[14] Plaintiff also asserts liability under the law of agency and the doctrine of command responsibility. A municipality is not subject to liability under agency law as it is a theory of vicarious liability. see *Johnson v. GlobalSantaFe Offshore Servs., Inc.*, 799 F.3D 317, 321 (5th Cir. 2016) (recognizing that agency law imposes vicarious liability); *Santacruz v. Hertz Equipment*, No. 3:12-CV-348, 2015 WL 2340330, at *2 (S.D. Tex. Apr. 27, 2015) ("vicarious liability is an issue of agency [law]"). The command responsibility doctrine is also inapplicable because it is used to hold "'a commander liable for acts of his subordinates." *Mamani v. Berzain*, 21 F. Supp. 3d 1353, 1375–76 (S.D. Fla. 2014) (quoting *Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002)).

or more policy, practice, or custom that violates Amendments to the United States Constitution . . . ." (doc. 3 at 9-10.) "Whether the legal basis of this claim is founded on the due process or equal protection clause, there is no federal constitutional right to have someone investigated or prosecuted for criminal wrongdoing," however. *Amir-Sharif v. Dist. Attorney's Office*, No. 3:06-CV-2277-B, 2007 WL 530231, at *2 (N.D. Tex. Feb. 21, 2007) (citing cases); *see Lewis v. Jindal*, 368 F. App'x 613, 614 (5th Cir. 2010) (stating that "private citizens do not have a constitutional right to compel criminal prosecution"); *Estate of Huff v. Abilene Police Dept.*, No. 1:15-CV-001-P-BL, 2015 WL 5674886, at *5 (N.D. Tex. Sept. 24, 2015) (citing cases) (recognizing that "'there is no constitutional right to have police investigate allegations a party feels should be investigated.'"). Because his allegations rely on the RPD's alleged failure to investigate or intervene based on his reports of criminal violations, he fails to state a violation of his constitutional rights. Nor do his allegations implicate the equal protection clause because he does not allege that he was treated differently from other similarly situated individuals. *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997) ("a party who wishes to make out an Equal Protection claim must prove 'the existence of purposeful discrimination' motivating the [governmental] action which caused the complained-of injury."); *Edwards v. Berkebile*, No. 3:08-CV-0010-L, 2008 WL 3155138, at *3 (N.D. Tex. July 30, 2008) ("The crux of an equal protection claim is that the complaining person was treated differently from similarly situated individuals."). Accordingly, his claims for violations of the Fifth

and Fourteenth Amendments of the United States Constitution under § 1983 should be dismissed for failure to state a claim.

C. 42 U.S.C. § 14141

Defendant argues that Plaintiff's claim under 42 U.S.C. § 14141, now cited as 34 U.S.C. § 12601, fails because he is not the Attorney General. (doc. 7 at 3.) A claim under § 12601, which allows a civil action to eliminate a pattern or practice of unconstitutional conduct by governmental entities and their employees, may only be brought by the Attorney General. *Chaney v. Races & Aces*, 590 F. App'x 327, 330 (5th Cir. 2014) (analyzing claim under § 14141). Cases addressing claims under the prior version of § 12601 have recognized that the statute does not create a private cause of action by private citizens. *See Rodgers v. City of Dallas*, No. 3:15-CV-01631-N, 2016 WL 9076232, at *2 n. 1 (N.D. Tex. Oct. 12, 2016); *Johnson v. Dodson*, No. 2:14-CV-00059-J, 2014 WL 4513380, at *4 (N.D. Tex. Sept. 12, 2014); *White v. City of Dallas*, No. 3:12-CV-2145-O, 2013 WL 821992, at *5–6 (N.D. Tex. Feb. 8, 2013), *adopted by*, 2013 WL 840503 (N.D. Tex. Mar. 6, 2013); *Knight v. City of Balch Springs*, No. 3:11-CV-1122-B-BH, 2011 WL 3519938, at *2 (N.D. Tex. July 25, 2011), *adopted by*, 2011 WL 3510877 (N.D. Tex. Aug. 10, 2011). Plaintiff's claims under § 12601 should be dismissed for failure to state a claim.

D. 42 U.S.C. § 1988

Defendant asserts that Plaintiff "may not obtain attorney's fees" because he is a *pro se* party. (doc. 7 at 6.)

Because Plaintiff is proceeding *pro se*, however,

he may not recover attorney's fees. *See Danial v. Daniels*, 162 F. App'x 288, 291 (5th Cir. 2006) ("Attorney's fees are not available to a non-attorney *pro se* litigant.") (citing *McLean v. Int'l Harvester Co.*, 902 F.2d 372, 373 (5th Cir. 1990)); *Vaksman v. C.I.R.*, 54 F. App'x 592 (5th Cir. 2002) ("As a *pro se* litigant, [the petitioner] is not entitled to attorney['s] fees because, quite simply, he did not actually 'pay' or 'incur' attorney['s] fees."). In any event, he is not entitled to attorney's fees because has failed to plead any viable causes of action. *See Everhart v. CitiMortgage, Inc.*, No. H-12-1338, 2013 WL 264436, at *10 (S.D. Tex. Jan. 22, 2013); *Avila v. Mortg. Elec. Registration Sys., Inc.*, No. 4:12-CV-830, 2012 WL 6055298, at *7 (S.D. Tex. Dec. 5, 2012). Accordingly, Plaintiff is not entitled to attorney's fees under § 1988.

E. State Law Claims

Defendant also moves to dismiss Plaintiff's state law claims. (doc. 7 at 4-6.) Plaintiff asserts that this Court has supplemental jurisdiction over his state law claims under 28 U.S.C. § 1367. (doc. 3 at 2.) Under § 1367(a), federal courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within [its] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." In essence, § 1367(a) grants the courts the "power to hear a state law claim under pendent or supplemental jurisdiction if (1) the federal issues are substantial, even if subsequently decided adverse to the party claiming it; and (2) the state and federal claims derive from a common nucleus of operative fact." *McKee v. Texas Star Salon,*

LLC, No. 3:15-CV-1162-D, 2007 WL 2381246, at *4 (N.D. Tex. Aug. 21, 2007) (citations omitted); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1996).

When all federal claims are dismissed prior to trial, the general rule in this circuit is to decline exercising jurisdiction over the remaining state law claims. *LaPorte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1257 (5th Cir. 1986); *see also* 28 U.S.C. § 1367(c)(3). This rule is "neither mandatory nor absolute." *Smith v. Amedisys Inc.*, 298 F.3d 434, 447 (5th Cir. 2002) (citation omitted). Rather, district courts are given wide discretion in deciding whether to exercise jurisdiction under such circumstances. *See Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993); *see also United Mine Workers*, 383 U.S. at 726 ("[P]endent jurisdiction is a doctrine of discretion, not of [a] plaintiffs right."). In exercising this discretion, courts should consider issues of judicial economy, convenience, and fairness to the litigants. *LaPorte Constr. Co.*, 805 F.2d at 1257. However, "no single factor is dispositive." *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008).

Here, the factors weigh in favor of retaining jurisdiction over Plaintiff's state law claims. His state law claims arise from the same "common nucleus of operative facts" as his federal claims, namely, the alleged acts or omissions of the RPD in failing to investigate or intervene in the alleged conduct by federal and state government departments and private corporations. (doc. 3 at 3-10.) Requiring Plaintiff to litigate his claims in state court would "necessarily require consideration

by two distinct courts of the same operative fact[s]" and the "same legal issues." *See McKee*, 2007 WL 2381246, at *4. Given Plaintiff's failure to state a claim for relief against Defendant in federal court, or otherwise show that a genuine controversy exists between the parties, allowing him to file suit in state court would impose unnecessary expenses on the court system and the parties involved. *See McCall v. Peters*, No. CIV.A. 3:00–CV–2247–D, 2003 WL 21488211, at *12 (N.D. Tex. May 12, 2003), *aff'd*, 108 F. App'x 862 (5th Cir. 2004) (in determining whether to exercise pendent or supplemental jurisdiction, the court may consider factors such as the amount of time and resources spent adjudicating the case). Because all three factors weigh in favor of retaining jurisdiction over Plaintiff's state law claims, the Court should exercise supplemental jurisdiction and review the claims on the merits.

1. Texas Constitutional Claims

Defendant contends that Plaintiff's claims under the Texas Constitution should be dismissed because "there is no cause of action [for damages] to enforce the Texas State Constitution." (doc. 7 at 4.)

"Claims seeking damages in tort under the Texas Bill of Rights (Article I) are unavailing because 'tort damages are not recoverable for violations of the Texas Constitution.'" *Valadez v. United Indep. Sch. Dist.*, No. L-08-22, 2009 WL 37485, at *1 (S.D. Tex. Jan. 6, 2009) (quoting *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 507 (5th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001)); *see also City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (stating

that there is no cause of action for damages against governmental entities for violations of the Texas Constitution). Accordingly, to the extent Plaintiff seeks damages for violations of the Texas Constitution, his claims should be dismissed. *See Valadez*, 2009 WL 37485, at *1 (dismissing claims for damages under the Texas Constitution).

2. Texas Tort Claims Act (TTCA)

Defendant also moves to dismiss Plaintiff's claims for libel and defamation, negligence, and negligent employment practices under the TTCA, as well as his claim for negligent infliction of emotional distress. (doc. 7 at 4-5.)[15]

The TTCA "provides a limited waiver of sovereign and governmental immunity for certain tort claims, 'allowing suits to be brought against governmental units only in certain, narrowly defined circumstances.'" *Dorward v. Ramirez*, No. 3:09-CV-0018-D, 2009 WL 2777880, at *13 (N.D. Tex. Aug. 28, 2009) (quoting *Tex. Dep't of Crim. J. v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001)). A city is a "governmental unit" under the TTCA. Tex. Civ. Prac. & Rem. Code Ann.. § 101.001(3)(B). This "waiver of immunity constitutes the 'only . . . avenue for common-law recovery against the government' on a tort theory." *Id.* (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008)).

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[15] Defendant does not specifically move to dismiss Plaintiff's negligent infliction of emotional distress claim under the TTCA, but it is considered under this section because negligent infliction of emotional distress is a tort.

a. Defamation and Libel[16]

Defendant argues that the TTCA does not waive immunity for libel and defamation. (doc. 7 at 4.)

The TTCA's limited waiver of sovereign and governmental immunity for certain tort claims expressly does not apply to claims "arising out of assault, battery, false imprisonment, *or any other intentional tort*." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (emphasis added); *see also Dorward*, 2009 WL 2777880, at *13 (citing *Tex. Dep't of Crim. J.*, 51 S.W.3d at 587); *Swiat v. City of Fort Worth*, No. 4:10-CV-354-A, 2011 WL 2559637, at *5 (N.D. Tex. June 28, 2011) (considering the scope of § 101.057(2)). Under Texas law, defamation, which includes libel, is an intentional tort. *Williams v. City of Irving, Tex.*, No. 3:15-CV-1701-L-BH, 2017 WL 3822115, at *9 (N.D. Tex. July 14, 2017) (citing cases) ("defamation of character (slander and libel)" is an intentional tort). Accordingly, Defendant has immunity from Plaintiff's defamation and libel claims under the TTCA, and they should be dismissed for failure to state a claim. *Id.* (dismissing defamation claims under Rule 12(b)(6) because the TTCA's waiver of immunity does not extend to intentional torts).

b. Negligence

Defendant argues that "Plaintiff has not alleged proper [TTCA] notice and has not alleged an

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[16] Libel is a type of defamation that is written, as opposed to slander, which is spoken defamation. *See Reagan v. Guardian Life Ins. Co.*,166 S.W.2d 909, 912 (Tex. 1942). Because libel is a type of defamation, these claims are analyzed together.

exception to sovereign immunity . . . even if timely and proper notice had been given and alleged." (doc. 7 at 5.) It also argues that "[r]ecords are not subject to suit under the [TTCA]." (*Id.*) Before a plaintiff may bring a tort action permitted under the TTCA "against a governmental entity, he must give notice in accordance with the TTCA." *Flores v. Nueces Cty.*, No. C-09-080, 2010 WL 2557775, at *12 (S.D. Tex. June 22, 2010) (citing Tex. Civ. Prac. & Rem. Code § 101.101(a)). Under the TTCA, "[a] governmental unit is entitled to receive notice of a claim against it . . . not later than six months after the day that the incident giving rise to the claim occurred." Tex. Civ. Prac. & Rem. Code § 101.101(a). "The notice must reasonably describe: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." *Id.* at § 101.101(a)(1)–(3). "These notice provisions are akin to statutes of limitations, and lack of notice bars any action under the TTCA." *Reynolds v. Dallas Cty.*, No. 3:07-CV-00513-O ECF, 2009 WL 2591192, at *6 (N.D. Tex. Aug. 21, 2009) (citing *Smith v. City of Houston*, 960 S.W.2d 326, 328 (Tex. App.—Houston[14th Dist.] 1997, no pet.)); *see also Tex. Tech Univ. Health Scis. Ctr. v. Rickey Lucero*, 234 S.W.3d 158, 166 (Tex. App.—El Paso 2007, pet. denied) ("[A] plaintiff's suit is barred by sovereign immunity unless the plaintiff pleads and proves notice [under § 101.101].").

Based on Plaintiff's allegations, it appears the incidents giving rise to his claim occurred in November 2015, when his family member contacted the RPD and it allegedly "inaccurately logged" "incorrect and illegally maintained information." (doc. 3 at 4-5, 14.) Plaintiff does not allege that he

provided notice to Defendant within six months, and although service of a complaint may constitute sufficient notice, Plaintiff's complaint was not served within six months of the incidents giving rise to his claim. *Reynolds*, 2009 WL 2591192, at *6 (stating that Plaintiff failed to allege, argue, or present evidence that he complied with the notice requirements); *Colquitt v. Brazoria Cty.*, 324 S.W.3d 539, 541 (Tex. 2010) (per curium) (stating that a lawsuit itself may constitute proper notice under the TTCA if it is "served on the governmental unit within six months of the incident and contain[s] all the requisite information.").[17] Nothing in Plaintiff's complaint suggests that Defendant had actual notice of Plaintiff's alleged injury such that the exception to the notice requirement would apply. *See Reynolds*, 2009 WL 2591192, at *6; *see also* Tex. Civ. Prac. & Rem. Code § 101.101(c) ("The notice requirements . . . do not apply if the governmental unit has actual notice that . . . the claimant has received some injury . . . .").[18] Accordingly,

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[17] Notably, the discovery rule does not apply to extend the TTCA's notice requirements. *See Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 848 (Tex. App.—Amarillo 2011, no pet.) (citing cases).

[18] "The Texas Supreme Court has held that actual notice to a governmental unit requires knowledge of '(1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved.'" *Mack v. City of Abilene*, 461 F.3d 547, 557 (5th Cir. 2006) (quoting *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995)). Plaintiff "has not alleged that [Defendant] had these three pieces of information." *Id.* (citing *Dallas–Fort Worth Int'l*

Plaintiff's negligence claim should be dismissed for failure to provide sufficient notice. *See Rojero v. El Paso Cty.*, 226 F. Supp. 3d 768, 776 (W.D. Tex. 2016) (dismissing the plaintiff's negligence claim where is complaint was "bereft of any allegation that purportedly gave notice . . . within the statutory-six-month window"); *Reynolds*, 2009 WL 2591192, at *6 (dismissing the plaintiff's state law claims under Rule 12(b)(6) for failure to provide sufficient notice under the TTCA); *but see Hart v. Dallas Cty.*, No. 10-CV-1447-F, 2011 WL 13234290, at *6 (N.D. Tex. Aug. 12, 2011) (declining to dismiss claims under the TTCA even though the notice alleged in the complaint "certainly border[ed] on being inadequate").

Even if Plaintiff had provided sufficient notice, his allegations fail to allege an exception to governmental immunity. (*See* doc. 3 at 14-15.) The TTCA waives governmental immunity in three general areas: "use of publicly owned vehicles, premises defects, and injuries arising from conditions or use of property." *Brown v. Montgomery Cty. Hosp. Dist.*, 905 S.W.2d 481, 484 (Tex. App.—Beaumont 1995, no writ); *see also* Tex. Civ. Prac. & Rem. Code § 101.021. Information contained in records is not tangible property that can support a waiver of sovereign immunity under section 101.021, however. *Campbell v. City of San Antonio*, 43 F.3d 973, 978–79 (5th Cir. 1995) (citing *Univ. of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175, 179 (Tex. 1994)). Here, Plaintiff's negligence

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Airport Bd. v. Ryan, 52 S.W.3d 426, 429 (Tex. App.—Fort Worth 2001, no pet.)).

claim is based on the allegedly false information contained in the RPD's records. (doc. 3 at 14.) His complaint alleges that the RPD, under Defendant's authority, "negligently created, maintains, and has acted upon records containing baseless, unsubstantiated, factually incorrect, and colloquially offensive characterizations describing health as a primary factor for Plaintiff's earliest reports when there is no history of symptoms or record of diagnosis . . . ." (*Id.*) He asserts that "[t]hese false characterizations relating to any health diagnosis where there are none . . . portray an inaccurate context that motivates [Defendant's] employees, agents, and other civilian authorities to ignore each of Plaintiff's updates and reports." (*Id.*) Because his claim is based on information contained in records, which does not constitute tangible property, Defendant's immunity has not been waived, and Plaintiff's negligence claim is also subject to dismissal on this basis. *See Campbell*, 43 F.3d at 978–79 (finding that the plaintiff's claim for negligent use of information in identification materials did not constitute a violation under the TTCA); *Thompson v. Watson*, No. 3:98-CV-0289-P, 1999 WL 184115, at *6–7 (N.D. Tex. Mar. 24, 1999) (granting summary judgment in the defendant's favor because the plaintiff failed to allege a violation of the TTCA where his claims were based on misuse of information contained in Texas State Driver's License Records); *see also Jefferson Cty. v. Sterk*, 830 S.W.2d 260 at 262–63 (Tex. App.—Beaumont 1992, writ denied) (determining that an arrest warrant was not personal property to support an action under the TTCA).

c. Negligent Employment Practices[19]

Defendant argues that "there is no liability for negligence in the hiring process under the [TTCA]." (doc. 7 at 5.)

