

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

GEORGIA CARRY.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
PARTIAL MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their undersigned counsel, and submit their Memorandum in Support of Defendants' Partial 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 property under the Fourth and Fourteenth Amendment. Further, Plaintiff Raissi alleges that Defendants violated his rights under the Privacy Act.

STATEMENT OF FACTS

On October 14, 2008 Defendant Nicholas, a MARTA Police officer, was patrolling on foot the South Parking area of the Avondale Train Station. Defendants' Response to Plaintiffs' First Discovery Requests, Interrogatory #9. Nicholas witnessed Plaintiff Raissi get out of his car, take a gun out of his car, put it in a holster in his back and then pull a shirt over it. Id. Nicholas, joined by Defendant Milton, also a MARTA Police officer, approached Raissi and asked him if he had a gun. Id. Nicholas asked Raissi for identification and his Georgia firearm license. Raissi presented a drivers license and his firearm license. Id. Nicholas also asked Raissi for his social security number, which Raissi readily provided. Defendants' Response to Plaintiffs' First Discovery Requests, Interrogatory #11. Neither officer specifically advised Raissi of whether the disclosure of the social security number was optional or mandatory, by what statutory or other authority they requested it, or what use would be made of the social security number. Id.; Defendants' Response to Plaintiffs' First Discovery Requests, Request for Admission #22.

MARTA is an entity established to build and operate a public transportation system in Atlanta and surrounding counties. G. Law. 1965, pp.2243 et seq. MARTA has the powers, privileges and immunities authorized by law for private corporations. Id. at p. 2253, § 8(a).

When checking to ensure that an individual with a gun has a valid firearm license, social security numbers were sometimes requested for the sole purpose of running a Georgia Crime Information Center (GCIC) check. Affidavit of Joseph Dorsey, par. 4. In March 2009, the MARTA Police Department ceased running GCIC checks when simply checking for valid firearm licenses. Id. at par.5. MARTA officers have been given instructions and training during roll call to stop the process of running a GCIC when checking for valid firearm licenses. Id. at par.6.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 mandates "the entry of summary judgment, after adequate time for discovery and 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...[I]n such a situation, there can be no genuine issue as to any material

fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 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. When the movant's burden is met, the non-moving party is then required to "go beyond the pleadings" and present evidence designating "specific facts showing there is a genuine issue for trial." Id. at 324.

ARGUMENT AND CITATION OF AUTHORITIES

This partial motion for summary judgment is only brought against Plaintiffs' Privacy Act cause of action.

I. SECTION 7 OF THE PRIVACY ACT DOES NOT APPLY TO MARTA BECAUSE MARTA IS NOT AN AGENCY UNDER THE ACT.

It is clear MARTA is not an "agency" under the definition of the Privacy Act. Section 7 of the Privacy Act of 1974 provides:

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether the disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

However, this section fails to provide a definition of "government agency". In fact, the only definition of "agency" is contained in 5 U.S.C. § 551, and was amended as follows:

For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e). This is actually the section regarding the Freedom of Information Act, but because the Privacy Act defines "agency" by cross-reference to 5 U.S.C. § 552(e), see 5 U.S.C. § 552a(a)(1), this definition also applies to the Privacy Act.¹ Therefore, the 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). Since the Eleventh Circuit has not specifically addressed the definition of "agency", other than to find that section 7 of the Privacy Act applies to

¹ Section 552a(a)(1) references 5 U.S.C. § 552(e), however after the 1986 renumbering of § 552 the definition for "agency" previously found in § 552(e) is now in § 552(f).

federal, state and local government agencies, Schwier v. Cox, 340 F.3d 1284, 1292(11th Cir. 2003), MARTA had to examine case law from other jurisdictions regarding the definition of government agency.

MARTA is not a "state" agency, nor a "state" authority. Johnson v. MARTA, 207 Ga. App. 869, 873 (1993). It is not a city, county "political subdivision" Richmond County Hospital Authority v. McCain, 112 Ga. App. 209, 210 (1965)(an Authority, which is an agency of one or more participating governmental units created by statute for a specific purpose, is not a political subdivision unless recited to be so in the pertinent Constitutional or statutory instruments creating it). The question for the court to determine is whether MARTA is a local government agency *under the Privacy Act*.

MARTA is an entity established to build and operate a public transportation system in Atlanta and surrounding counties. It is authorized by a local amendment to the State Constitution of 1945 that was adopted in 1964, Ga. L. 1964 p.1008, and remains in effect as part of the Constitution of 1983. Const. Art. XI, § 1, par. IV(d). This amendment applies in the counties of Fulton, DeKalb, Clayton, Gwinnett, and Cobb. In its session after this amendment was ratified, the General Assembly passed the

Metropolitan Atlanta Rapid Transit Authority Act of 1965. Ga. L. 1965, pp. 2243 et seq. This statute is MARTA's constituent document. It defines MARTA's nature and purpose, its powers and their limits, and its basic organization.

The Act "created a 'public body corporate' to be known as the Metropolitan Atlanta Rapid Transit Authority as a 'joint public instrumentality' of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinnett". Id. at p.2246 §4. Neither of these phrases is a legal term of art, the full meaning of which has been worked out in a body of case law. Their meaning, which each is presumed to have, City of Buchanan v. Pope, 222 Ga. App. 716, 717 (1996), must be taken from the common meanings of the words of which they consist. O.C.G.A. § 1-3-1(b). A corporate body is an abstraction created by law made up of other persons, that is treated for legal purposes as a person separate from those of whom it is made up. Its constituents may be natural persons or other legal abstractions; its rights and obligations are distinct from those of its constituents. To call it a "public" body corporate implies that it has been created for purposes of benefit to the public. An instrumentality is a means through which some purpose can be carried out. MARTA's

purpose is to build and operate a rapid transit system in the Atlanta metropolitan area. Ga. L. 1965 p. 2252, §7. Building and operating a transit system is considered a proprietary function, as distinguished from a governmental function. Bd. of Commrs. v. Chatham Advertisers, 258 Ga. 498, 499 (1988).

Based on the definition of agency in the Privacy Act, the question becomes whether MARTA is a "Government corporation" or "Government controlled corporation" under the Privacy Act. A local government corporation is generally considered a municipal corporation. O.C.G.A. §36-30-1 et. seq. Examining the general powers of MARTA, it has the powers, privileges and immunities authorized by law for private corporations and for instrumentalities of government. Ga. L. 1965 p. 53, § 8(a). Clearly, MARTA has not been given powers, privileges or immunities authorized by law for governments. Of further evidence that MARTA was not created to be a government corporation is the collective bargaining ability that it has. Georgia law prohibits local government entities from bargaining collectively with employees. MARTA can bargain with employees as if they were employees of privately owned transit. Local Division 732, Amalgamated Transit Union v. MARTA, 251 Ga. 15 (1983).

Even corporations that are defined as government corporations are not necessarily found to be government corporations under the Privacy Act. Amtrak is defined as a "mixed ownership Government corporation" and is subject to federal audit and reporting requirements. 31 U.S.C. § 9101(2)(A). It was still not found to be a Government corporation by the Fifth Circuit. Elm v. National Railroad Passenger Corp., 732 F.2d 1250, 1255 (5th Cir. 1984).

In determining whether an entity is a government controlled corporation, courts consider various factors including: performance of governmental functions by the entity; presence of substantial government control over the entity's day-to-day operations; authority of the entity to make and implement decisions; nature of the government's financial involvement with the entity; and the status of the entity's employees. See Forsham v. Harris, 445 U.S. 169, 180 (1980); Labor Executives' Ass'n v. Consol. Rail Corp., 580 F. Supp. 777, 778- 79 (D.D.C. 1984).

A. Performance of a Governmental Function

The MARTA Act makes it clear that the function of MARTA is to build and operate a rapid transit system in the Atlanta metropolitan area. Ga. L. 1965 p. 2252, §7. It is well settled in case law that such a function is considered a proprietary function, as distinguished from a

governmental function. Bd. of Commrs. v. Chatham Advertisers, 258 Ga. 498, 499 (1988). With the passing of the Act, it was expected that MARTA would take over the Atlanta Transit System, the private bus system in Atlanta, as in fact it did. Based on case law, it is clear that MARTA does not provide a governmental function.

B. Government Control Over MARTA's Day to Day Operations

In deciding whether MARTA is government controlled, cases place a great deal of weight on whether the government supervises or controls the everyday activities of the entity. See, Forsham, 445 U.S. at 178; (before characterizing an entity as federal the Court requires a threshold showing of substantial federal control or supervision of the activities). Irwin, 640 F.2d at 1056 (control must be "extensive, detailed and virtually day-to-day supervision" by the federal government). In Krebs v. Rutgers University, 797 F. Supp. 1246 (D.N.J. 1992), the court held that Rutgers University was not a governmental agency and that Rutgers was free to request social security numbers without complying with the provisions of § 7 of the Privacy Act. Id. at 1253. The Court reasoned that Rutgers was not a government agency because though it was in part a state created entity which served a state purpose with a large degree of state financing, it was an independent

entity able to direct its own actions. Id. at 1255. The court concluded that although there were many aspects of Rutgers' operations that touched and/or intersected with the State, the overall effect was an independent institution divorced from direct and day-to-day state control and not an agency subject to the provisions of § 7 of the Privacy Act. Id. Though MARTA is a state created entity and serves a public, however proprietary purpose, like the university in Krebs, 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. In fact, pursuant to the MARTA Act, MARTA only has to provide quarterly reports to the local governments on the operations of MARTA, and the appointed Board members only have to meet with the local government officials once a year to provide reports. Ga. L. 1988, p.5023, § 6(1). There must be evidence that the government controls MARTA's day-to-day operations to such an extent that it is being virtually operated by the government. 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 fact that many members of the Board of Directors for MARTA are appointed by local governments does not constitute government control. In discussing that all ten members of the board of directors for the Corporation for Public Broadcasting are presidentially appointed, the Fifth circuit recognized that for purposes of 5 U.S.C. § 552(e), the federal representation on the board was not contemplated to constitute government control. Elm, 732 F.2d at 1255.

