IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC., *et. al.*	)	
	)	CIVIL ACTION FILE NO.
v.	)	
	)	1:09-CV-594-TWT
METROPOLITAN ATLANTA	)	
RAPID TRANSIT AUTHORITY, *et. al.*	)	
	)	
Defendants	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants raise two issues in their defense. They argue that they are not a "local government agency," as that term is used in the Privacy Act. They also argue that Plaintiffs' Motion is moot. Plaintiffs will show below that neither argument is correct and that Plaintiffs are entitled to judgment as a matter of law.

I. Defendants are Subject to the Privacy Act

IA. There is no Statutory Definition of "State or Local Government Agency"

Defendants mistakenly try to apply the definition of "agency" from Section 3 of the Privacy Act to Plaintiffs' claims under Section 7 of the Privacy A. Section 7(b) of the Privacy Act requires that:

> Any federal, state, or local government agency which requests an individual to disclose his Social Security Account Number shall inform the individual whether that disclosure is mandatory or

> voluntary, by which statutory or other authority such number is solicited, and which uses will be made of it.

There is no definition in the statute for "federal, state, or local government agency," and Defendants' attempt to use the definition of "agency" from 5 U.S.C. § 552(e) is misplaced. *Ingerman v. Delaware River Port Authority,* 2009 U.S. Dist. LEXIS 55455, 18 (D. NJ 2009). (Holding that for purposes of Section 7 of the Privacy Act, "federal, state, or local government agency" does not depend on the definition in 5 U.S.C. § 552(e), but instead relies on the ordinary meaning of those words.)

In *Ingerman,* which is very similar to the case at bar, the Delaware River Port Authority (DRPA) defended itself on a Privacy Act lawsuit by arguing it is not a "federal, state, or local government agency," as that term is used in Section 7 of the Privacy Act. The District Court in *Ingerman,* relying on the 11th Circuit's decision in *Schwier v. Cox.,* 340 F.3d 1284 (11th Cir. 2003), concluded that DRPA was a government agency for purposes of Section 7 of the Privacy Act.

IB. The Ordinary Meaning of "Agency" Applies to Include Defendants

The *Ingerman* Court gives us a very thorough discussion of the applicability of the phrase "federal, state, or local government agency" in Section 7 of the Privacy Act to entities such as DRPA and MARTA that do not fit within traditional governmental structures. The Court said:

> The fact that the DRPA, as a 'bi-state' agency does not fall neatly within the precise confines of a 'Federal, State or local government agency" … does not change the conclusion that it is subject to Section 7…. The Privacy Act was designed to discourage improper uses of social security numbers and to allow individuals the opportunity to make an intelligent decision regarding its disclosure…. Given this corrective purpose, the Privacy Act surely represents a remedial statute. 'Remedial statutes,' such as the Privacy Act, should be construed liberally to include those cases which are within the spirit of the law, and all reasonable doubts should be construed in favor of applicability of the statute to the case.

2009 U.S. Dist. LEXIS 55455, 41.[1]

In determining if Section 7 of the Privacy Act applied to DRPA, the *Ingerman* Court observed that DRPA was created as:

> The body corporate and politic … which shall constitute the *public corporate instrumentality* of the Commonwealth of Pennsylvania and the State of New Jersey for the following *public purposes*, and which shall be deemed to be exercising an *essential governmental function*….

2009 U.S. Dis. LEXIS 55455, 38. [emphasis in original]. Compare that to the private law establishing MARTA, which says:

> There is hereby created a *public body corporate* … as a *joint public instrumentality* of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinnett for the purposes hereinafter provided… Provision for a rapid transit system within the metropolitan area is declared … to be *an essential governmental function* and a *public purpose* of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton, and Gwinnett.

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[1] The 11th Circuit applied this "remedial purpose" doctrine in *Jones v. Metropolitan Atlanta Rapid Transit Authority,* 681 F.2d 1376, 1380 (11th Cir. 1982).

1965 Ga. Laws 2243, 2246, 2275. [emphasis supplied]. It is quite telling that the words emphasized by the *Ingerman* Court appear in the MARTA Act as well.

The *Ingerman* Court further observed that the board of DRPA is appointed by the respective states and that board members may be removed by the states that appointed them. 2009 U.S. Dist. LEXIS 55455, 39. By comparison, MARTA board members are a combination of state officials serving *ex officio* and members appointed by the governing bodies of the City of Atlanta and the participating counties. A MARTA board member may be removed by the entity that appointed it. 1965 Ga.Laws 2243, 2248-2250.