As noted, the TTCA's limited waiver of immunity allows "'suits to be brought against governmental units only in certain, narrowly defined circumstances.'" *Dorward*, 2009 WL 2777880, at *13 (quoting *Miller*, 51 S.W.3d at 587). Negligent hiring, training, supervision, and retention claims "are areas of liability that have not been waived by the TTCA." *Rivera v. City of San Antonio*, No. SA-06-CA-235-XR, 2006 WL 3340908, at *15 (W.D. Tex. Nov. 15, 2006); *Univ. of Tex. Health Sci. Ctr. v. Schroeder*, 190 S.W.3d 102, 106 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("allegations of negligent supervision do not satisfy the limited waiver of immunity contained within the act."); *Campos v. Nueces Cty.*, 162 S.W.3d 778, 787–88 (Tex. App.—Corpus Christi 2005, no pet.) (stating that claims for negligent hiring, training, and supervision cannot be brought under the TTCA); see also Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 580–81 (Tex. 2001) (claims such as negligent training and failure to discipline "involve the misuse or non-use of information and are thus barred by sovereign immunity."). Accordingly, Defendant has immunity from Plaintiff's claims for negligent employment practices, and these claims should be dismissed. Rivera, 2006 WL 3340908, at *15 (dismissing

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[19] Plaintiff specifically alleges negligent hiring, training, supervision, and retention. (doc. 3 at 15.)

negligent hiring and negligent training claims under Rule 12(b)(6) based on the TTCA).

d. Negligent Infliction of Emotional Distress

Defendant also moves to dismiss Plaintiff's claim for negligent infliction of emotional distress for failure to state a claim. (doc. 7 at 5.)[20]

Texas law does not recognize a claim for negligent infliction of emotional distress. *See Hagen v. Hagen*, 282 S.W.3d 899, 910 (Tex. 2009) (noting that negligent infliction of emotional distress "is not a valid claim"); *see also Martin v. Grehn*, 546 F. App'x 415, 421 (5th Cir. 2013) (stating that the tort of negligent infliction of emotional distress "does not exist in Texas").[21] Because Texas law does not recognize this claim, it should be dismissed for failure to state a claim upon which relief can be

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[20] Defendant argues Plaintiff's claim for negligent infliction of emotional distress fails to meet the requirements of Rule 11. (doc. 7 at 5.) Because Defendant makes this argument in its failure to state a claim section and presents no argument regarding Rule 11, (*see id.*), this claim is considered under Rule 12(b)(6).

[21] Notably, a claim for negligent infliction of emotional distress is also not recognized under federal law. *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161, 172 (5th Cir. 1985); *accord Flores v. City of Palacios*, 381 F.3d 391, 401 n.8 (5th Cir. 2004) (recognizing that "the Constitution does not provide an independent right to be free from emotional distress"); *Shinn ex. rel. Shinn v. College Station Indep. Sch. Dist.*, 96 F.3d 783, 786 (5th Cir. 1996) (recognizing that "there is no constitutional right to be free from emotional distress.").

granted. *See Phillips v. United Parcel Service*, No. 3:10-CV-1197-G-BH, 2011 WL 2680725, at *15 (dismissing negligent infliction of emotional distress claim under Rule 12(b)(6)).

3. Texas Declaratory Judgments Act (the Act)

Defendant argues that Plaintiff's request for declaratory judgment for violations of the Texas Constitution "fails because it attempts to mandate the exercise of discretion in a manner the Plaintiff approves of and the Defendant is otherwise immune." (doc. 7 at 5.)[22]

Although claims for damages are not permitted under the Texas Constitution, "equitable remedies for violation[s] of constitutional rights may be enforced." *McPeters v. LexisNexis*, 910 F. Supp. 2d 981, 990 (S.D. Tex. Oct. 3, 2012) (citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995)). Under the Act, "[a] person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). "[S]uits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity . . . ." *City of El Paso v. Heinrich*,

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[22] It appears Defendant's argument relates only to Plaintiff's state law request for a declaratory judgment. (doc. 7 at 5-6 & n.6.)

284 S.W.3d 366, 372 (Tex. 2009). Governmental entities, however, "remain immune from suit" under the Act. *Id.* at 372–73. "[I]t follows that these suits cannot be brought against the state, which retains immunity, but must be brought against state actors in their official capacity." *Id.* at 373; *see Tex. Transp. Comm'n v. City of Jersey Village*, 478 S.W.3d 869, 883 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing cases) ("sovereign immunity bars declaratory-judgment claims against the governmental entities, as opposed to the governmental actors."). Here, Plaintiff's suit is only against a governmental entity, namely, the City of Richardson. (doc. 3 at 1, 3.) He seeks a declaratory judgment that the RPD, acting under Defendant's authority, "should have and must investigate crimes as reported by Plaintiff, consistent with the . . . Texas Constitution Article 1. Bill of Rights." (*Id.* at 17.) He also seeks a declaration that his "rights were deprived and violated as guaranteed in . . . the Texas Constitution by Defendant . . . ." (*Id.*) Because his suit is against a governmental entity, which retains immunity from suit under the Act, his claim should be dismissed on this basis for failure to state a claim. *Stem v. Gomez*, 813 F.3d 205, 215 (5th Cir. 2016) (affirming dismissal of claims under the Act because "sovereign immunity insulate[d] the city from the lawsuit"); *Garza v. Gulf Bend Center*, No. V-15-006, 2016 WL 590153, at *3 (S.D. Tex. Feb. 15, 2016) (dismissing claims for declaratory relief against non-profit governmental entities on the basis of governmental immunity for failure to state a claim under Rule 12(b)(6)).

doc. 3.) Regardless of which subsection Plaintiff relies upon, the law presumes that municipalities are incapable of entering into conspiracies. *See Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Hiliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). Defendant therefore cannot be liable under § 1985. *See Mitchell v. City of Sugar Land*, No. G–10–223, 2011 WL 1156253, at *8 (S.D. Tex. Mar. 25, 2011); *see also Batiste v. City of Beaumont*, 421 F. Supp. 2d 969, 986 (E.D. Tex. 2005). Plaintiff's claims under § 1985 should be *sua sponte* dismissed for failure to state a claim.

