

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RANDALL WAYNE MCNULTY,
Plaintiff,

OPINION AND ORDER

v.

13-cv-732-wmc

WISCONSIN DEP'T OF PUBLIC SAFETY,
Defendant.

Texas inmate Randall Wayne McNulty (TDCJ #1345297, former TDCJ #1115245) has filed a complaint asking the court to compel the “Wisconsin Department of Public Safety” to provide him with an accident report pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and state law governing open records. McNulty requests leave to proceed *in forma pauperis* and has made an initial, partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because he is incarcerated, the court is required by the Prison Litigation Reform Act (“PLRA”) to screen the complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). In addressing any *pro se* litigant’s complaint, the court must read the allegations generously, reviewing them under “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Even under this lenient standard, the complaint must be dismissed for reasons outlined briefly below.

OPINION

McNulty is presently incarcerated in the Texas Department of Criminal Justice – Correctional Institutions Division pursuant to a conviction for intoxication manslaughter, *see* TEX. PENAL CODE § 49.08(a), in Houston County Case No. 05CR076. A jury found McNulty guilty in that case and assessed a sentence of 99 years’ imprisonment. His conviction was affirmed on direct appeal. *See McNulty v. State*, No. 12-06-00019-CR, 2007 WL 805784 (Tex. App. — Tyler Aug. 22, 2007, pet. ref’d). He has also filed unsuccessful applications for habeas corpus review in state and federal court. *See McNulty v. Director, TDCJ*, Civil Action No. 9-09-cv-23 (E.D. Tex.).

In his pending complaint, McNulty now seeks evidence that the judge who presided over his trial in Case No. 05CR076, Houston County District Judge Jim Parsons, was once hit by a drunken driver in the State of Wisconsin. McNulty believes that the accident involving Judge Parsons occurred in Wisconsin prior to 2005. McNulty further believes that the Wisconsin Department of Public Safety may have a record of this accident. Assuming that one exists, he now requests a copy of the accident report in an effort to show that Parsons should have recused himself from presiding over McNulty’s trial on intoxication manslaughter charges in Texas.

In an effort to obtain a copy of the accident report, McNulty seeks relief under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. FOIA, however, applies only to federal, not state, agencies. *See Grand Central P’ship, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999). To the extent that McNulty seeks information from a state agency, he does not articulate a claim upon which relief can be granted under FOIA.

McNulty also invokes the Texas Open Records Act as a basis for his request. Texas law, however, does not apply here. Construed with generosity, McNulty arguably seeks relief under the Wisconsin Open Records Law. An action for release of information under the Wisconsin Open Records Law typically must be commenced by petition for writ of mandamus in state court. *See Wis. Stat. § 19.37(1); see also Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179, 190 (1979). Since McNulty is incarcerated, however, he is precluded by law from requesting records that do not refer to him. *See Wis. Stat. § 19.32(3)*.

Construed generously, McNulty's complaint seeks discovery for the purpose of pursuing habeas corpus review. As noted above, however, he has already had an opportunity to seek habeas corpus relief in state and federal court. Assuming that his request were properly made here, "Rule 6 of the Rules Governing § 2254 cases permits discovery only if and only to the extent that the district court finds good cause." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000). "Good cause" may be found when a petition for a writ of habeas corpus "establishes a prima facie claim for relief." *Id.* Before authorizing discovery, a federal habeas corpus court must first conclude that the specific allegations in the petition "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." *Id.* In that regard, petitioner's factual allegations "must be specific, as opposed to merely speculative or conclusory, to justify discovery." *Id.* "Simply put, Rule 6 does not authorize fishing expeditions." *Id.*

McNulty does not provide specific facts in support of his request for records and he does not otherwise show that this court has authority to grant that request. Even if a legal

basis existed for this court to order a state agency to search its records, such a search would be pointless here since Mr. McNulty has had repeated opportunities to request this information before his original conviction and in his unsuccessful collateral attack. Because he is not entitled to relief in any event, McNulty's complaint must be dismissed pursuant to 28 U.S.C. § 1915A(b) for failure to state a viable claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Randall Wayne McNulty's motion for leave to proceed is DENIED and his complaint is DISMISSED with prejudice for failure to state a claim upon which relief can be granted.
2. The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g).
3. The Clerk of Court will send a copy of this order to plaintiff and will also provide a copy of this order to the Texas Department of Criminal Justice - Office of the General Counsel, Capitol Station, P.O. Box 13084, Austin, Texas, 78711.

Entered this 28th day of February, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge