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 SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Plaintiff, Christopher Puckett, files this Memorandum of Law in Support of His Motion for Summary Judgment.

Summary

Plaintiff brought this action against Defendant for violations of the federal Privacy Act, Georgia firearm licensing law, the United States Constitution, and the Georgia Constitution. Defendant violated the statutory and constitutional authorities cited by failing to provide the warning required by the Privacy Act and failing to issue Plaintiff a Georgia Firearms License ("GFL") within the time required by law. Plaintiff seeks declaratory and injunctive relief for past and future violations, and attorneys fees and costs.

Background

With one exception, Defendant admits to the following facts. On September 25, 2006, Plaintiff applied for a renewal GFL at the Probate Court for Henry County, Georgia. Consent Order, ¶ 2[1]. Plaintiff applied through Defendant's employee, Lenora Harris-Land. Stipulation, ¶ 3. Harris-Land asked Plaintiff oral questions for his application, and entered Plaintiff's oral responses to the questions into an electronic version of the GFL application on her computer. Stipulation, ¶ 4. Among other questions, Harris-Land asked Plaintiff for his Social Security Account Number ("SSN"). Stipulation, ¶ 3. Harris-Land failed to provide Plaintiff written notice whether Plaintiff's disclosure of his SSN were mandatory or optional. Stipulation, ¶ 6. Harris-Land claims she remembers that back in September she orally stated to Plaintiff that providing his SSN was "optional." Stipulation, ¶ 5. Plaintiff insists she did

[1] This Memorandum of Law makes factual references to Doc. 31, a Consent Order Stipulating to Facts. Pursuant to that Order, the Parties have stipulated to certain facts, plus the record, to be used to support motions for summary judgment.

not. *Id.* This is the only fact disputed between the parties.[2] Harris-Land also failed to provide Plaintiff with information (orally or in writing) telling him by what statutory or other authority his SSN was requested and what uses would be made of it. Stipulation, ¶ 7. The federal Privacy Act requires provision of such notice. Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 2194, 5 U.S.C. § 552a(note).

Defendant issued Plaintiff his renewal GFL on January 8, 2007 (Stipulation, ¶ 13), 105 days after the date Plaintiff applied, and 45 days later than the 60 days required by Georgia law pursuant to O.C.G.A. § 16-11-129(d)(4) ("Not later than 60 days after the date of application . . .")

Plaintiff is seeking declaratory and injunctive relief to enforce the Privacy Act and the Georgia Firearms and Weapons Act. Plaintiff moves for summary judgment on all issues in his Amended Complaint except the federal constitutional isue, because there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.

Jurisdiction

[2] This fact is not material to the issues remaining in the case, as Plaintiff dropped the claim whose outcome hinges on the resolution of this factual issue.

This Court has jurisdiction over the case because the primary cause of action is a federal question, violations of the federal Privacy Act. 28 U.S.C. § 1331. Plaintiffs may sue under 42 U.S.C. § 1983 for violations of the Privacy Act. Schwier v. Cox, 340 F.3d 1284, 1292 (11th Cir. 2003). The Court has jurisdiction over the related state claims because they arise under a common nucleus of facts with the federal question. 28 U.S.C. § 1367.

Argument

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. Rules Civ. Proc. In the present case, there are no disputed issues of material fact, as Plaintiff and Defendant agree on what occurred. The issues raised by Defendants relate to matters of law only.

I. Violation of Section 7(b) of the Privacy Act

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." Defendant violated Section 7(b) of the Privacy Act by failing to inform Plaintiff:

1. Whether disclosure of his SSN was mandatory or optional;

2. By what statutory or other authority Plaintiff's SSN was solicited; and

3. What uses will be made of Plaintiff's SSN.

These three notices are required by federal law. The second two are not optional even if the government is requesting the SSN on a voluntary basis. Schwier v. Cox, 412 F.Supp. 2d 1266, 1275 (N.D. Ga. 2005).

Although the parties disagree over whether Defendant gave Plaintiff oral notice that the SSN was optional, the determination of that fact is not necessary to resolve this case, because all other facts are undisputed, even from Defendant's perspective.[3] Those facts establish a clear

[3] It also is undisputed that Defendant failed to give Plaintiff written notice whether the SSN was optional or mandatory. Although Plaintiff concedes the statute does not on its face require written notice, Plaintiff submits that written notice is preferable to oral notice, to avoid after-the-fact disputes such as the one before this Court.

violation of § 7(b). It is undisputed that Defendant failed to give any notice regarding the statutory authority for requesting Plaintiff's SSN and the uses that would be made of Plaintiff's SSN. A violation of a single provision would be sufficient for Plaintiff to prevail his claim under § 7(b). It is undisputed that Defendant violated 2 of the 3 provisions, and therefore Plaintiff must be awarded judgment as a matter of law on Count 1_of his Amended Complaint [Doc. 13].