In addition, the 11th Circuit has ruled that the General Assembly of Georgia has complete authority in setting the membership of the MARTA board. *Atlanta v. Metropolitan Atlanta Rapid Transit Authority,* 636 F.2d 1084, 1089 (11th Cir. 1981). The General Assembly has the power to increase or decrease the board membership at will. *Id.* It is difficult to imagine how an entity (the State of Georgia) that has complete authority to create and abolish MARTA, and to prescribe the board membership, cannot be said to be in control of MARTA.

In addition, minutes of MARTA board meetings are "public records," subject to "public inspection," certified copies of which must be made available to the public upon written request. 1965 Ga. Laws 2243, 2251. Finally, "Provisions

of the act of the General Assembly … regulating the conduct of officers, employees and agents of political subdivisions, municipal and other public corporations and other public organizations, shall be applicable to the conduct of [MARTA's] Board members, officers, employees and agents of [MARTA]." 1965 Ga. L. 2243, 2270.

IC. MARTA is Estopped From Asserting the Privacy Act Does Not Apply

As explained below, MARTA is both judicially and collaterally estopped from asserting that it is not a "local government agency."

Collateral Estoppel

Reversing a Court of Appeals decision (*Boswell v. MARTA,* 196 Ga.App. 902 (1990)), the Supreme Court of Georgia ruled that MARTA is a governmental entity and is therefore immune from punitive damages for public policy reasons. *Metropolitan Atlanta Rapid Transit Authority v. Boswell,* 261 Ga. 427 (1991). The effect of *Boswell* is that the issue of whether MARTA is a government entity has been conclusively determined. MARTA was a party to the case, the issue was actually litigated and was a crucial and necessary part of the earlier action, and MARTA had a full opportunity to participate. Accordingly, MARTA is collaterally estopped from relitigating the issue here. *A.J. Taft Coal Co., Inc. v. Connor,* 829 F.2d 1577, 1580 (11th Cir. 1987) (Holding that the elements of

collateral estoppel are 1) the party against which estoppel is claimed was a party to the case; 2) the issue was actually litigated and was a crucial and necessary part of the earlier action; and 3) the party against which estoppel is claimed had a full opportunity to participate).

In addition, the Eleventh Circuit has determined that "MARTA is an official agency invested with many official powers. Its conduct is state action." *Fountain v. Metropolitan Atlanta Rapid Transit Authority,* 678 F.2d 1038, 1045 (11th Cir. 1982). The 11th Circuit also has called MARTA an "agenc[y] responsible for implementing transportation projects," and "a publicly-owned mass transportation service." *Atlanta Coalition on Transportation Crisis, Inc. v. Atlanta Regional Commission,* 599 F.2d 1333, 1341 (11th Cir. 1979)

Judicial Estoppel

MARTA also is judicially estopped from asserting that it is not a "local government agency." The elements of judicial estoppel are 1) whether a party's later position was clearly inconsistent with its earlier position; 2) whether the party succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was mislead; and 3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or

impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001).

In the *Boswell* case (discussed above), MARTA asserted before the Court of Appeals of Georgia that "MARTA is an agency of local governments which performs an essential governmental function." MARTA's "Brief of Appellee" in Court of Appeals of Georgia Case No. A90A0849, p. 2.[2] After a discussion of all the factors supporting MARTA's position, MARTA concluded its "Brief of Appellee" with:

> [MARTA] is plainly a public agency, and an agency of local government, just as the General Assembly has said.

*Id. a*t pp. 3-4. In support of this conclusion, MARTA cites *City of Macon v. Pasco Building Systems,* 191 Ga. App. 48 (1989), which held that an "instrumentality" of a governmental entity is the agent of that entity. That is, MARTA argued that it is an agent of the City of Atlanta and the counties MARTA comprises.

As noted earlier, the Court of Appeals of Georgia rejected MARTA's arguments, but the Supreme Court of Georgia reversed. It can be fairly inferred that MARTA repeated its arguments from the Court of Appeals to the Supreme Court, but if this Court is not inclined to draw this inference without

[2] A certified copy of MARTA's "Brief of Appellee" is attached as Exhibit A for the Court's convenience.

documentation, Plaintiffs request that the Court wait for MARTA to file its briefs from the Supreme Court.[3]

MARTA's position in *Boswell* that it is a local government agency clearly is inconsistent with MARTA's present position that it is not a local government agency. The Supreme Court of Georgia accepted MARTA's argument, ruling that MARTA is a "governmental entity." It would be patently unfair for MARTA to be able to determine that it is or is not a "local government agency" depending on which result presents a more favorable outcome to MARTA. Thus, MARTA is judicially estopped from asserting that it is not a local government agency.

<u>ID. MARTA's Police Force is a Governmental Function</u>

Even if an entity is not a "government agency" for purposes of Section 7 of the Privacy Act, the entity may be liable under the Act "in certain situations, where there is a close nexus between the state and an action by [the entity]." *Yeager v.*

[3] Plaintiffs' counsel hereby represents to this Court that he has made a diligent search for MARTA's Supreme Court briefs. He learned, somewhat surprisingly, that the clerk of the Supreme Court of Georgia routinely destroyed its files (save for the court's opinions) during the early 1990s, so the briefs are not available from the Supreme Court. Plaintiffs' counsel also attempted to contact MARTA's opposing counsel from the *Boswell* case but learned from a former associate of such opposing counsel that the opposing counsel has been disbarred and appears to have fled the country to avoid prosecution. Thus, the only known potential source of MARTA's briefs from that case is MARTA itself (and MARTA's counsel). Plaintiffs have served a Request for Production of such briefs on Defendants [Doc. 28], and have filed a request to have the response filed in this Court [Doc. 29].

Hackensack Water Company, 615 F.Suppp.1087, 1091 (D. NJ 1985), *citing Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974). MARTA's request for Raissi's SSN bore a nexus to a state activity. It is important to keep in mind the context under which Defendant's asked Plaintiff Raissi for his SSN. It was not a MARTA cashier asking for Raissi's SSN while he was buying a fare ticket, or a MARTA bus driver or train operator asking Raissi for his SSN as he boarded a vehicle. It was MARTA's uniformed, armed police officers asking Raissi for his SSN while they detained him under force of law. Moreover, Defendants have stated that they asked for Raissi's SSN solely for the purpose of conducting a check of Raissi's criminal background through the Georgia Crime Information Center. That is, they asked for Raissi's SSN in order to use it in a state-owned and operated law enforcement system.

MARTA's police force also was authorized by the Georgia General Assembly, which said that "a member of such force shall be a peace officer and, as such, he shall have authority equivalent to the authority of a policemen of the city or county in which he is discharging his duties." 1965 Ga. L. 2243, 2256. It simply cannot be said that MARTA's police force is not a "government agency."

IE. Defendants' Cited Cases Are Not Helpful

In support of their argument that MARTA is not a "government agency," MARTA cites to a variety of cases. Several of these cases simply do not add anything to the analysis and will not be addressed by Plaintiffs. Several more, however, may give the Court a mistaken impression and must be discussed.

MARTA cites to the case of *Elm v. National Railroad Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984) for the proposition that the Privacy Act does not apply to Amtrak. Apparently likening itself to Amtrak (they both have trains, after all), MARTA implies that it, too must not be subject to the Privacy Act. The problem with this analogy is that in *Elm*, Amtrak was sued under Section 3 of the Privacy Act, which applies only to federal agencies and which has a separate definition of "agency." Plaintiffs reiterate that they are suing Defendants under Section 7 of the Privacy Act, which applies to federal, state, and local governmental agencies. Moreover, federal law explicitly states in Amtrak's charter that it "will not be an agency or establishment of the United States Government." 45 U.S.C. § 541. The General Assembly did not put a similar proviso in the act that created MARTA.

Defendants also cite to *Forsham v. Harris,* 445 U.S. 169 (1980) and *Labor Executive's Association v. Consolidated Rail Corp.,* 580 F.Supp. 777 (D. DC

1984). Both of these cases address the application of the Freedom of Information Act definition of "agency," contained in 5 U.S.C. § 552(e). While this definition is used in Section 3 of the Privacy Act, as discussed earlier, it applies only to federal agencies and has no bearing on Section 7 of the Privacy Act.

Defendants misleadingly cite to *Board of Commissioners v. Chatham County Advertisers,* 258 Ga. 498 (1988), which determined the placement of bus stop benches to be a "proprietary or ministerial" function and not a "governmental" function. The Court in *Board of Commissioners* uses the words "proprietary" and "ministerial" interchangeably, not mutually exclusively as Defendants use them in the case at bar. More importantly, the *Board of Commissioners* Court concluded that placement of bus stop benches is a "necessary governmental purpose." The Court observed, "The use of 'governmental purpose' in this context embraces all aspects of governmental functions, whether interpreted as governmental or as proprietary (ministerial)." 258 Ga. at 499, FN 1. Just as the placement of bus stop benches is a "necessary governmental purpose," the General Assembly determined in creating MARTA that MARTA was fulfilling a "necessary governmental purpose." If anything, the case cited by MARTA bolsters Plaintiffs' position, not Defendants'.

In addition, the Court of Appeals of Georgia has determined that "the operation of a fixed-route transit bus system … is a proprietary or ministerial function." *City Council of Augusta v. Lee*, 153 Ga. App. 94, 97 (1980). Thus, the use of the word "proprietary" in this context does not make it a non-governmental function.

Defendants also rely on *Krebs v. Rutgers University,* 797 F.Supp. 1246 (D. JN 1992), where Rutgers was found not to be a "government agency" for purposes of the Privacy Act. The *Krebs* case is not particularly helpful, however, because Rutgers is very different from MARTA. The *Ingerman* Court (discussed above) distinguished *Krebs* from its decision to apply the Privacy Act to DRPA:

> Rutgers: (1) originated as a private entity; (2) is not subject to review by the New Jersey Chancellor of Higher Education; and (3) retains a significant amount of autonomy and decision-making power subject to its own accountability.

2009 U.S. Dist. LEXIS 55455, 35. Like DRPA, MARTA did not originate as a private entity. MARTA is subject to accounting and management rules established by the General Assembly. MARTA's board make-up (and very existence) are controlled by the General Assembly. MARTA is much more like DRPA than Rutgers University, so the *Krebs* case is inapposite.

ID. Defendants Seek Immunity As Though They are Governmental

In their Answer [Doc. 3, p. 2], Defendants claim they are entitled to both qualified immunity and "official immunity." Because it is not clear what Defendants mean by "official immunity,"[4] Plaintiffs are not able to address exactly what Defendants are claiming. It seems clear, however, that whatever they mean, they are asking the Court to grant them some level of immunity based on their status as government agencies and officials of those agencies. It is wholly inconsistent for Defendants to argue, simultaneously, that they are not subject to the Privacy Act because they ***are not*** a government agency and they should be immune from Plaintiffs' claims because they ***are*** a government agency. To do so makes a mockery of the judicial system.

II. Plaintiffs' Claims are Not Moot

Defendants assert that they no longer request SSNs of people they stop for carrying firearms. Aside from the fact that Defendants exceed their authority when they stop people merely for legally carrying firearms (which will be the subject of

[4] The 11th Circuit uses "qualified immunity" and "official immunity" interchangeably under federal law. *See, e.g., Trammel v. Thomason,* 2009 U.S. App. LEXIS 13217 (11th Cir. 2009). There is a concept of "official immunity" in Georgia law for performance of official functions (*see, e.g., Peterson v. Crawford,* 268 Fed. Appx. 879 (11th Cir. 2008), but it is not readily apparent that this concept has any application in the instant case. In response to Plaintiffs' interrogatories asking Defendants what they mean by "official immunity," Defendants have refused to answer (citing privilege).

a future motion), Defendants' cessation of such conduct does not moot this case. Their belief that it does makes clear they do not understand the issues at stake. The harm to Raissi accrued when Defendants collected Raissi's SSN, and nothing Defendants have done serve to mitigate that harm.

Defendants wrongfully collected Raissi's SSN when they asked him for it without advising him whether disclosure was optional or mandatory, by what statutory or other authority they requested it, and what uses would be made of it. Defendants admit these operative facts, and defend themselves solely on the grounds that the requirements of Section 7(b) of the Privacy Act do not apply to them because (they argue) MARTA is not a government agency (discussed above in Part I).

Defendants violated Raissi's rights at the time his SSN was requested and collected. Defendants continue to retain Raissi's SSN in their records, in at least four separate locations. Raissi is suing for damages, declaratory relief, and injunctive relief. The injunctive relief includes an order to purge Raissi's SSN from Defendants' records.[5] Because they have not asserted that they have done so, Raissi's claim is very much alive. In addition, while Defendants now claim they no longer request SSNs when they stop people for carrying firearms, they

[5] Purging a Plaintiff's SSN from records is a proper form of relief, as discussed in Plaintiffs' opening Brief [Doc. 17-2, p. 7]

apparently continue to ask for SSNs when they run a "GCIC check" on a person. Defendants have not contended that they provide such people with the information required by the Privacy Act, and Plaintiffs still have an interest in seeing that Defendants do so. Plaintiffs' claims are not moot.

Conclusion

Defendants admit the facts necessary to conclude that they violated Section 7(b) of the Privacy Act. They defend themselves on the basis that they are not subject to the Act because they claim that MARTA is not a government agency. Plaintiffs have shown that MARTA is a government agency, that the Supreme Court of Georgia has said as much, and that MARTA has argued previously that it is a local government agency. Plaintiffs also have shown that their Privacy Act claims are ***not*** mooted by Defendants' cessation of asking firearms carriers for their SSNs, because Defendants still possess Plaintiff Raissi's SSN and Defendants still request SSNs of others in contexts besides carrying firearms. For the foregoing reasons, Plaintiffs' Motion must be granted.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

________/s/ John R. Monroe____________
John R. Monroe

CERTIFICATE OF SERVICE

I certify that on August 11, 2009, I filed the foregoing using the ECF system, which automatically will email a copy to:

Ms. Paula M. Nash
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/s/ John R. Monroe
John R. Monroe