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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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John Oliveira,

No. CV-16-02925-PHX-DLR

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Plaintiff,

**ORDER**

11

v.

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United States of America, et al.

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Defendants.

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Plaintiff John Oliveira alleges that Defendants the United States of America, the Department of the Interior (DOI), Acting Secretary of the Interior Kevin Haugrad, Acting Assistant Secretary of the Interior Weldon “Bruce” Loudermilk, Bureau of Indian Affairs (BIA) Internal Affairs Division Chief Damon Edminsten, BIA Special Agent in Charge Carleen Fischer, and BIA Contracting Officer Technical Representative Ann Button violated the Federal Tort Claims Act (FTCA) by disseminating inaccurate information from records relating to his employment at the Bureau of Indian Affairs (BIA).<sup>1</sup> At issue is Defendants’ Motion to Dismiss the FTCA Claims (Doc. 15). The motion is fully briefed and the Court heard oral argument on July 14, 2017. For the following reasons, the motion is granted.

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Haugrad and Loudermilk have been substituted for former Defendants Sally Jewell and Lawrence S. Roberts, respectively.

1 **I. Background<sup>2</sup>**

2 Oliveira worked for the BIA from 2000 to 2006. (Doc. 1 ¶ 14.) Eight years after  
3 he left the BIA, he was involved in an intertribal dispute at a casino in Coarsegold,  
4 California in his capacity as Chief of Tribal Police for the Chukchansi Tribal Police  
5 Department, which led to an investigation by the Madera County Sheriff's Department  
6 (MCSD). (¶¶ 20-23.)

7 As part of the MCSD investigation, BIA agents disclosed allegedly inaccurate  
8 personal information relating to Oliveira's prior employment with the agency.  
9 Specifically, Defendant Fischer spoke with MCSD detectives on October 16, 2014, and  
10 discussed the Chukchansi Tribe's internal dispute as it related to the BIA. (¶ 24.)  
11 Regarding Oliveira's history as a BIA employee, Fischer disclosed confidential  
12 information relating to Internal Affairs (IA) investigations she conducted, and advised the  
13 MCSD to make a formal inquiry with Defendant Edminsten. (¶¶ 28-30.) Oliveira claims  
14 that he was not the subject of any disciplinary proceeding resulting from any internal  
15 affairs (IA) investigations. (¶ 18.)

16 The MCSD subsequently reached out to Edminsten who, in an October 22, 2014  
17 letter, provided allegedly false information regarding three IA investigations in Oliveira's  
18 file. (¶ 31.) ABC News obtained and aired the contents of this letter in November 2014.  
19 (¶ 34.)

20 The following year, when Oliveira was under consideration for a position as the  
21 Chief of Police for White Mountain Apache Tribal Police Department (WMATPD) in  
22 Arizona, Defendant Button communicated false information to the WMATPD about  
23 Oliveira's prior employment with the BIA and advised the WMATPD not to hire him.  
24 (¶ 50.) WMATPD ultimately revoked Oliveira's employment offer. (¶ 51.)

25 These disclosures are the basis of Oliveira's claims for negligent file maintenance,  
26 false light invasion of privacy, negligent/intentional infliction of emotional distress, and

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28 <sup>2</sup> The relevant background is drawn from the well-pled factual allegations in Oliveira's complaint, which are accepted as true for purposes of this order. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).

1 negligent/intentional interference with prospective employment relations. Oliveira brings  
2 these claims against Defendants under the FTCA, which “waives the United States’  
3 sovereign immunity in a defined category of cases involving negligence committed by  
4 federal employees in the course of their employment.” *Alvarado v. Table Mountain*  
5 *Rancheria*, 509 F.3d 1008, 1018 (9th Cir. 2007) (internal quotation and citation omitted).  
6 Defendants move to dismiss, arguing that the Court lacks jurisdiction because the United  
7 States has not waived its sovereign immunity for the torts Oliveira has alleged.

## 8 **II. Legal Standard**

9 A complaint may be dismissed under Rule 12(b)(1) if the court lacks subject  
10 matter jurisdiction. Subject matter jurisdiction may be challenged facially or factually.  
11 *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial  
12 challenge, a defendant asserts that the complaint fails to allege facts sufficient to invoke  
13 federal jurisdiction. *Id.* A factual attack disputes the veracity of the allegations in the  
14 complaint that, if true, would invoke federal jurisdiction. *Id.* When subject matter  
15 jurisdiction is challenged under Rule 12(b)(1), the plaintiff has the burden of proving  
16 jurisdiction. *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001),  
17 *abrogated on other grounds by Herz Corp. v. Friend*, 559 U.S. 77 (2010).