II. Violations of State Law

Plaintiff is also entitled to summary judgment on Count 2 of his Amended Complaint, because it is undisputed that Defendant failed to issue Plaintiff's license within the statutory timeline. The process by which probate judges receive and process GFL applications is controlled by O.C.G.A. § 16-11-129, and Defendant failed to comply with this statute.

In order to analyze Defendant's failure to follow the state statute, it is necessary to understand the process for issuing GFLs. The statute directs probate judges to have applicants complete an application form and directs probate judges to request "an appropriate report" regarding criminal history checks be returned to the probate court by the local law enforcement agency capturing the applicant's fingerprints.

O.C.G.A. § 16-11-129(d)(1) and (2). The statute ***does not require that the probate judge ever receive a report at all,*** unless the local law enforcement agency discovers information that would render the applicant ineligible. See O.C.G.A. § 16-11-129(d)(4). Rather, the statute requires the probate judge to request that an "appropriate report" regarding certain background checks be returned to her by the local law enforcement agency, *see* O.C.G.A. § 16-11-129(d)(1) and (2), which has 50 days to perform the background checks, subsection 129(d)(4), but is not required to return any report to the judge unless the applicant is disqualified. Subsection 129(d)(4) provides, in pertinent part:

> When no derogatory information is found bearing on the applicant bearing on his or her eligibility to obtain a license or a renewal license, a report shall not be required.

Id. Instead, within 50 days the law enforcement agency is to return only "the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period [i.e., 50 days]." *Id*. Directly after this is the language that allows the judge only ten more days, for a total of 60 days, before she "shall issue" the license to

the applicant. *Id*. In the absence of any information, the probate judge is required to issue "[n]ot later than 60 days after the date of application . . ." Section 129(d)(4).[4]

Defendant admits that she did not have any disqualifying information indicating Plaintiff was ineligible for the license either at the 50 day mark or at the 60 day mark.

Of particular note is the legislature's use of the word "shall" in the emphasized portion of the statute shown above. The Supreme Court of Georgia has said repeatedly, "in its ordinary signification, 'shall' is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission." See, for example, *Termnet Merchant Services, Inc. vs. Phillips*, 277 Ga. 342, 344, 588 S.E.2d 745, 747 (2003). "'Shall' is generally construed as a

[4] U89-21 is an Attorney General opinion indicating that the firearms licensing statute does not permit the probate judge to exercise discretion to issue a license to an applicant, with one "sole exception" not relevant here, but must issue the license unless provided with information indicating the disqualification of the applicant.

word of mandatory import." *O'Donnell vs. Durham*, 275 Ga. 860, 861, 573 S.E.2d 23, 25 (2002).

There is nothing in the context of the statute that would lead one to infer that the legislature intended the word "shall" to be permissive. Indeed, the use of the word in the context of a time frame would lead to just the opposite conclusion. It would be useless surplusage for the legislature to tell Defendant that she is ***permitted*** to issue a GFL ***not later than*** 60 days of the application. Such a construction would turn the statute on its head and write the 60 day requirement completely out of the Code.

There is no hardship or penalty to Defendant in having to comply with the 60-day requirement. Defendant has not asserted a defense in her answer for her failure to comply with the statute.

II.C. Relief

In Section VIII of his Amended Complaint, Plaintiff seeks a declaratory judgment that the time provisions of O.C.G.A. § 16-11-129(d) are mandatory, and that applicants for GFLs not reported to be ineligible must be granted a GFL not later than 60 days after the date of application, as provided in O.C.G.A. §

16-11-129(d)(4). Plaintiff also seeks a permanent injunction, requiring Defendant to adhere to the requirements of O.C.G.A. § 16-11-129(d) for future applications and renewals, including Plaintiff's own renewal.

Declaratory judgments are authorized in O.C.G.A. § 9-4-2 and should be granted without regard to the existence or availability of other remedies. The "purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and the Act is to be liberally construed." *Georgia Casualty & Surety Co. vs. Turner*, 71 S.E.2d 773, 86 Ga. App. 418 (1952).

Under O.C.G.A. § 9-5-1:

> Equity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law.

There is no remedy at law for the wrong Plaintiff has suffered and likely will suffer again. ***Defendant admits that Plaintiff had a clear legal right to obtain a GFL***. Stipulation, ¶¶ 14-15, Amended Answer [Doc. 29], ¶¶ 26-28, 36-37. Denial of a clear legal right is a good and sufficient ground for an injunction to enforce that right.

