IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Timothy Charles Holmseth, Plaintiff, vs. City of Grand Forks/Grand Forks Police Department, University of North Dakota/University of North Dakota Police Department, State of North Dakota/North Dakota Highway Patrol, County of Grand Forks/Grand Forks County Sheriff's Office, Grand Forks County PSAP, Grand Forks States Attorney, Altru Health Systems, and U.S. Customs and Border Protection, Defendants.	)	Case No. 3:16-cv-303 **ORDER**

Plaintiff Timothy Charles Holmseth (Holmseth), who is proceeding pro se and in forma pauperis, filed a complaint and motion for emergency injunctive relief. (Doc. #4). Holmseth alleges the various defendants have engaged in a criminal conspiracy to destroy and conceal evidence of police misconduct.

Under 28 U.S.C. § 1915(e)(2), the court may sua sponte review an in forma pauperis complaint prior to it being served on the defendants. If the court determines that the action is frivolous, malicious, fails to state a claim, or seeks monetary relief against a defendant who is immune from such relief, the court must dismiss the complaint.

Holmseth initiated a case against some of the same defendants, apparently involving the same subject matter, in the District of Minnesota. That case was dismissed without prejudice because of "the absence of a complaint, [that] Court's lack of subject-

matter jurisdiction, [and] the inappropriateness of [that] District as a venue." Holmseth v. Grand Forks, Case No. 0:16-cv-2496, Doc. #3, p. 3 (D. Minn. Aug. 8, 2016) and Doc. #4 (D. Minn. Aug. 25, 2016). A Report and Recommendation (R&R) reviewing the District of Minnesota case stated, "by all appearances, this action could have been brought in the United States District Court for the District of North Dakota." Id. at Doc. #3, p. 3. Since he did not file a complaint in the District of Minnesota, it appears that court did not conduct a full review pursuant to § 1915(e)(2). Subsequent to filing of that R&R, Holmseth initiated a case in this court by filing a document captioned both "Complaint" and "Motion for Emergency Injunctive Relief." (Doc. #4).

Facts

The complaint describes Holmseth as a "journalist, author, publisher, songwriter, and media specialist." Id. at 3. The defendants are various law enforcement agencies, a health care provider, a state university, the State of North Dakota, a state's attorney, and local government entities.

The allegations of the complaint concern Holmseth's attempt to obtain information about a February 2015 event, in which a person was allegedly shot by a police officer. The complaint alleges the defendants "plan[] to destroy evidence" because it shows that they "attempted to murder an unarmed man, David James Elliott; and for the purpose of destroying evidence to avoid criminal prosecution." Id. at 5.

Holmseth alleges that he has made various requests for public records—including copies of video from body cameras worn by police officers and copies of video from law enforcement vehicles–concerning the February 2015 incident. He contends that the video evidence he has received "has clearly been altered using a video editor," to prevent

him and the public from "knowing the true facts and circumstances" surrounding the event. Id. at 4.

Holmseth's request for an injunction concerns the planned destruction of evidence by the Grand Forks Police Department (GFPD). To his complaint, Holmseth attached an email from a GFPD officer, which advised Holmseth that all "BWC and MVR" recordings would be subject to destruction as of July 18, 2016. (Doc. #4-1).

Law and Discussion

To state a cognizable claim, a complaint must meet the requirements of Federal Rule of Civil Procedure 8(a)(2), as interpreted by Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), Ashcroft v. Iqbal, 556 U.S. 662 (2009), and their progeny. To meet the Twombly/Iqbal standard, a complaint must present a "plausible" claim, and must give the defendants fair notice of the claim and grounds upon which it rests. E.g., Zink v. Lombardi, 783 F.3d 1089, 1098 (8th Cir. 2015). When the factual content of a complaint allows the court to reasonably infer that a defendant is liable for the alleged misconduct, the complaint has stated a facially plausible claim. Iqbal, 556 U.S. at 678. While facts alleged in the complaint are to be accepted as true, conclusory allegations of the elements of a cause of action are insufficient to state a claim that is plausible on its face. Id. In construing a pro se complaint, a court is to take a liberal approach and is to hold a pro se litigant to a less stringent pleading standard than would be required of attorneys. Erickson v. Pardus, 551 U.S. 89, 93 (2007).

