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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Mark D. Davenport,  
Plaintiff,  
  
v.  
United States Department of Homeland  
Security,  
Defendant.

No. CV18-00625-PHX-DGC

**ORDER**

Pro se plaintiff Mark D. Davenport sued Defendants Debra Wheeler, James Lundquist, and Kirstjen Neilson, Secretary of the Department of Homeland Security (“DHS”). Doc. 34. Defendants move to dismiss Plaintiff’s second amended complaint pursuant to Rule 12(b)(1) and (6). Doc. 43. The motion is fully briefed. Docs. 46, 47. For the following reasons, the Court will dismiss Plaintiff’s second amended complaint with prejudice.

**I. Background.**

Plaintiff began participating in an Equal Employment Opportunity Commission (“EEOC”) case in April 2015 as a non-attorney representative for his fiancé, a former employee of the Department of Transportation (“TSA”). Doc. 34 at 5. Debra Wheeler was involved in the EEOC case as a TSA human resources specialist. *Id.* at 6. According to Plaintiff, his fiancé experienced discriminatory and retaliatory conduct by TSA, which Plaintiff opposed through several EEOC complaints and in proceedings before an Administrative Law Judge.

1 Plaintiff alleges that Wheeler accessed his fiancé’s personal contact information in  
2 TSA’s record system without her consent or department authorization and disclosed that  
3 information to a third party, including his telephone number and home address. *Id.* at 6, 7.  
4 According to Plaintiff, Wheeler falsely alleged to federal law enforcement that Plaintiff  
5 had posed as a federal agent, stalked her at her home, performed a sex act in front of her  
6 home, and shot at her window with a gun. *Id.* at 6-9. Plaintiff asserts that Lundquist  
7 released his Social Security number, date of birth, driver’s license information, and banking  
8 account information to Wheeler. *Id.* at 9.

9 **II. Legal Standards.**

10 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*  
11 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the challenger  
12 disputes the truth of the allegations that, by themselves, would otherwise invoke federal  
13 jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039. “In a facial attack, the challenger  
14 asserts that the allegations contained in the complaint are insufficient on their face to  
15 invoke federal jurisdiction.” *Id.* “The district court resolves a facial attack as it would a  
16 motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and  
17 drawing all reasonable inferences in the plaintiff’s favor, the court determines whether the  
18 allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v.*  
19 *Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Defendants’ 12(b)(1) motion is a facial  
20 attack because Defendants, for purposes of the motion, do not substantially challenge the  
21 truth of the facts alleged in Plaintiff’s complaint. Doc. 43.

22 A successful motion to dismiss under Rule 12(b)(6) must show either that the  
23 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its  
24 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint  
25 that sets forth a cognizable legal theory will survive a motion to dismiss as long as it  
26 contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
27 plausible on its face.’” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.  
28 544, 570 (2007)). A claim has facial plausibility when “the plaintiff pleads factual content

1 that allows the court to draw the reasonable inference that the defendant is liable for the  
2 misconduct alleged.” *Id.*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). When  
3 analyzing a complaint for failure to state a claim to relief under Rule 12(b)(6), the well-  
4 pled factual allegations are taken as true and construed in the light most favorable to the  
5 nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal  
6 conclusions couched as factual allegations are not entitled to the assumption of truth, *Iqbal*,  
7 556 U.S. at 680, and therefore are insufficient to defeat a motion to dismiss for failure to  
8 state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

9 **III. Analysis.**

10 Plaintiff’s second amended complaint alleges two Privacy Act violations, two Title  
11 VII violations, and a Fourth Amendment violation. Doc. 34 at 9-13.

12 **A. The Privacy Act.**

13 Section 552a(e)(5) of the Privacy Act provides that “[e]ach agency that maintains a  
14 system of records shall maintain all records which are used by the agency in making any  
15 determination about any individual with such accuracy, relevance, timeliness, and  
16 completeness as is reasonably necessary to assure fairness to the individual in the  
17 determination.” 5 U.S.C. § 552a(e)(5). A plaintiff may sue for failure to meet this  
18 obligation, but, as Defendants note, the Privacy Act “only permits suits against an ‘agency,’  
19 *see* 5 U.S.C. § 552a(g)(1), and does not apply to individual defendants.” Doc. 43 at 4; *see*  
20 *Rouse v. U.S. Dept. of State*, 567 F.3d 408, 413 n.3 (9th Cir. 2009); *see Hewitt v. Grabicki*,  
21 794 F.2d 1373, 1377 (9th Cir. 1986); *Hurry v. Fin. Indus. Regulatory Auth. Inc.*, No. CV-  
22 14-02490-PHX-ROS, 2015 WL 11118114, at \*7 (D. Ariz. Aug. 5, 2015). Plaintiff asserts  
23 violations only against Wheeler and Lundquist. *See* Doc. 34 at 9-10.