III. Violations of Georgia Constitution

Defendant violated the Georgia Constitution, which states, "***The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne***." Georgia Constitution, Article I, Section I, ¶ VIII. Presumably, General Baker would agree that "bear" in the Georgia Constitution also means "to carry" as it does in the United States Constitution. Much of the foregoing discussion, therefore, on the Second Amendment to the U.S. Constitution applies here. The Georgia Constitution has an additional phrase, however, in that it empowers the General Assembly to regulate the ***manner*** in which arms are borne (i.e., carried). Significantly, the General Assembly is not empowered to ban the carrying of arms. The main method by which the State of Georgia has prescribed the manner in which arms may be borne is to regulate concealed carry, historically by banning it (allowing only open carry), and then by licensing it. Today, the General Assembly has prescribed the manner in which such arms may be borne by requiring a GFL to carry a firearm concealed or openly when outside of one's home, automobile, or place of business. See O.C.G.A. §§ 16-11-126 and 128.

The Georgia Supreme Court has held that the state may require a license to carry (i.e., a GFL) outside of one's home, car, or place of business without violating this state constitutional provision. Strickland v. State, 137 Ga. 1, 72 S.E. 260, 264 (1911). But, that power must be construed reasonably, so as not to "conflict with the Constitution." Id. at 265. Applying a licensing scheme so as to violate both federal and state law, such as Defendant has done in this case, cannot be held to be reasonable and constitutional.

V. Relief Requested

Plaintiff requested the following substantive relief:

1. A declaration that Defendant violated Section 7(b) of the Privacy Act.
2. A permanent injunction requiring Defendant to provide the warning in Section 7(b) of the Privacy Act, if she requests GFL applicants to provide SSNs.
3. An injunction requiring Defendant to expunge Plaintiff's SSN from her systems and records.
4. A declaration that Defendant violated
5. Article I, Section I, ¶ VIII of the Georgia Constitution.

6. A declaration that Defendant violated the Georgia Firearms and Weapons Act.

7. A permanent injunction ordering Defendant to issue GFLs to eligible applicants within 60 days of the date of application.

8. Attorneys fees and costs under 42 U.S.C. § 1988.

Items 1 and 2 -- Defendant has not even claimed that she complied with Section 7(b) of the Privacy Act. Plaintiff has proven in this case that Defendant violated this Section, and Defendant has not given any indication that she will not continue to do so. Future violations must be enjoined. Defendant could comply with an appropriate injunction simply by dropping the request for the SSN altogether or by including the warnings required by § 7(b) of the Privacy Act, if Defendant could locate a statutory or regulatory authority for soliciting the SSN disclosure. "The forms must also indicate under what authority – whether statutory or otherwise – such disclosure is sought. Finally, all uses contemplated for the SSNs must be disclosed." *Schwier v. Cox,* 412 F. Supp. 2d 1266, 1276 (2005).

Item 3 – Defendant's counsel advised Plaintiff's Counsel that Defendant already redacted Plaintiff's SSN from his application and other documents. Stipulation, ¶ 12. Curiously,

this contention is belied by the fact that Defendant filed Plaintiff's GFL application in this case [Doc. 15 Attachments], ***complete with Plaintiff's SSN***. Ironically, Plaintiff had to request recently that Defendant have that document sealed by the court. The fact that she filed with this Court information that she claimed no longer to have in her possession illustrates the lack of seriousness with which she takes this matter. The only way to ensure that Plaintiff's SSN really gets expunged from Defendant's records is to order her to do so. "[I]t is now *well-established* that an order for expungement of records is, in proper circumstances, a permissible remedy for an agency's violation of the Privacy Act." *Hobson v. Wilson,* 737 F.2d 1, 64 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084, 105 S.Ct. 1843 (1985) (emphasis added).

Items 4-6 – In parallel with the federal claim, Plaintiff has proven that Defendant violated the Georgia Firearms and Weapons Act, and that violation is appropriately declared. Moreover, Defendant should be enjoined against future similar violations.

Item 8 – 42 U.S.C. § 1988 provides for attorneys fees for a prevailing party. "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the

benefit the parties sought in bringing the suit,' the plaintiff has crossed the threshold to a fee award of some kind." Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 791, 109 S. Ct. 1486, 1493 (1989).

Plaintiff requests that the Court award attorneys fees and costs to him. Based on the Court's order on this Motion, Plaintiff will file supplemental documentation and evidence to support the amount of the fees and costs that should be awarded.

CONCLUSION

The resolution of Plaintiff's case is simple. He is merely asking Defendant to follow the federal and state laws applicable to his situation. There are no genuine issues of material fact because the operative facts are admitted. Plaintiff is entitled to judgment as a matter of law. His Motion for Summary Judgment should be granted and he should receive the relief requested in this Memorandum of Law.

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Local Rule 7.1D Certification

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

/s/ John R. Monroe
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