B. Federal Declaratory and Injunctive Relief

Plaintiff also appears to seek declaratory and injunctive relief under federal law. (doc. 3 at 17.) Because Plaintiff's substantive claims under federal law are subject to dismissal for failure to state a claim, his requests for equitable relief, to the extent asserted under federal law, should be *sua sponte* dismissed for failure to state a claim. *See Jackson v. Fed. Home Loan Mortg. Corp.*, No. 4:11-CV-507-A, 2011 WL 3874860, at *3 (N.D. Tex. Sept. 1, 2011) ("To obtain injunctive relief, [a] plaintiff is required to plead and prove, inter alia, 'a substantial likelihood of success on the merits.'") (quoting *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996)); *Turner v. AmericaHomeKey Inc.*, No. 3:11-CV-0860-D, 2011 WL 3606688, at *6 (N.D. Tex. Aug. 16, 2011) (dismissing the plaintiff's request for declaratory judgment where he pleaded no viable claim for relief).

C. State Injunctive Relief

Plaintiff also appears to request preliminary

and permanent injunctive relief under state law. (doc. 3 at 17.) Plaintiff's requests for injunctive relief, to the extent asserted under state law, appear to relate only to his claim that Defendant violated Article 1, Section 30 of the Texas Constitution (doc. 3 at 12, 17.)

As noted, claims for equitable relief are available for violations of the Texas Constitution. *McPeters*, 910 F. Supp. 2d at 990 (citing *Bouillion*, 896 S.W.2d at 149). Section 30 of Article 1 "provides crime victims the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process and the right to be reasonably protected from the accused throughout the criminal justice process." *Herrera v. State*, 24 S.W.3d 844, 845–46 (Tex. App.—El Paso 2000, no pet.); *see* Tex. Const. art. I, § 30(a).

1. Preliminary Injunction

In order to be entitled to a preliminary injunction under Texas law, "the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Health Care Serv. Corp. v. East Tex. Med. Center*, 495 S.W.3d 333, 337 (Tex. App.—Tyler 2016, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).

Here, Plaintiff alleges that the RPD, acting under Defendant's authority, created and maintains records containing incorrect and offensive information about his health in violation of the Texas Constitution, and requests injunctive relief to prohibit the availability of such information and to

force the RPD to correct or update it. (doc. 3 at 12, 17.) His conclusory and speculative allegations do not show how these alleged actions create a cause of action against Defendant for violation of Section 30. His speculative belief that these records motivate employees to ignore his crime reports do not show the existence of imminent or irreparable injury, and are insufficient to "raise [his] right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Accordingly, his claim for preliminary injunctive relief, to the extent asserted under the Texas Constitution, should be *sua sponte* dismissed for failure to state a claim.

2. Permanent Injunction

"To obtain permanent-injunctive relief [under Texas law], a party must show (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law." *Livingston v. Livingston*, 537 S.W.3d 578, 587 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Risner v. Harris Cty. Republican Party*, 444 S.W.3d 327, 339 (Tex. App.—Houston [1st Dist.] 2014, no pet.)). "When determining the appropriateness of a permanent injunction, a court should balance the competing equities, including the public interest." *Id.* (internal quotations omitted). Plaintiff's request for permanent injunctive relief fails for similar reasons as his request for preliminary injunctive relief: his conclusory and speculative allegations fail to show the existence of a wrongful act or the existence of imminent harm or irreparable injury. Accordingly, his claim for permanent injunctive relief, to the extent asserted under the Texas Constitution,

should also be *sua sponte* dismissed for failure to state a claim.

V. OPPORTUNITY TO AMEND

Notwithstanding their failure to plead sufficient facts, the Fifth Circuit is inclined to give *pro se* plaintiffs several opportunities to state a claim upon which relief can be granted. *See Scott v. Byrnes*, No. 3:07-CV-1975-D, 2008 WL 398314, at *1 (N.D. Tex. Feb. 13, 2008); *Sims v. Tester*, No. 3:00-CV-0863-D, 2001 WL 627600, at *2 (N.D. Tex. Feb. 13, 2001). Courts therefore typically allow *pro se* plaintiffs to amend their complaints when the action is to be dismissed pursuant to a court order. *See Robinette v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:96-CV-2923-D, 2004 WL 789870, at *2 (N.D. Tex. Apr. 12, 2004); *Sims*, 2001 WL 627600, at *2. A *pro se* plaintiff may also obtain leave to amend his complaint in response to a recommended dismissal. *See Swanson v. Aegis Commc'ns Grp., Inc.*, No. 3:09-CV-0041-D, 2010 WL 26459, at * 1 (N.D. Tex. Jan. 5, 2010); *Scott*, 2008 WL 398314, at *1. However, "[w]hen a plaintiff is given an opportunity to amend a complaint that fails to state a claim upon which relief can be granted, but refuses to do so, then the district court is justified in dismissing the complaint with prejudice." *Rodriguez v. U.S.*, 66 F.3d 95, 98 (5th Cir. 1995). Additionally, a court may appropriately dismiss an action with prejudice without giving an opportunity to amend if it finds that the plaintiff has alleged his or her best case. *Jones v. Greninger*, 188 F.3d 322, 327 (5th Cir. 1999).

Here, Plaintiff has not amended his complaint

since filing this action. It does not appear that he could successfully state a claim for relief even if provided an opportunity to amend, however. His claims under § 1983 are based on *respondeat superior* and actions that do not constitute constitutional violations, and his state law claims are either unrecognized or barred by immunity. Additionally, to the extent he seeks injunctive relief under state law, it does not appear that he can successfully state a claim for such relief. Any further opportunity to amend is therefore unwarranted.

VI. RECOMMENDATION

Defendant's motion to dismiss should be **GRANTED**, and Plaintiff's claims should be **DISMISSED with prejudice**. Plaintiff's claims under 42 U.S.C. § 1985, as well as any remaining federal and/or state law claims for declaratory and injunctive relief should be *sua sponte* **DISMISSED with prejudice** for failure to state a claim.

SO RECOMMENDED on this 27th day of July, 2018.

[Illegible]_____

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

[Illegible]_____

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

Texas Uniform Declaratory Judgments Act

CIVIL PRACTICE AND REMEDIES CODE
TITLE 2. TRIAL, JUDGMENT, AND APPEAL
SUBTITLE C. JUDGMENTS
CHAPTER 37. DECLARATORY JUDGMENTS

Sec. 37.001. DEFINITION. In this chapter, "person" means an individual, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.002. SHORT TITLE, CONSTRUCTION, INTERPRETATION. (a) This chapter may be cited as the Uniform Declaratory Judgments Act.