C. MARTA's Authority to Make and Implement Decisions

The controlling standard is whether a unit has independent legal authority in the exercise of specific functions. Consol. Rail Corp., 580 F. Supp. at 779. While it is true that MARTA has independent authority over MARTA decisions, it does not have authority to make decisions for City of Atlanta, or any of the counties that have chosen to have MARTA transit. To have authority to make decisions means that alleged government controlled corporation has independent legal authority to make decisions for agency that allegedly controls it. Id. There are no allegations in the complaint that MARTA has any such authority over the City of Atlanta or any of the various counties included in the Act, and there is no factual basis for any such allegation. MARTA does not have legal authority to make

decisions for any of the local governmental agencies where it provides transit.

D. Government Financial Involvement With MARTA

It is well established that merely having a financial relationship with the government even if it includes government oversight and requires compliance with regulations, does not establish the degree of control necessary for an entity to be considered a government controlled corporation under the Privacy Act. See St. Michael's Convalescent Hosp. v. State of Cal., 643 F.2d 1369, 1373-74 (9th Cir. 1981). The Fifth Circuit court also found that financial accountability to the government does not constitute government control under the meaning of the Privacy Act. Elm, 732 F.2d at 1255. Other than contracts, or sale tax (which come from citizens, not governments) MARTA receives virtually no local government funds. Thus the government's financial involvement with MARTA does not make it a government controlled corporation.

In reviewing the relevant factors cumulatively, MARTA cannot be considered a government agency under the Privacy Act because it clearly lacks the attributes that have been considered significant in determining whether MARTA is a government controlled corporation under the Privacy Act. As such, summary judgment should be granted for Defendants.

E. MARTA Lacks Governmental Immunities

MARTA lacks the government immunities that federal, state and local governments enjoy. While acknowledging that it was not dispositive, the Court considered the fact that Rutgers was not entitled to Eleventh Amendment Immunity relevant to its determination of whether Rutgers qualified as a governmental agency under § 7 of the Privacy Act. Krebs, 797 F. Supp. at 1255. In addition, like Rutgers MARTA is not entitled to Eleventh Amendment immunity, nor is it entitled to state governmental immunity. Ga. L. 1965, p. 2253.

II. PLAINTIFFS' PRIVACY ACT CAUSE OF ACTION IS MOOT

Pursuant to Article III of the Constitution, federal courts only have jurisdiction over "cases" and "controversies." See Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1332 (11th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). "The doctrine of mootness derives directly from the case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" Al Najjar v. Ashcroft, 273 F.3d 1330, 1335. If a lawsuit is rendered moot by subsequent developments, it cannot present a live Article III case or controversy. Camp v. Cason, 220 Fed. Appx 976, 980 (2007). A case is moot when the issues presented are no longer live or the

parties lack a legally cognizable interest in the outcome. Mingkid v. U.S. Att'y Gen., 468 F.3d 763, 768 (11th Cir. 2006).

When checking to ensure that an individual with a gun has a valid firearm license, social security numbers were sometimes requested for the sole purpose of running a Georgia Crime Information Center (GCIC) check. Affidavit of Joseph Dorsey. The social security numbers were used in aiding in obtaining proper identification of the individual through the GCIC system. As Plaintiffs have expressed, a Defendant officer stated the social security number while running a GCIC check over the radio. Plaintiffs' Statement of Material Facts, par. 7.

In March 2009, the MARTA Police Department ceased performing GCIC checks when simply checking for valid firearm licenses. MARTA officers have been given instructions and training during roll call to stop performing GCIC checks when checking for valid firearm licenses. Therefore, MARTA officers are no longer requesting social security numbers during weapon checks. Plaintiffs' Privacy Act cause of action is no longer a live controversy over which this court has jurisdiction. Since it is moot, Defendants' Motion for Partial Summary Judgment should be granted.

CONCLUSION

MARTA is not a government agency, federal, state or local, which is subject to the provisions of § 7 of the Privacy Act, and Plaintiff is not entitled to relief. For all the reasons set forth above, Defendants respectfully request that this Court grant their motion for partial summary judgment and dismiss Plaintiffs' claim against them for Privacy Act violations.

This 27th day of July, 2009.

Respectfully Submitted,

/S/ Paula Morgan Nash
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Defendants)

CERTIFICATE OF FONT TYPE, SIZE AND SERVICE

I hereby certify that on July 27, 2009, I served Plaintiffs' counsel by e-filing "DEFENDANTS' PARTIAL MOTION TO FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF" 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:

John R. Monroe
Attorney at Law
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This 27th day of July, 2009

/s/ Paula Morgan Nash

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