## 18 **III. Discussion**

19 Sovereign immunity is jurisdictional and, absent a waiver, shields the United  
20 States and its agencies from suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). The  
21 FTCA acts as a limited waiver of sovereign immunity for specific types of torts  
22 committed by government employees, and is the exclusive remedy for tortious conduct  
23 by the United States. *See F.D.I.C. v. Craft*, 157 F.3d 697, 706-07 (9th Cir. 1998). The  
24 FTCA’s limited waiver of sovereign immunity does not extend to “[a]ny claim arising  
25 out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of  
26 process, libel, slander, misrepresentation, deceit, or interference with contract rights.” 28  
27 U.S.C. § 2680(h). “When a claim falls within a statutory exception to the FTCA’s waiver  
28 of sovereign immunity, the court is without subject matter jurisdiction to hear the case.”

1 *Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993). To determine whether a  
2 claim “arises out of” a tort enumerated in § 2680(h), courts examine the conduct upon  
3 which a plaintiff’s claim is based, rather than the label attached to the claim. *Mt. Homes,*  
4 *Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990) (“[W]e look beyond [the  
5 complaint’s] characterization to the conduct on which the claim is based.”)

6 **A. Negligent File Maintenance (Count II)**

7 Oliveira styles his second cause of action as a “negligent file maintenance” claim.  
8 “Most courts which have considered claims for negligent recordkeeping have found them  
9 barred under the libel and slander exception to the FTCA.” *Talbert v. United States*, 932  
10 F.2d 1064, 1067 (4th Cir. 1991).<sup>3</sup> When assessing negligent file maintenance claims  
11 brought under the FTCA, the Ninth Circuit distinguishes claims based on the  
12 performance of operational tasks from claims based on communication of information.  
13 *Guild v. United States*, 685 F.2d 324, 325 (9th Cir. 1982). The government may be held  
14 liable under the FTCA for injuries resulting from negligence in the performance of  
15 operational tasks even though misrepresentations are collaterally involved. *Id.* But  
16 claims essentially based on the communication of negative information about a plaintiff  
17 to a third party are barred by the FTCA’s libel, slander, and misrepresentation exceptions,  
18 even when the inaccurate information was caused by negligence. *See Alexander v.*  
19 *United States*, 787 F.2d 1349, 1350-51 (9th Cir. 1986).

20 For example, the plaintiff in *Alexander* complained that the Federal Bureau of  
21 Investigation (FBI) sent his “rap sheet,” which contained two arrest items that should not  
22 have been placed on the report because they had been ordered sealed by a California  
23 court, to his employer, resulting in plaintiff’s termination. *Id.* The court held that the

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25 <sup>3</sup> Oliveira relies on *Quinones v. United States*, 492 F.2d 1269, 1274-76 (3d. Cir.  
26 1974), in which the Third Circuit reversed the dismissal of a negligent file maintenance  
27 claim, finding that it fell outside of the FTCA’s intentional tort exception because of the  
28 different elements of negligence and defamation claims under Pennsylvania law. Numerous courts, however, have declined to follow *Quinones*, including the Fourth  
Circuit in *Talbert*, the Eighth Circuit in *Moessmer v. United States*, 760 F.2d 236, 237  
(8th Cir. 1985), and the First Circuit in *Jimenez–Nieves v. United States*, 682 F.2d 1, 6  
(1st Cir. 1982).

1 plaintiff's claim was barred by the FTCA's misrepresentation exception because the heart  
2 of his grievance was the communication of the information contained in the rap sheet.  
3 *Id.*; *cf. Mundy*, 983 F.2d at 952-53 (finding exception inapplicable where plaintiff sued  
4 FBI for misfiling paperwork, resulting in denial of security clearance and termination by  
5 his employer, because the heart of the grievance was the negligent misfiling).

6 Fairly read, Oliveira does not allege negligent operational tasks. Instead, like in  
7 *Alexander*, Oliveira alleges that he was damaged by the communication of information in  
8 his file. Although Oliveira alleges that "Defendants had a duty to gather, accurately  
9 summarize, store and maintain, and if requested and allowable under law, accurately  
10 disseminate information concerning Oliveira's employment history at the BIA," (Doc. 1 ¶  
11 66), he does not actually allege that a negligent operational task occurred. Rather, he  
12 claims that BIA agents either misrepresented or miscommunicated the nature and result  
13 of the investigations. Indeed, during oral argument Oliveira could not articulate any  
14 independent harm he suffered from alleged operational negligence. Instead, he conceded  
15 that if the allegedly inaccurate information he believes exists in his files had not been  
16 communicated to others, then he likely would not have brought this complaint. Thus, the  
17 gravamen of Oliveira's complaint is the communication of allegedly false information,  
18 which falls squarely within the misrepresentation exception to the FTCA. Count II  
19 therefore is dismissed.

