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' BRIEF IN SUPPORT OF THEIR SECOND MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their undersigned counsel, and submit their Brief in Support of Defendants' Second Motion for Summary Judgment.

INTRODUCTION

Plaintiff Christopher Raissi ("Raissi" or "Plaintiff") and Plaintiff GeorgiaCarry.org bring this lawsuit against Defendants Metropolitan Atlanta Rapid Transit Authority ("MARTA" or "Defendant"), Wanda Dunham, Joseph Dorsey, Terry Milton and Malcolm Nicholson. Plaintiff's Complaint alleges a 42 U.S.C. § 1983 violation for illegal search, detention and seizure of person and property under the Fourth and Fourteenth Amendment. (Complaint ¶ 1). Plaintiff

Raissi also alleges that Defendants violated his rights under the Privacy Act and the Open Records Act.[1] Id.

STATEMENT OF FACTS

MARTA is an entity established to build and operate a public transportation system in Atlanta and surrounding counties. Ga. L. 1965, pp.2243 et seq. MARTA police officers shall have authority and immunities equivalent to those of a peace officer of the municipality or county in which that person is discharging the duties as a member of such force. Ga. L. 2002, p. 5683, § 8(o). On July 1, 2008, a law went into effect allowing the carrying of firearms on the MARTA transit system, as well as other places, with a valid Georgia firearms license, provided that the firearm is carried properly. Complaint ¶ 11; O.C.G.A. §16-11-126.

Requests From John Monroe to Dorsey

On or about June 20, 2008 Plaintiffs' counsel, John Monroe, met with Defendant Dorsey to discuss the new law. (Complaint ¶ 11). John Monroe made an oral request for a copy of MARTA's policy on HB 89 once it was developed. (Complaint ¶ 12). This was reiterated in e-mail on the same day. (Complaint ¶ 13; Exhibit A attached to Complaint). On June 27, 2008 and July 8, 2008, Plaintiffs'

[1] Defendants have filed a partial motion for summary judgment on the Privacy Act claim, and reiterate their position here. Defendants further reiterate their position in regards to the Open Records Act claim as asserted in their motion to dismiss.

counsel sent e-mails to Defendant Dorsey asking questions regarding MARTA's policy. (Complaint ¶¶ 14 & 15; Exhibits B & C attached to Complaint). No Police Department policy was developed or provided to Plaintiffs' counsel. However, a training bulletin was provided at a later time. (Deposition of Joseph Dorsey ("Dorsey depo.") pp.18-19; Affidavit of Joseph Dorsey ("Dorsey aff.")¶ 8, Exh. C).

Incident at Avondale MARTA Station

On October 14, 2008 Defendant Sgt. Malcolm Nicholas, a MARTA Police officer, was patrolling the south parking area of the Avondale Train Station. Deposition of Malcolm Nicholas ("Nicholas depo.") pp.8-9. Nicholas has been in law enforcement over 12 years. Nicholas depo. p.5. Plaintiff Raissi parked in the parking lot on the south side of the Avondale MARTA station. Deposition of Christopher Raissi ("Raissi depo.") p.10. It was his first time riding MARTA and he had "heard bad stories". Raissi depo. p.10. He took his holstered pistol and put it in the small of his back, and locked his valuables in his truck. Raissi depo. p.10. His gray t-shirt was hanging over the firearm. Raissi depo. pp.11-12. While sitting in his car, Nicholas witnessed Raissi get out of his car, take a holstered gun out of his car and put it in the middle of his back, between his pants and his body, and then pull a