24 Plaintiff responds with an extensive elaboration of his factual allegations and  
25 citations to federal law discussing the Privacy Act, but does not clearly respond to  
26 Defendants’ arguments. Doc. 45 at 1-22. Although Plaintiff’s Counts 1 and 2 mention  
27 only Wheeler and Lundquist, he asserts that he also named the DHS Secretary in his  
28 complaint and seems to ask the Court to construe Counts 1 and 2 as being alleged against

1 Secretary Nielsen, as well. *See id.* at 2. But “Plaintiff cannot amend his . . . complaint  
2 merely by discussing unpled claims in a response to a motion to dismiss.” *Piper v. Gooding*  
3 & *Co. Inc.*, No. CV-18-00244-PHX-DLR, 2018 WL 924947 (D. Ariz. Feb. 15, 2018). Nor  
4 can the Court look to Plaintiff’s proposed amendments on this issue because Counts 1 and  
5 2 in Plaintiff’s proposed third amended complaint remain unchanged. *See* Doc. 46 at 10.

6 Defendants also argue that Plaintiff has failed again to sufficiently plead pecuniary  
7 and economic harm. Docs. 34 at 12, 43 at 7-9, 33 at 4-5; *FAA v. Cooper*, 566 U.S. 284,  
8 299, 304 (2012). Plaintiff alleges that he has suffered “monetary damages caused as a  
9 result of the stress and impact on [his] physical health and necessity to retain counsel,” and  
10 “[p]ecuniary damages for medical expenses and other costs caused as a direct result of  
11 Defendants’ actions.” Doc. 34 at 2, 12. These general statements are insufficient to plead  
12 “tangible economic loss” from the alleged Privacy Act violations. *Cooper*, 566 U.S. at  
13 303. The Court will dismiss Counts 1 and 2.

14 **B. Title VII Claims.**

15 Section 2000e-16 “describes the parameters within which an individual may sue the  
16 federal government for a violation of Title VII, stating in pertinent part . . . [that in a civil  
17 action under § 2000e-5] the head of the department, agency, or unit, as appropriate, shall  
18 be the defendant.” *Mahoney v. U.S. Postal Serv.*, 884 F.2d 1194, 1198 (9th Cir. 1989)  
19 (quoting 42 U.S.C. § 2000e-16(c)). Thus, a plaintiff “must name the head of the employing  
20 agency or department as the party defendant.” *Alhuwalia v. U.S. Postal Serv.*, No. 88-  
21 6179, 1990 WL 140714, at \*1 (9th Cir. Sept. 28, 1990); *see also Kimmons v. Veterans*  
22 *Admin. Hosp.*, No. 87-2356, 1988 WL 82846, at \*1 (9th Cir. July 29, 1988) (citing *Koucky*  
23 *v. Dep’t of Navy*, 820 F.2d 300, 302 (9th Cir. 1987)); *Cupp v. Veterans Admin. Hosp.*, 677  
24 F. Supp. 1018, 1019 (N.D. Cal. 1987) (citing *White v. Gen. Servs. Admin.*, 652 F.2d 913,  
25 916 n.4 (9th Cir. 1981)).

26 Counts 3 and 4 allege retaliation by Defendants under 42 U.S.C. § 2000e “for  
27 participation in protected activity.” Doc. 34 at 10-11. Defendants argue in their motion  
28

1 that Plaintiff cannot assert Title VII claims against Wheeler and Lundquist, and that he  
2 lacks standing to assert a Title VII claim against Secretary Nielsen. Doc. 43 at 9.

3 Plaintiff does not address his Title VII claims or Defendants' arguments. Doc. 45.  
4 Wheeler and Lundquist are improperly named defendants because neither is the head of  
5 the relevant employing agency. And Plaintiff cannot assert Title VII claims against  
6 Secretary Nielsen because he does not allege that had an employment relationship with  
7 DHS. "Title VII protections do not apply where there is no employment relationship."  
8 *DaOro v. Eskaton*, No. 2:11-cv-0960-KJM-JFM, 2013 WL 789120, at \*3 (E.D. Cal. March  
9 1, 2013) (citing cases); *see also Waisgerber v. City of Los Angeles*, 406 Fed. App'x 150,  
10 151 (9th Cir. 2010) (citing *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th  
11 Cir. 1980)).