(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and

insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

(c) This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.003. POWER OF COURTS TO RENDER JUDGMENT; FORM AND EFFECT. (a) A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

(b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

(c) The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1,

administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.08(a), eff. Sept. 1, 1987; Acts 1999, 76th Leg., ch. 855, Sec. 10, eff. Sept. 1, 1999.

Sec. 37.0055. DECLARATIONS RELATING TO LIABILITY FOR SALES AND USE TAXES OF ANOTHER STATE. (a) In this section, "state" includes any political subdivision of that state.

(b) A district court has original jurisdiction of a proceeding seeking a declaratory judgment that involves:

(1) a party seeking declaratory relief that is a business that is:

(A) organized under the laws of this state or is otherwise owned by a resident of this state; or

(B) a retailer registered with the comptroller under Section 151.106, Tax Code; and

(2) a responding party that:

(A) is an official of another state; and

(B) asserts a claim that the party seeking declaratory relief is required to collect sales or use taxes for that state based on conduct of the business that occurs in whole or in part within this state.

(c) A business described by Subsection (b)(1) is entitled to declaratory relief on the issue of whether the requirement of another state that the business collect and remit sales or use taxes to that state constitutes an undue burden on interstate commerce under Section 8, Article I, United States Constitution.

(d) In determining whether to grant declaratory relief to a business under this section, a court shall consider:

(1) the factual circumstances of the business's operations that

determined in other civil actions in the court in which the proceeding is pending.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.008. COURT REFUSAL TO RENDER. The court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.009. COSTS. In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.010. REVIEW. All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.011. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

APPENDIX C

Texas Tort Claims Act

CIVIL PRACTICE AND REMEDIES CODE
TITLE 5. GOVERNMENTAL LIABILITY
CHAPTER 101. TORT CLAIMS
SUBCHAPTER A. GENERAL PROVISIONS

Sec. 101.001. DEFINITIONS. In this chapter:

(1) "Emergency service organization" means:

(A) a volunteer fire department, rescue squad, or an emergency medical services provider that is:

(i) operated by its members; and

(ii) exempt from state taxes by being listed as an exempt organization under Section 151.310 or 171.083, Tax Code; or

(B) a local emergency management or

district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;

(C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

(4) "Motor-driven equipment" does not include:

(A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or

(B) medical equipment, such as iron lungs, located in hospitals.

(5) "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

(6) "State government" means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 693, Sec. 1, eff. June 19, 1987; Acts 1991, 72nd Leg., ch. 476, Sec. 1, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 827, Sec. 1, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 968, Sec. 1, eff. Sept. 1, 1997. Amended by: Acts 2011, 82nd Leg., R.S., Ch. 1101 (S.B. 1560), Sec. 1, eff. June 17, 2011.

Sec. 101.002. SHORT TITLE. This chapter may be cited as the Texas Tort Claims Act.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.003. REMEDIES ADDITIONAL. The remedies authorized by this chapter are in addition to any other legal remedies.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

SUBCHAPTER B. TORT LIABILITY OF GOVERNMENTAL UNITS

municipal airport for space flight activities as defined by Section 100A.001 unless the municipality would otherwise be liable under Section 101.021.

(b) This section does not affect a limitation on liability or damages provided by this chapter, including a limitation under Section 101.023.

Added by Acts 2001, 77th Leg., ch. 1423, Sec. 35, eff. June 17, 2001. Amended by: Acts 2013, 83rd Leg., R.S., Ch. 50 (H.B. 278), Sec. 2, eff. September 1, 2013.

Sec. 101.0215. LIABILITY OF A MUNICIPALITY. (a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

(1) police and fire protection and control;

(2) health and sanitation services;

(3) street construction and design;

(4) bridge construction and maintenance and street maintenance;

(5) cemeteries and cemetery care;

(6) garbage and solid waste removal,

collection, and disposal;

(7) establishment and maintenance of jails;

(8) hospitals;

(9) sanitary and storm sewers;

(10) airports, including when used for space flight activities as defined by Section 100A.001;

(11) waterworks;

(12) repair garages;

(13) parks and zoos;

(14) museums;

(15) libraries and library maintenance;

(16) civic, convention centers, or coliseums;

(17) community, neighborhood, or senior citizen centers;

(18) operation of emergency ambulance service;

(19) dams and reservoirs;

(20) warning signals;

(21) regulation of traffic;

(22) transportation systems;

(23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;

(24) vehicle and motor driven equipment maintenance;

(25) parking facilities;

(26) tax collection;

(27) firework displays;

(28) building codes and inspection;

(29) zoning, planning, and plat approval;

(30) engineering functions;

(31) maintenance of traffic signals, signs, and hazards;

(32) water and sewer service;

(33) animal control;

(34) community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code;

(35) latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located; and

(36) enforcement of land use restrictions under Subchapter E, Chapter 212, Local Government Code.

(b) This chapter does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

(1) the operation and maintenance of a

public utility;

(2) amusements owned and operated by the municipality; and

(3) any activity that is abnormally dangerous or ultrahazardous.

(c) The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 3.02, eff. Sept. 2, 1987. Amended by Acts 1997, 75th Leg., ch. 152, Sec. 1, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 1170, Sec. 2, eff. June 18, 1999; Acts 2001, 77th Leg., ch. 1399, Sec. 1, eff. June 16, 2001. Amended by: Acts 2013, 83rd Leg., R.S., Ch. 50 (H.B. 278), Sec. 1, eff. September 1, 2013.

Sec. 101.023. LIMITATION ON AMOUNT OF LIABILITY. (a) Liability of the state government under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of

property.

(c) Liability of a municipality under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(d) Except as provided by Section 78.001, liability of an emergency service organization under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 3.03, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 827, Sec. 2, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 968, Sec. 2, eff. Sept. 1, 1997.

Sec. 101.024. EXEMPLARY DAMAGES. This chapter does not authorize exemplary damages.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.025. WAIVER OF GOVERNMENTAL IMMUNITY; PERMISSION TO SUE.

(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.026. INDIVIDUAL'S IMMUNITY PRESERVED. To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.027. LIABILITY INSURANCE. (a) Each governmental unit other than a unit of state government may purchase insurance policies protecting the unit and the unit's employees against claims under this chapter. A unit of state government may purchase such a policy only to the extent that the unit is authorized or required to do so under other law.

(b) The policies may relinquish to the insurer

the right to investigate, defend, compromise, and settle any claim under this chapter to which the insurance coverage extends.