shirt over it. Nicholas depo. pp.11-12. Plaintiff Raissi purchased a Breeze Card, and when he turned around he saw two police officers looking at him. Raissi depo. p.13. Sgt. Nicholas told Raissi to stop, and identified himself as a police officer. Raissi depo. p.13. Sgt. Nicholas said nothing else to Raissi at that time. Id. There was one officer behind Raissi and another officer in front of Raissi. Id. at 14. Sgt. Nicholas, who was behind Raissi pulled Raissi's pistol from its holster, and asked, "what are you doing with a gun?" Id. Nicholas asked Raissi for identification and his Georgia firearm license. Raissi handed his drivers license and his firearm license to Nicholas. Raissi depo. pp.15-16; Nicholas depo. p.21. Raissi then engaged the officers in general conversation. Raissi depo. pp.16-17. Nicholas also asked Raissi for his social security number, which Raissi readily provided. Id. at p.17. All of this occurred in public by the Breeze Card machines. Id. at p.18. Raissi was told by Nicholas that he was going to run his information and if everything was good, he would be free to go. Nicholas said "good" meant no warrants or felonies. Id. at p.17. When checking to ensure that an individual with a gun has a valid firearm license, social security numbers were sometimes requested for the purpose of running a Georgia Crime Information

Center (GCIC) check. Dorsey depo. p.9. Since there is no data base to ensure that firearm licenses are valid, GCIC checks provide information that at a minimum lets officers know if the person is legally qualified to obtain a firearms license (i.e. not a felon, no warrants). Nicholas depo. pp.29-30; Dorsey Affidavit, Exh.1)

About five minutes passed from the time that Raissi was stopped until the time that he was asked for his social security number. Raissi depo. pp.18-19. After Raissi gave Sgt. Nicholas his social security number, it was radioed to dispatch and Raissi waited five to ten minutes while dispatch did a check. Raissi depo. p.20. Officer Milton never said anything. He just looked around, watching the crowd and being aware of his surroundings. Raissi depo. p.19. Raissi was told that he would be taken to a private, secure area where he could re-holster his firearm outside of public view. Raissi depo. p.22. Only Sgt. Nicholas went into the secure area with Raissi. Raissi depo. p.23. At that point Raissi was free to go. Id. at p.22. This "didn't take very long". Raissi depo. p.22. Raissi then got on the train. Id. According to Raissi, the entire encounter, from the time he was told to stop, until the time he was released took between 15 and 30 minutes. Raissi depo. p.21. However, Raissi did not have an exact

estimate. Id. During the encounter, Raissi never asked either officer if he could leave. Raissi depo. p.25.

Open Records Request from Raissi.

On October 16, 2008 Defendant Raissi sent an Open Records Act request to Defendant Dunham requesting records pertaining to his detention. (Complaint ¶ 23; Exhibit D attached to Complaint). The request was received by the Police Department, and pursuant to directive from the General Manager, the Police Department faxed it to Legal Services. Affidavit of Linda Morgan ¶¶4&6, Exh. A. However, Legal Services does not have a record of receiving the fax. Id. at ¶6. Raissi never followed up with his open records request. Raissi depo. p.28. Plaintiff has now received the records.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 mandates the entry of summary judgment upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The movant is not required to negate its opponent's claim. Id. at 323. Rather, the movant may discharge its burden merely by "pointing out to the district court that there is an

absence of evidence to support the non-moving party's case." Id. at 325.

ARGUMENT AND CITATION OF AUTHORITIES

I. DEFENDANTS MILTON AND NICHOLAS HAD REASONABLE SUSPICION TO STOP (SEIZE) PLAINTIFF RAISSI.

The Fourth Amendment protects against "unreasonable searches and seizures" Terry v. Ohio, 392 U.S. 1, 8, 88 S.Ct. 1868, 1873 (1968). A temporary detention of an individual during a stop by police constitutes a seizure of the person. Whren v. United States, 517 U.S. 806, 809-810, 116 S.Ct. 1769, (1996). A stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. Id. at 810, 116 S.Ct. 1769. There is "no ready test for determining reasonableness other than by balancing the government's need to search (or seize) against the invasion which the search (or seizure) entails." Terry, 392 U.S. at 21. The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from the facts, reasonably warrant such intrusion. Id. A reviewing court must look to the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct.

690 (1981). This allows officers to draw on their own experience and specialized training to make inferences. "The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions..." United States v. Sokolow, 490 U.S. 1, 11, 109 S.Ct. 1581 (1989).

