

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

GEORGIACARRY.ORG, INC., <i>et. al.</i>)	
)	CIVIL ACTION FILE NO.
v.)	
)	1:09-CV-594-TWT
METROPOLITAN ATLANTA)	
RAPID TRANSIT AUTHORITY, <i>et. al.</i>)	
)	
Defendants)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION *IN LIMINE***

Plaintiffs move for an order *in limine* to prevent Defendants from introducing evidence of their actions in their encounter with Plaintiff Raissi on October 14, 2008. The basis for this Motion is that Defendants have spoliated evidence, and Plaintiffs seek the order *in limine* as a sanction for such spoliation.

Background

Defendants Nicholas and Milton are two MARTA police officers who detained Plaintiff Raissi at the Avondale MARTA train station to see if he had a Georgia firearms license (“GFL”). Deposition of Malcolm Nicholas, p. 44; Deposition of Terry Milton, p. 30. The parties dispute certain aspects of that detention, including how long it lasted, whether Nicholas forcibly seized Raissi’s firearm, and whether the officers’ actions amounted to a non-consensual encounter.

Defendants had in place at the Avondale station on the day of the incident a video surveillance system. Doc. 16-3, p. 11. Although no one is known to have seen a video recording of the incident, Defendants believe, based on their knowledge of their system and of the location of the incident, that the incident was recorded. *Id.*

Two days after the incident, on October 16, 2008, Raissi sent Defendants an open records request via certified letter, asking for “all files, records, and other documents in your possession that refer, reflect, or relate to the 14 October 2008 detention of Christopher Hesam Raissi in the Avondale Marta station at approximately 2: 00 pm that afternoon.” Doc. 16-2, p. 4. Defendants acknowledge receiving Raissi’s letter, but they never responded to it. Doc. 3, p. 6, ¶ 24; Doc. 16-2, p. 2.

Defendants’ video recording system automatically deletes recordings 30 days after they are made, if they are not saved by human intervention. Doc. 16-3, p. 11. Defendants did not save the video recording of their encounter with Raissi, so it is believed to have been deleted on or about November 13, 2008. *Id.*

Argument

I. Defendants Spoliated the Video Recording

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009), *citing West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999).

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation – most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.

Griffin v. GMAC Commercial Financing, Inc., 2007 U.S. Dist. LEXIS 10504, 8 (N.D. Ga 2007), *citing Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998).

Absent some exemption from the Georgia Open Records Act, O.C.G.A. § 50-18-70, *et. seq.* (“ORA”) (and Defendants have not claimed any such exemption), receipt of Raissi’s letter created an affirmative legal obligation under the ORA for Defendants to produce the records sought.¹ One cannot reasonably

¹ Plaintiffs note that Defendants have filed a Motion to Dismiss [Doc. 10] Plaintiffs’ ORA count against Defendants. As Plaintiffs noted on p. 5 of their

argue that the video recording would be included in the description of the records sought. Defendants' failure to respond to Raissi's request and subsequent destruction of the video recording resulted in the destruction of evidence that Defendants were legally obligated to preserve.

Defendants also should have inferred that Raissi's request indicated a likelihood of litigation. *Baxley v. Hakiel Industries, Inc.* 282 Ga. 312 (2007) (Bar manager should have known that a video surveillance tape would be evidence in litigation, and should have known that litigation was likely after an accident occurred). Defendants' internal affairs commander made an internal investigation of what records were available, prior to the expiration of the 30-day window, yet still the video was deleted. Doc. 16-2, p. 2.

In addition, a party that destroys evidence in violation of a state statute requiring preservation of that evidence is *per se* guilty of spoliation. *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 525 (1997) (Elevator company guilty of spoliation when it repaired elevator after an accident, when such repair was in violation of state elevator inspection laws). There is no reason to treat an evidence preservation/production requirement under the Open Records Act any differently.

Brief opposing Defendants' Motion [Doc. 11], Plaintiff Raissi's open records request would become a factor in a spoliation claim.

II. Sanction for Spoliation is Appropriate

Once spoliation is found to have occurred, the court must determine if a sanction is appropriate. Factors to consider are 1) whether plaintiff was prejudiced as a result of the destruction of evidence; 2) whether the prejudice can be cured; 3) the practical importance of the evidence; 4) whether defendant acted in good or bad faith; and 5) the potential for abuse if expert testimony about the evidence provided by the spoliator were not excluded. *Griffin*, 2007 U.S. Dist. LEXIS 10504, 9, *citing Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005). With regard to the fourth factor, the law does not require a showing of malice in order to find bad faith. The court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party. *Id.*

Plaintiff was prejudiced in the instant case. He has no evidence other than his own testimony about what the officers did and how they acted towards him. The video recording would show exactly what the officers did, thus potentially corroborating Raissi's testimony. The prejudice cannot be cured. There are no known witnesses to the event other than the parties to the case.

The video recording could be quite important. Given that the parties have a dispute over whether the encounter was consensual, the video recording could have resolved this issue. For example, Raissi contends that Sgt. Nicholas forcibly seized

Raissi's firearm, which Defendants deny. The video recording would be expected to have shown the seizure of the firearm. The use of force would be an indication that the encounter was not consensual and therefore was a "seizure" for Fourth Amendment purposes.

While Plaintiffs do not contend that Defendants acted with malice when they destroyed the video recording, Defendants did act in bad faith. As noted above, they had an affirmative legal obligation to preserve and make available to Raissi the video recording. Their failure to fulfill this legal duty indicates their culpability. When weighed against the great prejudice to Plaintiffs, this culpability indicates bad faith for the purposes of spoliation analysis.

Finally, the fifth factor relates to the use of expert evidence by the spoliator. The court in *Griffin* disregarded this factor where, as in the instant case, the case did not involve the use of experts by the spoliator. 2007 U.S. Dist. LEXIS 10504, 9, FN 3.

Remedy Sought

Potential remedies in a spoliation case are judgment against the spoliator, exclusion of testimony, or a jury instruction that the spoliation raises a presumption against the spoliator. *Id.* Plaintiffs acknowledge that judgment against Defendants for the spoliation would be too harsh a remedy in the instant case. Likewise, a jury

CERTIFICATE OF SERVICE

I certify that on August 12, 2009, I filed the foregoing using the ECF system, which automatically will email a copy to:

Ms. Paula M. Nash
pmnash@itsmarta.com

/s/ John R. Monroe
John R. Monroe