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

GEORGIACARRY.ORG, INC., And CHRISTOPHER RAISSI,	)	
Plaintiffs	)	
v.	)	**CIVIL ACTION FILE NO. 1:09-CV-0594-TWT**
METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, et al.	)	
Defendants	)	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO THEIR PARTIAL MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their undersigned counsel, and submit their Reply to Plaintiffs' Response in Opposition to Their Partial Motion for Summary Judgment.

I. Defendant MARTA is Not Subject to the Privacy Act.

Plaintiffs wrongly contend that the definition of "agency" from the Privacy Act only applies to Section 3 of such Act. In doing so, Plaintiffs completely miss Defendants'point. Plaintiff attempts to use Ingerman v. Delaware Port Authority, 2009 WL 1872679, 7 (D.N.J.) to support his contention that the definition of "agency" only applies to Section 3 and not Section 7 of the Privacy Act. This is completely misleading, in that Ingerman only used the distinction of the two sections in deciding whether

"agency" included "state and local government" agencies within its definition. Ingerman held that "when agency is expressed preceded by the specific terms 'federal, state, or local government', see 5 U.S.C. 552a (note), these specific terms must control in such instance." Ingerman v. Delaware River Port Authority, 2009 WL 1872679, 7 (D.N.J.) In the present case, Defendants do not ask this Court to make such an interpretation. The Eleventh Circuit has previously held that 7(b) applies to federal, state and local government agencies. Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003). Defendants' brief never disagrees with this point.

Defendants' contention is that this Court must determine what constitutes a state or local government agency through analogizing the definition, or requirements for a federal government agency. The extent of the Privacy Act's coverage under section 552(f) is a matter to be developed by the courts on a case by case basis. Irwin Mem'l Blood Bank of S.F. Med. Soc'y v. American National Red Cross, 640 F.2d 1051, 1054 (1981). This has in fact been done in other cases as it relates to Section 7 of the Privacy Act, including in the case cited by Plaintiffs, Ingerman v. Delaware River Port Authority. Courts in determining if an entity is subject to the Privacy Act have

consistently found that it hinges on government control of the entity. This has been the case whether the potential violation was under Section 3 or Section 7 of the Privacy Act. See, Ingerman v. Delaware River Port Authority, 2099 WL 1872679 (D.N.J.); Krebs v. Rutgers University, 797 F.Supp. 1246 (D.JN 1992); Elm v. National Railroad Passenger Corp.,732 F.2d 1250(5th Cir. 1984).

Plaintiffs further assert that the Ingerman court in determining if section 7 of the Privacy Act applied to DRPA observed that DRPA, like most Authorities, 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 WL 1872679, 13 (D.N.J.). Plaintiffs compare such language to the fact that the MARTA Act states:

> There is hereby created a public body corporate … as a joint public corporate instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinnett for purposes hereinafter provided.

Although this very common language which is used to create authorities is similar, it is virtually irrelevant to the reason that the Ingerman Court found the Delaware River Port Authority (DRPA) was a state agency subject to Section 7 of the Privacy Act. First, the Ingerman court

notes that the Agreement creating the DRPA states that it is a "bi-state agency". Id. at 14. More importantly, the Court found in Ingerman, that there was sufficient government control over and involvement in the DRPA to render it subject to Section 7. Id. at 13. Examples of this include that the commissioners who make up the DRPA are politically accountable to the administration in office, meaning the Governors of New Jersey and Pennsylvania. Id. The Governor of Pennsylvania has the power to remove Pennsylvania's appointed commissioners at will. Id. The minutes of each meeting of the DRPA must be transmitted to both Governors at "their respective executive chambers". Id. Of greater significance is the fact that each Governor has the power to veto any action taken by the commission. Id. The Ingerman Court held that DRPA is subject to direct review of the Governors of New Jersey and Pennsylvania.