A reasonable suspicion may be formed by observing exclusively legal activity. United States v. Harris, 526 F.3d 1334, 1337 (11th Cir. 2008). Whether the officer involved "'actually and subjectively has the pertinent reasonable suspicion," is not the relevant inquiry; but instead, the Court asks whether "given the circumstances, reasonable suspicion objectively existed to justify,'" the stop. United States v. Nunez, 455 F.3d 1223, 1226 (11th cir. 2006)(quoting Hicks v. Moore, 422 F.3d 1246, 1252 (11th Cir. 2005)). Viewing the totality of the circumstances, including the observation of a gun, Sgt. Nicholas' training and experience, the previous criminal activity at MARTA stations, and the duty to provide extraordinary diligence for the safety of patrons, it was reasonable for Defendants to conduct a brief investigative stop of Plaintiff Raissi.

1. Nicholas Saw the Firearm.

It is an undisputed fact that Plaintiff Raissi had a firearm in a holster tucked in the back of his pants. Raissi depo. p.10. It is also undisputed that Defendant Sgt. Nicholas **witnessed** Raissi place the firearm in the small of his back, and pull his shirt over it, while in the MARTA parking lot. Nicholas depo. pp.11-12. This is clearly not a situation where the officer received some unreliable information from an anonymous person. Sgt. Nicholas felt that it was suspicious for Raissi to have the gun in the middle of his back. Nicholas depo. p.44. Nicholas was concerned that Raissi could possibly endanger the public, himself or another officer. Id. Seeing an individual with a gun, place it in the small of his back and cover it with his shirt is enough for reasonable suspicion.

Georgia's firearm statute provides in relevant part:

> (c) This code section shall not permit,... the concealed carrying of a pistol, revolver, or concealable firearm by any person unless that person has on his or her person a valid license issued under Code Section 16-11-129 and the pistol, revolver, or firearm may only be carried in a ... holster ... in which event the weapon may be concealed by the person's clothing... .

O.C.G.A. §16-11-126(c). The law clearly makes it a crime to carry a weapon unless the person has a valid license on his person. An officer's observance of a person's possession of

a firearm in a public place is sufficient to create reasonable suspicion to detain that person for further investigation. United States v. Cooper, 293 Fed. Appx. 117, 2008 WL 4276904 (3rd Cir.). Similar to Georgia, the law in Pennsylvania provides that no person shall carry a firearm upon any public property unless such person is licensed to carry a firearm. 18 Pa. Cons.Stat § 6108. "Possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." Cooper, at 117 quoting Commonwealth v. Robinson, 410 Pa. Super. 614, 600 A.2d 957, 959 (1991). In Cooper, similar to the present case, the officer observed that Cooper had a handgun under his shirt in his waistband. Cooper was stopped, the weapon was taken from his waistband, and he was asked by the officer for a license. Despite the fact that a person can carry a gun in public in Pennsylvania, the Court found the stop to be reasonable. See also, United States v. Bond, 173 Fed. Appx. 114, 2006 WL 751509 (3rd Cir). Similarly, the Georgia Court of Appeals found that an officer seeing a bulge under a suspect's shirt at the waist had a founded suspicion justifying the stop.

Edwards v. State, 165 Ga.App.527, 528 (1983). The officer stopped the suspect for no other the reason than he saw the bulge and thought he might be carrying a concealed weapon. The court found that this was reasonable suspicion. Id. Clearly, where an officer actually sees the gun tucked in the waist band in the back, as in this case, there is enough reasonable suspicion of carrying a weapon without a license, or possibly some other illegal activity, to justify further investigation.

2. Defendants Are Aware of Crimes at MARTA Stations.

Officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 676 (2000). It is undisputed that crime occurs at MARTA train stations. Police records show that in fiscal year 2008, there were approximately 53 gun related incidents within the MARTA system. Of those, 34 involved persons with guns without valid firearm licenses, and 18 had an unknown license status. Only 1 incident involved a person with a valid firearms license. Dorsey aff. ¶4. In fiscal year 2009, there were approximately 84 gun related incidents within the MARTA's system. Of those, 54 involved persons with guns without valid firearm licenses, and 16

had an unknown license status. Dorsey aff. ¶5. There was also a shooting less than a week before the incident with Raissi. Dorsey aff. ¶6. There is clearly an issue regarding people with guns on the MARTA system without valid gun license. Plaintiffs would apparently prefer that MARTA wait until after shots are fired to stop someone with a gun.

Defendant police officers were aware of the potential for criminal acts on MARTA. On October 14, 2008, police officers were patrolling the stations and parking lots looking for suspicious persons coming in and out, and any type of crimes being committed. Nicholas depo. p.9. Defendant Nicholas stated that there had been a rash of car thefts at the Avondale station around this time. Id. Even Plaintiff admits that he was carrying his gun, and putting valuables in his trunk because he had heard bad stories about MARTA. Raissi depo. p.10. These circumstances require investigating people seen with guns on MARTA property.

3. Defendants Owe Patrons a Duty of Extraordinary Care.

Unlike a typical government, MARTA owes a higher duty of care to its passengers or patrons. Its agents, such as police officers, and other employees, are the ones that must provide this higher duty of care. "A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers but is not liable

for injuries to them after having used such diligence." O.C.G.A. §46-9-132. MARTA, as a transit authority, is a common carrier with the duty to protect passenger from unreasonable risk of harm. Robertson v. Metropolitan Atlanta Rapid Transit Authority, 199 Ga. App. 681 (1991); Walker v. Metropolitan Atlanta Rapid Transit Authority, 226 Ga. App. 793, 795 (1997). Extraordinary diligence to protect the lives of its patrons is defined as "that extreme care and caution" which very prudent persons exercise. The amount of care demanded must be proportionate to the apparent risk. See, Sparks v. Metropolitan Atlanta Rapid Transit Authority, 223 Ga. App. 768, (1996). "Knowledge of conditions which are likely to result in an assault upon a passenger, or which **constitute a source of potential danger**, imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in the light of existing hazards." Id., quoting Southeastern Stages v. Stringer, 263 Ga. 641, 643 (1993) (emphasis added). Knowledge that a person entering MARTA's station, possesses potentially dangerous weapons, puts a duty on MARTA employees to act vigilantly to ensure that passengers are safe. MARTA has placed this legal duty on the Police Department. (Dorsey aff., exh. C). Looking at the totality of the circumstances including

observing a firearm being placed in the small of the back and covered with a shirt, past knowledge of persons without valid gun licenses bringing guns into MARTA train stations, crimes involving guns having been committed on MARTA property, and the duty of extraordinary diligence, it is clear that Sgt. Nicholas and Officer Milton had reasonable suspicion to stop Plaintiff Raissi.

II. DEFENDANT NICHOLAS DID NOT VIOLATE PLAINTIFF'S RIGHTS WHEN HE SEIZED HIS GUN.

The limitations that the Fourth Amendment places on a protective seizure and search for weapons, must be developed by the factual circumstances of individual cases. Terry, 392 U.S. at 29. In this case, as in Terry, the record evidences the tempered act of a police officer who in the course of an investigation had to take a quick decision as to how to protect himself and others from possible danger, and took reasonable, limited steps to do so. Sgt. Nicholas limited the scope of his search and seizure to the area (small of back) where he had observed the firearm. In one immediate, snatching motion, Sgt. Nicholas took the weapon from the back of Plaintiff Raissi's pants. (Raissi depo. pp.14-15; Nicholas depo. p.20). Where a police officer believes that a suspect may be armed and dangerous, he is entitled for the safety of

himself and others in the area to conduct a reasonable search in an attempt to discover weapons which might be used to harm him, and such a search is reasonable under the Fourth Amendment. Terry, 392 U.S. at 30-31. Sgt. Nicholas obviously knew that Raissi was armed and possibly dangerous because he did not encounter him in the parking lot, but let him walk towards the station. Nicholas depo. p. 15. Nicholas then gave a radio signal of person being armed. Id. He followed from a distance, and did not want to encounter until he was in the safety standpoint of having two officers present. Id. pp. 16-17. When Nicholas stopped Raissi, he "removed the threat away" by taking the gun. Nicholas depo. p. 18. This action did not violate the constitutional rights of Plaintiff Raissi.