(c) This state or a political subdivision of the state may not require an employee to purchase liability insurance as a condition of employment if the state or the political subdivision is insured by a liability insurance policy.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1999, 76th Leg., ch. 1499, Sec. 1.01, eff. Sept. 1, 1999.

Sec. 101.054. STATE MILITARY PERSONNEL. This chapter does not apply to a claim arising from the activities of the state military forces when on active duty under the lawful orders of competent authority.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.055. CERTAIN GOVERNMENTAL FUNCTIONS. This chapter does not apply to a claim arising:

(1) in connection with the assessment or collection of taxes by a governmental unit;

(2) from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in

compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others; or

(3) from the failure to provide or the method of providing police or fire protection.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 3.05, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 139, Sec. 1, eff. Sept. 1, 1995.

Sec. 101.056. DISCRETIONARY POWERS. This chapter does not apply to a claim based on:

(1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or

(2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.057. CIVIL DISOBEDIENCE AND

CERTAIN INTENTIONAL TORTS. This chapter does not apply to a claim:

(1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or

(2) arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.058. LANDOWNER'S LIABILITY. To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under this chapter, Chapter 75 controls.

Added by Acts 1995, 74th Leg., ch. 520, Sec. 4, eff. Aug. 28, 1995.

SUBCHAPTER D. PROCEDURES

Sec. 101.101. NOTICE. (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:

(1) the damage or injury claimed;

(2) the time and place of the incident; and

(3) the incident.

(b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.

(c) The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 101.102. COMMENCEMENT OF SUIT. (a) A suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises.

(b) The pleadings of the suit must name as defendant the governmental unit against which liability is to be established.

(c) In a suit against the state, citation must be served on the secretary of state. In other suits, citation must be served as in other civil cases unless no method of service is provided by law, in which case service may be on the administrative head of the governmental unit being sued. If the administrative head of the

governmental unit is not available, the court in which the suit is pending may authorize service in any manner that affords the governmental unit a fair opportunity to answer and defend the suit.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 3.06, eff. Sept. 2, 1987.

Sec. 101.103. LEGAL REPRESENTATION. (a) The attorney general shall defend each action brought under this chapter against a governmental unit that has authority and jurisdiction coextensive with the geographical limits of this state. The attorney general may be fully assisted by counsel provided by an insurance carrier.

(b) A governmental unit having an area of jurisdiction smaller than the entire state shall employ its own counsel according to the organic act under which the unit operates, unless the governmental unit has relinquished to an insurance carrier the right to defend against the claim.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

APPENDIX D

Texas Defamation Mitigation Act

CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 73. LIBEL
SUBCHAPTER A. GENERAL PROVISIONS

Sec. 73.001. ELEMENTS OF LIBEL. A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1,

1985.

Sec. 73.002. PRIVILEGED MATTERS. (a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

(1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;

(C) an executive or legislative proceeding (including a proceeding of a legislative committee), a proceeding in or before a managing board of an educational or eleemosynary institution supported from the public revenue, of the governing body of a city or town, of a county commissioners court, and of a public school board or a report of or debate and statements made in any of those proceedings; or

(D) the proceedings of a public

meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and

(2) reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 73.003. MITIGATING FACTORS. (a) To determine the extent and source of actual damages and to mitigate exemplary damages, the defendant in a libel action may give evidence of the following matters if they have been specially pleaded:

(1) all material facts and circumstances surrounding the claim for damages and defenses to the claim;

(2) all facts and circumstances under which the libelous publication was made; and

(3) any public apology, correction, or retraction of the libelous matter made and published by the defendant.

(b) To mitigate exemplary damages, the defendant in a libel action may give evidence of the intention with which the libelous publication was made if the matter has been specially pleaded.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 73.005. TRUTH A DEFENSE. (a) The truth of the statement in the publication on which an action for libel is based is a defense to the action.

(b) In an action brought against a newspaper or other periodical or broadcaster, the defense described by Subsection (a) applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.

(c) This section does not abrogate or lessen any other remedy, right, cause of action, defense, immunity, or privilege available under the Constitution of the United States or this state or as provided by any statute, case, or common law or rule.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by: Acts 2015, 84th Leg., R.S., Ch. 191 (S.B. 627), Sec. 1, eff. May 28, 2015.

Sec. 73.006. OTHER DEFENSES. This chapter does not affect the existence of common law, statutory law, or other defenses to libel.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

SUBCHAPTER B. CORRECTION, CLARIFICATION, OR RETRACTION BY

PUBLISHER

Sec. 73.051. SHORT TITLE. This subchapter may be cited as the Defamation Mitigation Act. This subchapter shall be liberally construed.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.052. PURPOSE. The purpose of this subchapter is to provide a method for a person who has been defamed by a publication or broadcast to mitigate any perceived damage or injury.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.053. DEFINITION. In this subchapter, "person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity. The term does not include a government or governmental subdivision, agency, or instrumentality.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.054. APPLICABILITY. (a) This

subchapter applies to a claim for relief, however characterized, from damages arising out of harm to personal reputation caused by the false content of a publication.

(b) This subchapter applies to all publications, including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.055. REQUEST FOR CORRECTION, CLARIFICATION, OR RETRACTION. (a) A person may maintain an action for defamation only if:

(1) the person has made a timely and sufficient request for a correction, clarification, or retraction from the defendant; or

(2) the defendant has made a correction, clarification, or retraction.

(b) A request for a correction, clarification, or retraction is timely if made during the period of limitation for commencement of an action for defamation.

(c) If not later than the 90th day after receiving knowledge of the publication, the person does not request a correction, clarification, or retraction, the person may

not recover exemplary damages.

(d) A request for a correction, clarification, or retraction is sufficient if it:

(1) is served on the publisher;

(2) is made in writing, reasonably identifies the person making the request, and is signed by the individual claiming to have been defamed or by the person's authorized attorney or agent;

(3) states with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;

(4) alleges the defamatory meaning of the statement; and

(5) specifies the circumstances causing a defamatory meaning of the statement if it arises from something other than the express language of the publication.

(e) A period of limitation for commencement of an action under this section is tolled during the period allowed by Sections 73.056 and 73.057.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.056. DISCLOSURE OF EVIDENCE OF FALSITY.