Further evidence of government control over the DRPA is that a majority of each state's appointed commissioners must vote in favor of any DRPA action in order for it to be binding. Id. Furthermore, only by passage of parallel legislation in both States may additional powers be granted or additional duties be imposed on the DRPA. Id. There can

be no question that the DRPA is totally controlled by the Governors of the two states.

The fact that many members of the Board of Directors for MARTA are appointed by local governments does not constitute government control.[1] Elm v. National Railroad Passenger Corp., 732 F.2d 1250, 1255 (5th Cir. 1984). Unlike, DRPA, the MARTA Board does not have political accountability to the local governing bodies. The local governing bodies cannot remove the Board members without cause, and even then the member must be given a copy of charges, have his defense publicly heard, and has a right to judicial review before the superior court. Ga. L. 1965, p.2250, §6(e). In the case of abandonment, conviction of crime, removal from office, or disqualification, the Board, not the local government body has the right to remove the member. Id. The local government bodies have no veto rights over any action of the Board. There is no requirement that minutes of each meeting be submitted to the local government bodies. The appointed Board members only have to meet with the local government officials once a year to

[1] Plaintiff makes an assertion that the Board of Directors is controlled by the General Assembly because it enacted the MARTA Act. It is clear that the General Assembly has no authority to appoint Board members or to participate in Board actions. If simply passing the laws that create institutions or that governs the behavior of individuals equates to the General Assembly holding control, then it holds control over almost all entities and individuals in Georgia.

provide reports. Ga. L. 1988, p.5023, § 6(l). Even then, it is for informational purposes because the MARTA Act does not provide for the local government bodies to be able to take any action. Unlike the DRPA, it is clear that MARTA has no direct review by the local government bodies.

Furthermore, MARTA does not have constricting, controlling laws that require that a majority of each local government body appointed members must vote in favor of any MARTA action for it to be binding. Nor do parallel, or multiple local legislation have to passed to have additional duties imposed.

In comparison to DRPA, MARTA is never referred to in the MARTA Act as a bi-state agency, multi-government agency, or any other governmental "agency". Though MARTA is a state created entity and serves a public, however proprietary purpose, it is an independent entity able to direct its own actions. In this case, it is clear that the government exercises no supervision over the day-to-day operations of MARTA or controls its activities. There can be no dispute that MARTA is operated by its own management, which includes a General Manager, and its own employees. The officers and employees who conduct MARTA's day-to-day affairs are not local government employees. The state and local governments are not even providing financial support

to MARTA, as most of its budget comes from sales tax and revenues.

It is clear that MARTA was neither created or functions with the type of government control that is in the DRPA Agreement. It is this control that led the Ingerman Court to hold that DRPA was a government agency. "Given not only the threat of veto but also the threat of removal from office, the requirement of voting majorities from each state, and the mandate of parallel legislation, there is sufficient government control over and involvement in the DRPA to render it a government agency subject to Section 7 of the Privacy Act." Id. at 13. Repeatedly, the Ingerman Court makes it clear that it is the government control that puts DRPA within the "ambit of coverage" and "spirit of the statute" of Section 7 of the Privacy Act. For the reasons stated in Defendants Brief in Support of Their Partial Motion for Summary Judgment, and further explained in this brief, it is clear that MARTA is not an Agency under the Privacy Act.

As stated in Defendants' initial brief, Krebs v, Rutgers University, 797 F.Supp. 1246 (D.JN 1992) provides the framework for determining if an entity is an agency under the Privacy Act. Plaintiff asserts that Krebs is not an applicable case because it involves an institute of

higher education. The analogy between the two institutions is not based on the type of their respective businesses, but is more related to the fact that each was created by the state, each retains autonomy in their day to day operations, and functions without government control over the operation. Rutgers was found not to be an agency under the Privacy Act, and neither should MARTA.

II. Defendant MARTA is Not Estopped From Asserting that the Privacy Act Does Not Apply.

Defendants are neither collaterally nor judicially estopped from asserting that the Privacy Act does not apply to them. First, Defendants have made it very clear that they are asserting that MARTA is not an "agency" as determined under the *Privacy Act*. Plaintiffs have provided no cases or briefs where MARTA has asserted that it is an agency under the Privacy Act.

A. No Collateral Estoppel.

More importantly, Plaintiffs assert collateral estoppel based on the fact that the Supreme Court of Georgia in Metropolitan Atlanta Rapid Transit Authority v. Boswell, 261 Ga. 427 (1991) ruled that MARTA is a governmental entity. Defendant MARTA does not, and has not contended that it is not a governmental entity. "Governmental entity" is a common, all inclusive, phrase

used to include authorities, or public corporations created by or pursuant to the Constitution of Georgia, in with other governmental units. See, O.C.G.A. §36-82-240.

In Boswell, the Supreme Court found that MARTA was a governmental entity. Boswell, 261 Ga. at 428. The Court further held that it was against public policy to subject MARTA to punitive damages as it would burden the very taxpayers and citizens whose benefits the wrongdoer was being chastised. Id. What Boswell never does, is hold that MARTA is a local government "agency", either under the Privacy Act, or in general. Collateral estoppel does not apply in this case.

B. No Judicial Estoppel.

Likewise, judicial estoppel does not apply. Plaintiffs assert that Defendants are judicially estopped from making the argument that MARTA is not a local government agency because it has previously made the argument that it is a local government agency. Defendants admit that it has made the argument that it is a local government agency on numerous occasions, including in the Boswell briefs[2]. MARTA would like to be considered a local

[2] Plaintiffs attached Defendants' Court of Appeals brief, and made a discovery request for Defendants to produce and file the Supreme Court briefs. At this time, such briefs have not been located, and have possibly been destroyed, as Boswell was a 1988 case. However, Defendants' counsel has no reason to believe that MARTA took any

government agency and be entitled to sovereign immunity similar to counties and municipalities. As some of its briefs might assert, MARTA believes that legally it should be entitled to certain immunities similar to local government agencies, however asserting it does not make it true. Despite the number of times that MARTA calls itself a local government agency in the Boswell briefs, the Supreme Court of Georgia stops short of such a declaration, and only found MARTA to be a "governmental entity". In order to be judicially estopped from asserting a different position, the party must have succeeded in persuading a court to accept the party's earlier position. New Hampshire v. Maine, 532 U.S. 742, 750 (2001). Plaintiffs have failed to establish that MARTA was successful in persuading the Boswell Court that it is a local government agency, and more importantly, that it is a local government agency subject to the Privacy Act.

III. There is No Close Nexus Between the State, City or County and MARTA's Police Force.

Plaintiffs assert that MARTA's police force is a government agency. Interestingly enough, Plaintiffs did not sue MARTA's Police Department or force, probably

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different position in the Supreme Court briefs than was taken in the Court of Appeals brief.

because they realized that a police force or department is not a legal entity capable of suing or being sued. It cannot be a government agency.

Plaintiffs have failed to establish a close nexus between the action by MARTA and the state, City of Atlanta or Dekalb County.[3] Plaintiffs assert that because MARTA police officers asked Plaintiff Raissi for his social security number in the process of performing a criminal background check that they were performing a state activity. Plaintiffs' reliance on Yeager v. Hackensack Water Company, 615 F. Supp. 1087 (D. NJ 1985) is incorrect. In Yeager, the New Jersey Governor declared a drought emergency and issued orders directing the Drought Coordinator "to take whatever steps are necessary and proper to alleviate the water supply emergency" and to effectuate his order. Id. at 1988. The Drought Coordinator issued an order delegating the enforcement function to the water purveyors. Such order also directed specific actions for the purveyors to take. Pursuant to the state's directive, Hackensack Water Company sought to ascertain its customers' social security numbers and the names of household members. Id. at 1089. The Yeager court

[3] The incident occurred at the MARTA Avondale Train station in Dekalb County.

held that Hackensack Water Company was "authorized by the state to take whatever action it deemed necessary, including the collection of its customers' social security numbers, to enforce the state's water rationing program". Id. at 1089-90. The court goes further to say that in certain situations where there is a "close nexus between the state and an action by a regulated entity, the action of the latter may be fairly treated as that of the state itself". Id. at 1091. This is said to exist where a statutory scheme or executive directive compels the alleged proscribed activity. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449,453 (1974).

Plaintiffs have not identified any statutory scheme or executive directive that compelled the MARTA police officer's to ask for Plaintiff's social security number. Without more, it cannot be found that there was a close nexus between MARTA police and the state, city or county to subject MARTA to section 7 of the Privacy Act.

IV. Defendants Seek Immunity.

Plaintiffs' are correct in asserting that Defendants are seeking immunities. In its Answer Defendants assert as defenses both qualified and official immunity. Defendants use qualified and official immunity interchangeably in

asserting a defense for the individual defendants. Claiming entitlement to qualified immunity is not inconsistent with what Defendants argue in regards to the Privacy Act. First, Defendants do not assert these immunities in defense to the Privacy Right claim as it can only lie against MARTA, and not the individuals. See, Doe v. Naval Air Station, 768 F.2d 1229, 1231(11th Cir. 1985).

As it relates to the other causes of action in this case, the police officials or officers are entitled to qualified or official immunity. The MARTA Act specifically provides that a member of MARTA's security force shall be a peace officer and, as such, shall have immunities equivalent to peace officers of the municipality or county in which that person is discharging his duties. Ga. L. 2002, p. 5683. The MARTA Act does not provide that MARTA is a local government agency, or that its employees are state officials, but it does extend qualified and/or official immunities to law enforcement officers. As such, Defendants are entitled to assert it as an appropriate defense.

V. Plaintiffs' Claims Are Moot.

A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief. Mingkid v. U.S. Att'y Gen., 468 F.3d

763, 768 (11th Cir. 2006). Plaintiffs allege that the Privacy Act claim is not moot because Plaintiffs speculate that Defendants continue to ask for social security numbers when they run a GCIC check on a person, and that they do not follow the guidelines of the Privacy Act when doing so. Plaintiffs have no evidence supporting this assertion. The only evidence in this cases shows that at the time Plaintiff Raissi was stopped, Defendants sometimes obtained social security numbers to conduct weapons checks, and failed to follow the guidelines with Raissi. Such actions have since ceased. Furthermore, Plaintiffs do not have standing to raise such a claim for any other circumstances other than firearm license checks.

Plaintiffs also contend that the Privacy Act claim is not moot because Plaintiff Raissi's seeks an order to purge his social security number from Defendants records. Although Defendants do not object to the purging of Plaintiff Raissi's social security number, such a remedy was not requested in Plaintiff's Complaint and not part of the record in this case. Asserting in the summary judgment motion does not make it a part of the record. Nor were damages requested for this claim. Plaintiffs' Complaint as it relates to the Privacy Act requests as a remedy "a declaration that the Officer's violated the Privacy Act,

together with an injunction against future violations". Plaintiffs' Complaint ¶37. The injunction requested against future violations for any GeorgiaCarry.Org member who lawfully carries firearms on the MARTA system is moot because Defendant no longer request social security numbers for this class of citizen, and there is no evidence that social security numbers are requested in other contexts without following the Privacy Act requirements.

CONCLUSION

For the reasons given in Defendants Partial Motion for Summary Judgment further emphasized in this Reply Brief, Defendants' Motion for Summary Judgment should be granted, and Plaintiff's Privacy Act claim should be dismissed.

This 27th day of August, 2009.

Respectfully Submitted,

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CERTIFICATE OF FONT TYPE, SIZE AND SERVICE

I hereby certify that on August 27, 2009, I served Plaintiffs' counsel by e-filing "DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO THEIR PARTIAL MOTION FOR SUMMARY JUDGMENT" in 12-point Courier New for filing and uploading to the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorney of record:

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This 27th day of August, 2009

/s/ Paula Morgan Nash
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