Holmseth refers to 42 U.S.C. § 1983 in the caption of the complaint and on the civil cover sheet. The complaint includes a general allegation of violation of Holmseth's First Amendment rights and a general reference to defendants having violated "state

and federal statutes." (Doc. #4, pp. 2-3). Applying a liberal construction, the court construes the complaint to claim that, in allegedly altering evidence and allegedly not properly responding to Holmseth's requests for public records, the defendants violated Holmseth's First Amendment rights. The court further construes the complaint to seek injunctive relief pursuant to 42 U.S.C. § 1983. The court therefore analyzes the complaint to determine whether it meets the Twombly/Iqbal standards for pleading those claims.

To adequately state a claim under § 1983, a plaintiff must allege that (1) acting under color of state law, (2) a person deprived the plaintiff of rights secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). The court therefore considers whether, assuming all facts alleged in the complaint are true, the complaint adequately pleads both elements.

The caption of the complaint also names Altru Health Systems (Altru), the State of North Dakota, the North Dakota State Highway Patrol, the University of North Dakota (UND), and the UND Police Department as defendants. But, a private hospital is not a "person" amenable to suit under § 1983. Williams v. St. Vincent Hosp., 258 Fed. Appx. 293, 294 (11th Cir. 2007). Nor are the State of North Dakota, the North Dakota State Highway Patrol, or UND,[1] which includes its police department.[2] See Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989) (a state and its agencies are not "persons"

[1] The University of North Dakota is an arm of the state of North Dakota. Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991), overruled on other grounds by Bulman v. Hulstrand Const. Co., Inc., 521 N.W.2d 632, 634 (N.D. 1991).

[2] "[A] university police department is not considered an entity separate from its university." Thomas v. Univ. of Cent. Ark. Police. Dept., No. 4:09-cv-902, 2010 WL 1643278, at *1 (E.D. Ark. Apr. 22, 2010) (citation omitted).

under § 1983). Additionally, the state and its agencies are entitled to Eleventh Amendment immunity from suit in federal court. Treleven v. Univ. of Minn., 73 F.3d 816, 818 (8th Cir. 1996); Nix v. Norman, 879 F.2d 429, 432 (8th Cir. 1989). The complaint against Altru, the State of North Dakota, the North Dakota State Highway Patrol, and UND, including its police department, will therefore be dismissed without prejudice. None of those defendants are subject to suit n federal court pursuant to § 1983.

The caption of the complaint names U.S. Customs and Border Protection (CBP) as a defendant. The only mention of CBP in the body of the complaint is that Elliott told Holmseth that Elliott was pursued by CBP, and that "Respondent is illegally withholding information regarding the involvement of the United States Border Patrol." (Doc. #4, p. 5). CBP is a federal agency, not a person subject to liability under § 1983. Section "1983 does not provide for liability against federal agencies acting under color of federal law." Ponton v. AFSCME, 395 Fed. App'x 867, 872 (3d Cir. 2010) (citation omitted); see also D'Addabbo v. Obama, 530 Fed. App'x 828, 829 (10th Cir. 2013). The complaint against CBP will therefore be dismissed without prejudice.

The complaint names the Grand Forks Police Department, the Grand Forks County Sheriff's Office, and the "Grand Forks Public Service Access Point" (PSAP),[3] (Doc. #4, p. 2), as defendants. None of these defendants are entities which are subject to suit under § 1983. Ketchum v. City of W. Memphis, 974 F.2d 81, 82 (8th Cir. 1992)

[3] The "Grand Forks Public Safety Answering Point" is a "combined dispatch center" for Grand Forks County law enforcement, fire department, and ambulance services. See Grand Forks, City Departments, Public Service Answering Point (PSAP), http://www.grandforksgov.com/government/psap (last visited Sept. 29, 2016).

(departments and subdivisions of local governments are "not juridical entities suable as such"); Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992) ("[s]heriff's departments and police departments are not usually considered legal entities subject to suit"). The complaint against those defendants will therefore be dismissed without prejudice.

The complaint also names the Grand Forks County State's Attorney, the City of Grand Forks, and the County of Grand Forks as defendants. Holmseth's complaint is silent as to the capacity in which he has named the Grand Forks County State's Attorney; therefore, it is construed as against the attorney in his official capacity only. See Egerdahl v. Hibbing Cmty. Coll., 72 F.3d 615, 619 (8th Cir. 1995). Section 1983 suits against local government employees in their official capacities are actually suits against the entity of which the employee is an agent. Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690 n.5 (1978). In other words, official capacity claims against the Grand Forks County State's Attorney are effectively claims against Grand Forks County itself.

"When a plaintiff is seeking to impose section 1983 liability on a local government body, the plaintiff must show that there is an official policy or a widespread custom or practice of unconstitutional conduct that caused the deprivation of a constitutional right." Marksmeier v. Davie, 622 F.3d 896, 902 (8th Cir. 2010) (citing Monell, 436 U.S. at 690-91). As discussed below, the complaint does not allege deprivation of a federally protected right, much less an official policy or widespread custom of deprivation of a federally protected right.

There is no general constitutional right of access to government information. As described by the United States Supreme Court:

> There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> . . . .
>
> Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Under our holdings in Pell v. Procunier, [417 U.S. 817 (1974)] and Saxbe v. Washington Post Co., [417 U.S. 843 (1974)], until the political branches decree otherwise, as they are free to do, the media have no special right of access . . . different from or greater than that accorded the public generally.

Houchins v. KQED, Inc., 438 U.S. 1, 14-15 (1978). See also Entler v. McKenna, No. C11-5081, 2011 WL 4368367, at *3 (W.D. Wash. July 19, 2011) (discussing the state of Washington's legislatively created right of access to public records); Eggenberger v. W. Albany Twp., 820 F.3d 938, 942 (8th Cir. 2016) ("The First Amendment guarantees a right to publish information, but not necessarily a right to *gain* information.") (citation omitted); Schuloff v. Fields, 950 F. Supp. 66, 68 (E.D.N.Y. 1997) ("While the Supreme Court recognizes an implicit First Amendment right of access to certain government information, . . . the Court has never extended that right to encompass all government records.").

North Dakota's Legislature has created a right of access to public records and established a procedure for the public to request copies of public records. N.D. Cent. Code § 44-04-18. The complaint alleges that Holmseth has followed the established procedure but that the defendants have not appropriately responded to his requests. In essence, the complaint alleges that the defendants have violated Holmseth's rights under a state statute.

Violation of a state statute, however, does not give rise to a claim under § 1983. Holmseth cites nothing, and this court's research reveals nothing, suggesting that a violation of North Dakota's open records statute infringes on any federal right. Holmseth's claim is therefore not plausible under Twombly/Iqbal, and it will be dismissed with prejudice. Because he has not alleged a viable claim under § 1983, his motion for emergency injunctive relief will be denied. Finally, since Holmseth has failed to state any viable federal law claims, this court will decline to exercise supplemental jurisdiction over any state law claims. See 28 U.S.C. § 1367(c)(3).

Conclusion

It is **ORDERED** that:

(1) The § 1983 claims against Altru, the State of North Dakota, the North Dakota Highway Patrol, UND, UND Police Department, CBP, the Grand Forks Police Department, the Grand Forks County Sheriff's Office, and the PSAP are **DISMISSED** without prejudice;

(2) The § 1983 claims against the Grand Fork's County State's Attorney, the City of Grand Forks, and the County of Grand Forks are **DISMISSED** with prejudice;

(3) The court declines to exercise supplemental jurisdiction over any state law claims, and those claims are **DISMISSED** without prejudice;

(4) Holmseth's motion for emergency injunctive relief is **DENIED**; and

(5) The court finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken in forma pauperis.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 30th day of September, 2016.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge