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

CHRISTOPHER PUCKETT,	)	
	)	
Plaintiff	)	CIVIL ACTION FILE NO.
	)	
v.	)	1:06-CV-2382-BBM
	)	
KELLEY S. POWELL in her Official capacity as Probate Judge for Henry County, Georgia	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION TO FILE OUT OF TIME AND IN REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CONTEMPT

Background

Plaintiff brought this case against Defendant alleging, *inter alia,* violations of the federal Privacy Act stemming from Defendant's asking Georgia firearms license ("GFL") applicants for their social security account numbers ("SSNs"). The Court ruled in Plaintiff's favor on summary judgment, declared Defendant to have violated the Act and enjoined future violations. Doc. 36. When Plaintiff discovered that Defendant was continuing to violate the Act, Plaintiff filed his Motion for Contempt [Doc. 47].

The same day Plaintiff's Motion was filed, Plaintiff's counsel realized the style of the Motion and the supporting

Memorandum of Law were identical (instead of being separately styled as a motion and a memorandum of law). Plaintiff's counsel discussed this with the Clerk, who advised counsel to withdraw the Motion and refile it correctly styled. Plaintiff thereafter withdrew his original Motion [Doc. 48] and filed a new Motion with the correct style [Doc. 49].

Defendant files her Emergency Motion on the grounds that her counsel inadvertently believed that Plaintiff had withdrawn his original Motion and had not refiled it.

1. Defendant Has Not Demonstrated Excusable Neglect

Defendant seeks to justify her Emergency Motion on defense counsel's inadvertence in not understanding that Plaintiff withdrew and then re-filed his Motion. She fails to recognize, however, that inadvertence of counsel does not constitute excusable neglect.

Plaintiff's original Motion [Doc. 47] was filed June 12, 2008. Plaintiff's withdrawal of Doc. 47 [Doc. 48] was filed June 13, 2008. In the Withdrawal of Motion [Doc. 48], Plaintiff clearly stated that he was withdrawing him Motion "to correct a filing error." He continued by saying, ***"Plaintiff will refile his Motion for Contempt as a new docket entry."*** Doc. 48, p. 1

[emphasis supplied]. True to his word, Plaintiff refiled his Motion for Contempt as Doc. 49.

Plaintiff could not have been any clearer in his filings. It is difficult to imagine how defense counsel could have read Doc. 48 to mean anything other than that Doc. 47 was withdrawn and a new motion would be filed. Moreover, "[I]nadvertence … do[es] not constitute 'excusable neglect.'" *Advanced Estimating Sys. v. Riney,* 130 F.3d 996, 998 (11th Cir. 1997), citing *Pioneer Investment Services v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 391 (1993).

Even an ordinary application of the phrase "excusable neglect" cannot lead one to conclude that it fits the facts of this case. There simply is no reason to believe that a motion, followed by a withdrawal of the motion (and promised new motion), followed by a new motion do not result in a motion for which a response is possible.

The Supreme Court in *Pioneer Investment Services* articulated a four-pronged test for excusable neglect. The Court is to consider 1) danger of prejudice to the nonmovant; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it

was within reasonable control of the movant; and 4) whether the movant acted in good faith. 507 U.S. at 395.

Any delay in receiving justice is a prejudice, but in this case every day that goes by with Defendant's continuing to ask GFL applicants for their SSNs is another day when those applicants are having their privacy violated. The purpose of the statute was to avoid this result, and the prejudice to GFL applicants can not be overstated.

Motions normally require a response within 17 calendar days (L.R. 7.1(B) requires 10 days, L.R. 6.1(A) clarifies that weekends and holidays are not counted and three days are added for service). Because Plaintiff's refiled Motion was filed on June 13, 2008, Defendant's response was due June 30. Thus, Defendant's response is 15 days late, or almost twice the time originally allotted to her. Given that the Motion already has been submitted to the Court, it is disruptive to the judicial process now to have to consider Defendant's Emergency Motion and even further delay a ruling on Plaintiff's Motion.

The cause for the delay is simple: Defense counsel did not read the documents Plaintiff filed. If he had, it would have been clear that Plaintiff's Motion was not withdrawn in its entirety, but merely withdrawn and refiled. Moreover, the delay

was completely within the control of Defendant (and not Plaintiff).

Plaintiff does not allege that Defendant has not acted in good faith (with regard to responding to Plaintiff's Motion).

2. Defendant Does Not Have a Meritorious Response

Even if the Court finds Defendant's neglect to be excusable, the defense she has submitted is not meritorious. Plaintiff's Motion pointed out that Defendant has not been abiding by the Court's order (Doc. 36) because she has not been advising GFL applicants by what statutory or other authority she requests the applicants' SSNs, in violation of Section 7(b) of the Privacy Act.

Defendant refers the Court to the documents she provides to GFL applicants entitled "Social Security Numbers." Docs. 50-2, p. 3 and 50-3, p. 3. This document states, in pertinent part:

> The Probate Judge of Henry County is authorized to request Social Security numbers pursuant to [1] *Official Code of Georgia Annotated,* Section 16-11-129, which regulates firearms licensing checks and [2] also under Rule 24.1, *Uniform Rules for the Probate Courts* in other situations as set forth therein including guardianships, conservatorships and estates. [3] The Social Security number blanks appear in certain forms published by the State of Georgia and by the local Court.

[numbering added for ease of reference below].

It should be somewhat obvious that Defendant cannot comply with Section 7(b) of the Privacy Act by naming whatever authority she cares to, without regard to whether such sources ***actually*** authorize requesting the SSN. If that were the case, the requirement to state the authority would be utterly meaningless and would be surplusage.

None of the three "authorities" listed by Defendant actually authorizes Defendant to request SSNs of GFL applicants. Plaintiff will discuss them here in turn.

1. O.C.G.A. § 16-11-129 is the Georgia statute conferring authority on probate judges to issue GFLs. The GFL application, however, is required by the statute to be created by the state Department of Public Safety, not by the probate judge. O.C.G.A. § 16-11-129(a). The state form formerly contained a blank for the SSN, but that blank was removed by the Department of Public Safety as a result of Privacy Act litigation against it. *Camp v. Cason*, U.S. District Court for the Northern District of Georgia, Case No. 1:06-CV-1586-CAP, Doc. 81-3 (Affidavit of the Commissioner of the Department of Public Safety stating that the SSN had been removed from the form). Thus, in direct response to litigation over the Privacy Act, the State of Georgia

determined that it was not authorized to request SSNs at all.[1] Defendant cites to nothing in O.C.G.A. § 16-11-129 that authorizes her to request SSNs because there is nothing. The words "social security" are nowhere to be found there.

Moving from the sublime to the ridiculous, Defendant also claims Rule 24.1 of the *Uniform Rules for the Probate Courts* authorizes her to request SSNs from GFL applicants. This rule, reproduced in its entirety for the Court's convenience, states:

> **24.1. Criminal Background Information of Certain Nominated Temporary Administrators, Personal Representatives or Guardians**
>
> Any person requesting appointment by a probate court in this State as temporary administrator or personal representative of an estate of a decedent or as guardian of the person or property of an incapacitated adult or a minor may be required to first submit to a criminal background check by allowing the probate court in which the petition seeking such appointment is pending to access the criminal records information maintained by the Georgia Crime Information Center (GCIC) with reference to such person. The actual performance of a background check shall be in the discretion of the judge of the probate court before which the proceedings are pending, and there shall be no requirement that a criminal history be obtained for every such person. In order to allow access to the GCIC records, any person requesting such appointment shall, upon request by the probate court, sign a form

[1] The Department of Public Safety initially changed the form to make the request for the SSN voluntary, but changed it again when the Eleventh Circuit reversed the District Court's grant of the Department's motion for summary judgment. *Camp v. Cason,* 220 Fed. Appx. 976 (11th Cir. 2007) (unpublished).

> consenting to the release of such information by GCIC to the probate court, which form shall be substantially the same as the consent form appended to the Georgia Probate Court Standard Form 31. All information received by a probate court pursuant to this Rule shall be considered confidential and shall be disclosed by the probate court or its staff only to the person seeking such appointment, any attorney representing such person, and any attorney and/or guardian-ad-litem representing the heirs or beneficiaries of the decedent, the alleged incapacitated adult or the minor involved in the proceedings. Any records so obtained by a probate court shall be destroyed within 30 days after the expiration of the time for filing of an appeal of the order of the probate court granting or denying such appointment; if an appeal is filed, such records shall be destroyed within 30 days after the appeal is dismissed or withdrawn or the remittitur is returned to the probate court.

It is readily apparent to the reader that this rule has nothing whatsoever to do with GFL applications and does not mention SSNs. Moreover, it is doubtful that a state entity can empower itself with authority to request SSNs and cite to such authority in an effort to comply with the Privacy Act. If it could do so, again, the words of the Privacy Act would be reduced to meaningless surplusage.

Finally, Defendant cites to "certain forms published by the State of Georgia and by the local Court." Without elaboration from Defendant, Plaintiff has not a clue to what forms Defendant refers. Plaintiff already has shown that the official state

form for GFL applications does not have a space for the SSN, ***expressly so to comply with the Privacy Act.*** Defendant has therefore created her own form with a blank for the SSN, just so she can continue to ask for it after the State of Georgia has told her it is not necessary.

3. Plaintiff's Proposed Remedy is Logically Sound

Defendant objects to Plaintiff's proposed remedy for Defendant's contempt, a court appointed monitor and expungement of wrongfully collected SSNs, but offers no alternative. Plaintiff explained in his opening Brief why conventional sanctions for contempt, monetary sanctions and incarceration, are not likely to achieve compliance with the Court's Order. His proposed remedy, on the other hand, is likely to achieve that goal (and Defendant fails to claim that it will not).

Defendant's objection is that the proposed remedy "far exceeds" the scope of the original Order. This is not true. The Court ordered Defendant to provide the warning required by the Privacy Act for all future GFL applicants, not just for Plaintiff's future applications. It is appropriate, therefore, in the face of continued violations, that the Court appoint a monitor to report whether Defendant continues to violate the Court's Order. It also is appropriate to expunge all the SSNs

that Defendant collected while failing to provide the appropriate warning.

Conclusion

Defendant has failed to show this Court that she did not respond to Plaintiff's Motion on a timely basis on account of excusable neglect. Rather, the cause was inadvertence, which the Supreme Court has held does not constitute excusable neglect.

Plaintiff has demonstrated that Defendant's opposition to Plaintiff's Motion is not meritorious and that his proposed remedy for Defendant's contempt is appropriate.

For the foregoing reasons, Defendant's Emergency Motion should be denied and Plaintiff's Motion should be granted.

JOHN R. MONROE, ATTORNEY AT LAW

__/s/ John R. Monroe_____
John R. Monroe
Georgia State Bar No. 516193

9640 Coleman Road
Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318

ATTORNEY FOR PLAINTIFF

Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Memorandum of Law in Support of Plaintiff's Motion for Contempt was prepared using Courier New 12 point, a font and point selection approved in LR 5.1B.

_____/s/ John R. Monroe_____
John R. Monroe

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2008, I electronically filed the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION TO FILE OUT OF TIME AND IN REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CONTEMPT, together with accompanying documents, with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Patrick D. Jaugstetter, Esq.
Attorney for Defendant Kelley S. Powell
140 Henry Parkway
McDonough, GA 30253
Telephone (770) 898-7591
Facsimile (770) 898-7593
pjaugstetter@co.henry.ga.us