### 20 **B. False Light Invasion of Privacy (Count III)**

21 Next, Oliveira claims that, by misrepresenting the results of the IA investigations  
22 during his employment with the agency, BIA agents invaded his privacy and portrayed  
23 him in a derogatory and false light, particularly after ABC News published the  
24 information. False light invasion of privacy claims, however, fall under the libel, slander,  
25 and misrepresentation exceptions to the FTCA. *See Lorenzo v. United States*, 719 F.  
26 Supp. 2d 1208, 1213 (S.D. Cal. 2010) ("[F]alse light invasion of privacy is equivalent to  
27 libel."); *Bowles v. United States*, No. CV11-1474 PHX DGC, 2011 WL 6182330, at \*3  
28 (D. Ariz. Dec. 13, 2011) (finding that an inaccurate and defamatory letter that painted the

1 plaintiff in a false light constituted “libel- and slander-type actions listed in § 2680(h).”  
2 Accordingly, Count III is dismissed.

3 **C. Negligent and/or Intentional Emotional Distress (Counts IV and V)**

4 Oliveira claims that he suffered emotional distress as a result of Defendants’  
5 misrepresentations. But when the underlying government action which leads to  
6 emotional distress is misrepresentation, libel, or slander, the claims fall within the  
7 FTCA’s exceptions. *Thomas-Lazear v. F.B.I.*, 851 F.2d 1202, 1206-07 (9th Cir. 1988).  
8 As previously noted, the gravamen of Oliveira’s grievance is that Defendants  
9 communicated inaccurate information about his employment with the BIA. Accordingly,  
10 because any emotional distress Oliveira might have suffered resulted from conduct  
11 arising out of libel, slander, or misrepresentation, Counts IV and V are dismissed.

12 **D. Negligent and Intentional Interference with Prospective Economic**  
13 **Relations (Counts VI and VII)**

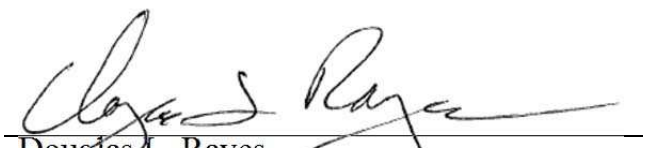
14 Finally, Oliveira claims that Defendants interfered with his prospective  
15 employment relations with the WMATPD, which was on the verge of finalizing an  
16 employment contract with him before Defendant Button made allegedly false statements  
17 about Oliveira and advised the tribe not to hire him. (Doc. 1 ¶ 50.) The FTCA, however,  
18 does not permit claims arising out of “interference with contract rights,” 28 U.S.C. §  
19 2680(h), and courts have concluded that this exception includes claims for interference  
20 with prospective contractual relations. Indeed, “[a]llowing an action for interference with  
21 a prospective contract but not for interference with an existing contract achieves an  
22 anomalous result.” *Moessmer v. United States*, 760 F.2d 236, 237 (8th Cir. 1985); *see*  
23 *also Dupree v. U.S.*, 264 F.2d 140, 143 (3d Cir. 1959) (“The tort of interference with  
24 prospective or potential advantage is simply an extension of tort liability for interference  
25 with existing contractual relations[.]”); *Saratoga Sav. & Loan Ass’n v. Fed. Home Loan*  
26 *Bank of S.F.* 724 F. Supp. 683, 688 (N.D. Cal. 1989) (“The majority of courts that have  
27 considered this issue have held the exception applicable to prospective contractual  
28 relations as well as existing contracts, reasoning that it would be illogical to hold the

1 United States liable for interfering with the mere expectancy of entering a contract, but  
2 not liable for interfering with an existing contract.”) Accordingly, Oliveira’s claims for  
3 interference with prospective contractual relations are dismissed.

4 **IT IS ORDERED** that Defendants’ Motion to Dismiss FTCA Claims (Doc. 15) is  
5 **GRANTED.**

6 Dated this 26th day of July, 2017.

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Douglas L. Rayes  
United States District Judge