(a) A person who has been requested to make a correction, clarification, or retraction may ask the person making the request to provide reasonably available information regarding the falsity of the allegedly defamatory statement not later than the 30th day after the date the person receives the request. Any information requested under this section must be provided by the person seeking the correction, clarification, or retraction not later than the 30th day after the date the person receives the request.

(b) If a correction, clarification, or retraction is not made, a person who, without good cause, fails to disclose the information requested under Subsection (a) may not recover exemplary damages, unless the publication was made with actual malice.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.057. TIMELY AND SUFFICIENT CORRECTION, CLARIFICATION, OR RETRACTION. (a) A correction, clarification, or retraction is timely if it is made not later than the 30th day after receipt of:

(1) the request for the correction,

clarification, or retraction; or

(2) the information requested under Section 73.056(a).

(b) A correction, clarification, or retraction is sufficient if it is published in the same manner and medium as the original publication or, if that is not possible, with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of and:

(1) is publication of an acknowledgment that the statement specified as false and defamatory is erroneous;

(2) is an allegation that the defamatory meaning arises from other than the express language of the publication and the publisher disclaims an intent to communicate that meaning or to assert its truth;

(3) is a statement attributed to another person whom the publisher identifies and the publisher disclaims an intent to assert the truth of the statement; or

(4) is publication of the requestor's statement of the facts, as set forth in a request for correction, clarification, or retraction, or a fair summary of the statement, exclusive of any portion that is defamatory of another, obscene, or otherwise improper for publication.

(c) If a request for correction, clarification, or retraction has specified two or more statements as false and defamatory, the correction,

clarification, or retraction may deal with the statements individually in any manner provided by Subsection (b).

(d) Except as provided by Subsection (e), a correction, clarification, or retraction is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of if:

(1) it is published in a later issue, edition, or broadcast of the original publication;

(2) publication is in the next practicable issue, edition, or broadcast of the original publication because the publication will not be published within the time limits established for a timely correction, clarification, or retraction; or

(3) the original publication no longer exists and if the correction, clarification, or retraction is published in the newspaper with the largest general circulation in the region in which the original publication was distributed.

(e) If the original publication was on the Internet, a correction, clarification, or retraction is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of if the publisher appends to the original publication the correction, clarification, or retraction.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.058. CHALLENGES TO CORRECTION, CLARIFICATION, OR RETRACTION OR TO REQUEST FOR CORRECTION, CLARIFICATION, OR RETRACTION. (a) If a defendant in an action under this subchapter intends to rely on a timely and sufficient correction, clarification, or retraction, the defendant's intention to do so, and the correction, clarification, or retraction relied on, must be stated in a notice served on the plaintiff on the later of:

(1) the 60th day after service of the citation; or

(2) the 10th day after the date the correction, clarification, or retraction is made.

(b) A correction, clarification, or retraction is timely and sufficient unless the plaintiff challenges the timeliness or sufficiency not later than the 20th day after the date notice under Subsection (a) is served. If a plaintiff challenges the timeliness or sufficiency, the plaintiff must state the challenge in a motion to declare the correction, clarification, or retraction untimely or insufficient served not later than the 30th day after the date notice under Subsection (a) is served on the plaintiff or the 30th day after the date the correction, clarification, or retraction is made, whichever is later.

(c) If a defendant intends to challenge the sufficiency or timeliness of a request for a correction, clarification, or retraction, the

defendant must state the challenge in a motion to declare the request insufficient or untimely served not later than the 60th day after the date of service of the citation.

(d) Unless there is a reasonable dispute regarding the actual contents of the request for correction, clarification, or retraction, the sufficiency and timeliness of a request for correction, clarification, or retraction is a question of law. At the earliest appropriate time before trial, the court shall rule, as a matter of law, whether the request for correction, clarification, or retraction meets the requirements of this subchapter.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.059. EFFECT OF CORRECTION, CLARIFICATION, OR RETRACTION. If a correction, clarification, or retraction is made in accordance with this subchapter, regardless of whether the person claiming harm made a request, a person may not recover exemplary damages unless the publication was made with actual malice.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.060. SCOPE OF PROTECTION. A timely and sufficient correction, clarification, or

retraction made by a person responsible for a publication constitutes a correction, clarification, or retraction made by all persons responsible for that publication but does not extend to an entity that republished the information.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.061. ADMISSIBILITY OF EVIDENCE OF CORRECTION, CLARIFICATION, OR RETRACTION. (a) A request for a correction, clarification, or retraction, the contents of the request, and the acceptance or refusal of the request are not admissible evidence at a trial.

(b) The fact that a correction, clarification, or retraction was made and the contents of the correction, clarification, or retraction are not admissible in evidence at trial except in mitigation of damages under Section 73.003(a)(3). If a correction, clarification, or retraction is received into evidence, the request for the correction, clarification, or retraction may also be received into evidence.

(c) The fact that an offer of a correction, clarification, or retraction was made and the contents of the offer, and the fact that the correction, clarification, or retraction was refused, are not admissible in evidence at trial.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950

(H.B. 1759), Sec. 2, eff. June 14, 2013.

Sec. 73.062. ABATEMENT. (a) A person against whom a suit is pending who does not receive a written request for a correction, clarification, or retraction, as required by Section 73.055, may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending.

(b) A suit is automatically abated, in its entirety, without the order of the court, beginning on the 11th day after the date a plea in abatement is filed under Subsection (a) if the plea in abatement:

(1) is verified and alleges that the person against whom the suit is pending did not receive the written request as required by Section 73.055; and

(2) is not controverted in an affidavit filed by the person bringing the claim before the 11th day after the date on which the plea in abatement is filed.

(c) An abatement under Subsection (b) continues until the 60th day after the date that the written request is served or a later date agreed to by the parties. If a controverting affidavit is filed under Subsection (b)(2), a hearing on the plea in abatement will take place as soon as practical considering the court's docket.

(d) All statutory and judicial deadlines under the Texas Rules of Civil Procedure relating to a

suit abated under Subsection (b), other than those provided in this section, will be stayed during the pendency of the abatement period under this section.

Added by Acts 2013, 83rd Leg., R.S., Ch. 950 (H.B. 1759), Sec. 2, eff. June 14, 2013.

No. _____

PETITION FOR WRIT OF CERTIORARI

June 2019