12 **C. Fourth Amendment Claim.**

13 Plaintiff asserts that "Defendant's conduct as alleged above constitutes an  
14 unreasonable search or seizure of Plaintiff's personal information without proper warrant  
15 or authorization." Doc. 34 at 12. Defendant argues that Plaintiff fails to state a Fourth  
16 Amendment claim because he does not allege having an expectation of privacy in his  
17 fiancé's emergency contact information, nor does he allege that Wheeler's disclosure to  
18 Lundquist was indiscriminate or public. Doc. 43 at 10.

19 Count 5 pleads no unreasonable restriction of movement, nor a physical intrusion  
20 on Plaintiff's person, house, papers, and effects, or invasion of a protected privacy interest  
21 that Plaintiff had in his fiancé's contact information. *See Patel v. City of Los Angeles*, 738  
22 F.3d 1058, 1061 (9th Cir. 2013); *Bettin v. Maricopa County*, No. CIV 04-02980 PHX  
23 MEA, 2007 WL 1713319, at \*9-\*10 (D. Ariz. June 12, 2007); *see also In re Crawford*, 194  
24 F.3d 954, 958-59 (9th Cir. 1999). Plaintiff's response does not mention his Fourth  
25 Amendment claim, nor does he clearly respond to Defendants' arguments. While other  
26 parts of Plaintiff's complaint allege specific conduct by Defendants, he does not specify  
27 which defendant Count 5 refers to, nor what conduct constituted an unreasonable search or  
28 seizure. The Court will not write Plaintiff's complaint for him. *Hearns v. San Bernardino*

1 *Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008); *see also McHenry v. Renne*, 84 F.3d  
2 1172, 1180 (9th Cir. 1996).

3 **IV. Leave to Amend.**

4 Plaintiff has filed a motion to amend his second amended complaint. Doc. 46.  
5 Defendants argue that further amendment would be futile. Docs. 43, 48. Plaintiff seems  
6 to concede that his Title VII and Fourth Amendment claims should be dismissed, as he  
7 fails to address those counts and Defendants' arguments. He asks only that the Court deny  
8 the motion "to dismiss claims related to the Privacy Act violations." Doc. 45 at 26.

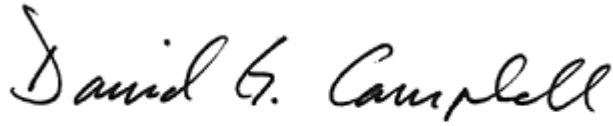
9 As noted, Wheeler and Lundquist are improperly named individual defendants in  
10 Plaintiff's Privacy Act claims, and Plaintiff has failed again to plead sufficiently his  
11 specific pecuniary and economic harm. Doc. 34 at 12; *Cooper*, 566 U.S. at 299, 304.  
12 Plaintiff's proposed third amended complaint adds only that Plaintiff "firmly believed he  
13 would [be] criminally prosecuted," he "secured legal counsel resulting [in] more than ten  
14 thousand dollars in expenses along with over four thousand dollars in co-pays for a medical  
15 emergency room visit shortly after Federal Agents confronted" him, and he "believed he  
16 was suffering from a heart attack caused by the stress and worry placed upon him by  
17 Wheeler's manufactured false allegations." Doc. 46-1 at 9. These allegations do not plead  
18 tangible economic harm caused by disclosure of his personal information under the Privacy  
19 Act. They instead appear linked to Wheeler's allegedly false allegations about Plaintiff.  
20 The proposed third amended complaint does not address this insufficiency or any of the  
21 remaining deficiencies identified in Defendants' motion to show that amendment would  
22 not be futile.

23 Plaintiff has had three opportunities to plead viable claims against Defendants and  
24 has failed to do so. The Court "may deny leave to amend where a plaintiff has  
25 '[r]epeated[ly] fail[ed] to cure deficiencies by amendments previously allowed.'" *Dutcius*  
26 *v. Meritage Homes of Ariz., Inc.*, 462 Fed. App'x 658, 659-60 (9th Cir. 2011) (citing  
27 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809-10 (9th Cir. 1988)). The Court will  
28 dismiss Plaintiff's second amended complaint with prejudice.

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**IT IS ORDERED:** that Defendants’ motion to dismiss (Doc. 43) is **granted**. Plaintiff’s complaint is dismissed with prejudice, and Plaintiff’s motion to amend (Doc. 46) is **denied**. Plaintiff’s motion for leave to file surreply (Doc. 49) is found to be **moot**. The Clerk of Court is directed to terminate this action.

Dated this 31st day of May, 2019.



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David G. Campbell  
Senior United States District Judge