III. DEFENDANTS MILTON AND NICHOLAS ARE ENTITLED TO QUALIFIED IMMUNITY.

The MARTA Act provides MARTA police officers with the same immunities as a peace officer of a county or municipality. Ga. L. 2002 p.5683. The evidence in the record clearly demonstrates that officers Milton and Nicholas are entitled to qualified immunity. So long as a government official acts within the scope of his discretionary authority and does not violate clearly established law of which a reasonable person should have

known, the doctrine of qualified immunity protects him. Harlow v. Fitzgerald, 457 U.S. 800, 818; Purcell, 400 F.3d at 1319. Qualified immunity provides immunity from suit not just immunity from liability. Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985). "The defense of qualified immunity represents a balance between the need for a damages remedy to protect the rights of citizens and the need for government officials to be able to carry out their discretionary functions without the fear of constant baseless litigation." GJR Investments, Inc., v. County of Escambia, Fla., 132 F.3d 1359, 1366 (11th Cr. 1998). "The defense embodies an 'objective reasonableness' standard, giving a government agent the benefit of the doubt unless his actions were so obviously illegal in the light of then-existing law that only an official who was incompetent or who knowingly violated the law would have committed them." Id. "Qualified immunity thus represents the rule, rather than the exception: 'Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.'" Id., (quoting Lassiter v. Alabama A&M Univ. Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994)). A plaintiff seeking to overcome the defense of qualified immunity must first establish the violation of a

constitutional right. Saucier v. Katz, 533 U.S. 194, 201, (2001). Then, he must be able to demonstrate that the right was so clearly established at the time of the alleged violation that a reasonable public official in a similar situation would be aware that his conduct was unconstitutional. Id.; Siegert v. Gilley, 500 U.S. 226, 232, (1991). This is a "purely legal question." Id.

In addition, "to receive qualified immunity, the public official must show that he was acting within the scope of his discretionary authority at the time the allegedly wrongful acts occurred." Durruthy v. Pastor, 351 F.3d 1080, 1087 (11th Cir. 2003) (citing Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)). If a government employee is following a legitimate job-related function through means that are within his power to utilize, then that function is discretionary. Holloman v. Hartland, 370 F.3d 1252, 1265 (2004). "Once it is established that the defendant was acting within his discretionary authority, 'the burden shifts to the plaintiff to show that qualified immunity is not appropriate.'" Durruthy, 351 F.3d at 1087.

"[I]n the context of the Fourth Amendment, when a defendant raises the defense of qualified immunity, the standard is not actual reasonable suspicion, but 'arguable' reasonable suspicion." Jackson v. Sauls, 206 F.3d 1156,

1166 (11th cir. 2000). In other words, "[a] law enforcement official who reasonably but mistakenly concludes that reasonable suspicion is present is still entitled to qualified immunity." Id.

Discretionary authority is defined as "all actions of a governmental official that (1) 'were undertaken pursuant to the performance of his duties," and (2) were 'within the scope of his authority.'" Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994)(quoting Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988)). The function of being a MARTA police officer includes patrolling areas in efforts of crime prevention, and conducting investigations. Nicholas depo. p.9; Dorsey aff., Exh.C. Defendants Milton and Nicholas encounter Plaintiff Raissi while performing these discretionary actions. Once a defendant has discharged his burden of showing that the alleged conduct was performed within the scope of his discretionary authority, the burden shifts to the plaintiff to prove that the defendant is not entitled to qualified immunity. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002).

As argued in the previous sections, Plaintiffs cannot produce sufficient evidence to allow a reasonable trier of fact to determine that Defendants Milton and Nicholas violated a constitutional right held by Plaintiff Raissi.

Even if the Court accepts Plaintiff's contention that Defendants Milton and Nicholas' conduct constituted a constitutional violation, Plaintiff cannot demonstrate that Defendants stop and seizure of Plaintiff, after seeing him with a firearm at a MARTA station, violates law that is clearly established considering that Defendants owe an extraordinary duty of care to the patrons of MARTA. In fact, the law that allows persons to bring firearms on to MARTA property had only gone into effect 4 months prior to this incident. O.C.G.A. §16-11-126. It is not clearly established as to how Defendants are to exercise their duty of extraordinary diligence in light of the recent gun law. If Plaintiff cannot identify a specific source sufficient to place Defendants Milton and Nicholas on notice of how to balance these two laws, then these Defendants are entitled to qualified immunity.

IV. MARTA IS ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' FEDERAL LAW CLAIMS.

As a matter of law, Plaintiffs cannot prove that MARTA is liable for the alleged constitutional deprivation. Plaintiffs allege that by establishing a policy of detaining anyone seen carrying a firearm, even without probable cause or reasonable, articulable suspicion that a crime has occurred or is about to occur, MARTA, Dunham, and

Dorsey[2] have established a policy of violating the Fourth and Fourteenth Amendment (Complaint, ¶ 28). Plaintiffs have failed to show that MARTA maintained a policy, practice or custom that resulted in the deprivation of their constitutional rights. Section 1983 creates a cause of action against any person who, acting under color of state law, deprives another of constitutional or federal rights. See 42 U.S.C. § 1983. To establish MARTA's liability under § 1983, Plaintiffs must identify a policy or custom that deprives them of their constitutional rights and caused their injuries. Grech v. Clayton County, 335 F.3d 1326, 1329 (11th Cir. 2003).

Assuming, *arguendo,* that Plaintiffs could show a constitutional deprivation, their claim still must fail because they cannot demonstrate that MARTA had a custom or policy that caused the asserted violation. Plaintiffs cannot rely upon the theory of *respondeat superior* to hold a government entity liable. See, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691. "Congress did not intend [for] municipalities to be held liable unless deliberate action attributable to the municipality directly caused a

[2] Defendants Dunham and Dorsey are being sued in their in their officials capacities. A §1983 suit against a public official in his official capacity is the same as a suit against the public entity itself. Lassiter v. Alabama A&M University, 3 F.3d 1482, 1485 (11th Cir. 1993).

deprivation of federal rights". Board of County Com'rs v. Brown, 520 U.S. 397, 415 (1997). Thus, "it is only when the execution of the government's policy or custom ... inflicts the injury that the municipality may be held liable." City of Canton v. Harris, 489 U.S. 378, 385 (1989). Plaintiffs must be able to show that MARTA's policies were the "moving force" behind the constitutional violation. Grech, 335 F.3d at 1330.

In the case at bar, Plaintiff cannot identify any relevant policy or custom either promulgated or maintained by MARTA which caused the alleged constitutional deprivation. MARTA published an informational leaflet to its employees. Dorsey aff. ¶7, Exh.B. Such leaflet advised employees to "use discretion and report any suspicious person, activity or package to a MARTA Police Officer". Id. The document further indicates how MARTA Police will respond, stating that "Police will approach the customer and request that he or she produce a firearms permit and photo identification". Id. Also, the MARTA Police training bulletin states "It is important that officers recognize elements of their cases which could be viewed as infringements upon the right of citizens who are lawfully carrying firearm. It is also crucial for officer safety that officers are able to conduct investigations of

armed citizens in a safe manner that remains within Constitutional parameters." Dorsey aff. ¶8, Exh.C p.1. Finally it states that for a stop based on reasonable suspicion, the officer must show articuable facts, which, when taken together, would lead any police officer to believe that a crime has been or is about to be committed, and for a frisk the officer must be able to articulate a reasonable belief that the suspect is both armed and dangerous. Id. at p.3. Defendant Dorsey further verified that an investigation is conducted when a gun is observed by an officer. Dorsey depo. pp.6-7. If a person fails to cooperate with the investigation, they are not arrested, but must leave the MARTA property. Dorsey depo. pp.10-11. There is no policy or practice promulgated by MARTA that violated Plaintiffs' constitutional rights. The federal claims against MARTA, Dunham and Dorsey should be dismissed.

V. THERE IS NO OPEN RECORDS ACT VIOLATION.

Plaintiffs allege that Defendants Dunham and Dorsey have denied them access to documents which constitute public records under O.C.G.A. § 50-18-70. The Open Records Act vests Georgia Superior Courts with the discretion in determining whether to allow or prohibit inspection of public records. O.C.G.A. § 50-18-73(a); see Bowers v.

Shelton, 265 Ga. 247, 453 S.E.2d 741 (1995). Plaintiffs' claims regarding the Open Records Act requests are clearly based on state law, are not within the original subject matter jurisdiction, or supplemental jurisdiction of this Court. Defendants have briefed this jurisdictional issue fully within its Motion to Dismiss. Doc.10-2. By reference, Defendants fully and completely adopt and incorporate such argument into this brief.

Even if this Court found that it had jurisdiction over the Open Records Act claims, the e-mails sent to Defendant Dorsey by John Monroe are not Open Records Act requests. Monroe alleges to have had a conversation with Defendant Dorsey on June 20, 2008 requesting the Police Department's gun policy. (Complaint ¶12). Monroe sent an e-mail on June 20, 2009 asking "please send me your policy regarding encounters with people carrying firearms on the MARTA system **after you develop one** for the post-July 1, 2008 world". (Exhibit A to Complaint). It is clear from the language in the e-mail that Monroe had previously been told that a policy did not exist. O.C.G.A. §50-18-70(d) makes it clear that no public officer shall be required to prepare documents not already in existence. Smith v. DeKalb County, 288 Ga. App. 574 (2007). No policy or standard operating procedure was ever developed. Dorsey

depo. pp. 6-7. The only thing that eventually was developed was a training bulletin. Dorsey depo. pp.18-19. Not only was Monroe requesting something that he knew did not exist, but the context of the entire e-mail would not lend one to believe that it was an Open Records Act request. Furthermore, it never indicates that it is being made pursuant to the Open Records Act. Due the informally and the fact that it was not stated to be an open records request, Defendant Dorsey did not recognize it to be something as formal as an Open Records request. Dorsey depo. p.20.

Monroe sent additional e-mails on June 27, 2008 and July 8, 2008. (Complaint, Exhibits B and C). These e-mails do not request documents. They ask whether a policy has been developed, and whether certain statements are accurate. The Open Records Act does not require the answering of questions. These e-mails are not Open Records Act requests.

On or about October 16, 2008, Plaintiff Raissi sent an Open Records Act request to Chief Dunham. (Complaint, Exh, D). Pursuant to a directive from the General Manager of MARTA, this request was sent to the Office of Legal Services, presumably by facsimile. (Morgan aff. ¶¶4 &6, Exh.A; Doc.16-2). There is no record of Legal Services

receiving the fax for the request. Morgan aff. ¶6. As such, the request was not answered. Neither Plaintiff Raissi nor his attorney followed–up about the request. Raissi depo. p.28. In March 2009, upon first notice that the request was not answered, Legal Services sent per e-mail, the requested documents to Plaintiff's attorney. As Plaintiffs have now been sent the documents, and there is no live controversy, the Open Records Act claim is moot. Mingkid v. U.S. Att'y Gen., 468 F.3d 763,768 (11th Cir. 2006).

CONCLUSION

For the above stated reasons in Defendants' Second Motion for Summary Judgment should be granted.

This 11th day of August, 2009.

Respectfully Submitted,

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