



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**September 26, 2017 Government Records Council Meeting**

Shawn Hopkins  
Complainant

Complaint No. 2014-04

v.

Township of Aberdeen (Monmouth)  
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of September, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 29, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
September 26, 2017 Council Meeting**

**Shawn G. Hopkins<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-04**

v.

**Township of Aberdeen (Monmouth)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Aberdeen (“Township”), including property pictures.

**Custodian of Record:** Karen Ventura  
**Request Received by Custodian:** December 27, 2013  
**Response Made by Custodian:** December 31, 2013  
**GRC Complaint Received:** January 9, 2014

**Background**

August 29, 2017 Council Meeting:

At its August 29, 2017 public meeting, the Council considered the August 22, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Mr. Kineavy complied with the Council’s July 25, 2017 Interim Order because he responded in the prescribed time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian and Mr. Kineavy unlawfully denied access to responsive CAMA data and photographs. However, Mr. Kineavy, as the custodian of record for the Township’s CAMA data and photographs, complied with the Council’s July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Kineavy’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor

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<sup>1</sup> Represented by Richard Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by Daniel J. McCarthy, Esq., of Rogut, McCarthy, LLC (Cranford, NJ).

Mr. Kineavy's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. In accordance with the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Mr. Kineavy disclosed the responsive CAMA data and photos to the Complainant as a result of this complaint. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On August 30, 2017, the Council distributed its Interim Order to all parties. On September 11, 2017, Complainant's Counsel sent an e-mail to the Government Records Council ("GRC"), confirming that the parties reached a fee agreement.

#### Analysis

##### Prevailing Party Attorney's Fees

At its August 29, 2017 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On August 30, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on September 28, 2017. On September 11, 2017, Complainant's Counsel confirmed via e-mail that the parties reached a fee agreement.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a

fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

September 19, 2017



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
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INTERIM ORDER

August 29, 2017 Government Records Council Meeting

Shawn G. Hopkins  
Complainant

Complaint No. 2014-04

v.

Township of Aberdeen (Monmouth)  
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Mr. Kineavy complied with the Council’s July 25, 2017 Interim Order because he responded in the prescribed time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian and Mr. Kineavy unlawfully denied access to responsive CAMA data and photographs. However, Mr. Kineavy, as the custodian of record for the Township’s CAMA data and photographs, complied with the Council’s July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Kineavy’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor Mr. Kineavy’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. In accordance with the Council’s July 25, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Mr. Kineavy disclosed the responsive CAMA data and photos to the Complainant as a result of this complaint. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business**



**days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of August, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 29, 2017 Council Meeting**

**Shawn G. Hopkins<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-04**

v.

**Township of Aberdeen (Monmouth)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Aberdeen (“Township”), including property pictures.

**Custodian of Record:** Karen Ventura

**Request Received by Custodian:** December 27, 2013

**Response Made by Custodian:** December 31, 2013

**GRC Complaint Received:** January 9, 2014

**Background**

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also Paff v. Twp. of Galloway*, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Thus, the Custodian must disclose the responsive CAMA data to the Complainant.
  
2. The Custodian unlawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive photographs to the Complainant by his preferred method of delivery.

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<sup>1</sup> Represented by Richard Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by Daniel J. McCarthy, Esq., of Rogut McCarthy, LLC (Cranford, NJ).

3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
4. The Council defers analysis of whether the Custodian and/or Mr. Kineavy knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 27, 2017, the Council distributed its Interim Order to all parties. On the same day, Mr. Kineavy e-mailed the Government Records Council ("GRC"), stating that he sent all data and pictures to the Complainant on July 18, and July 27, 2017, respectively. On the same day, the Complainant's Counsel responded, stating that Mr. Kineavy actually sent the data to the Complainant via e-mail on July 19, 2017. On July 28, 2017, the GRC confirmed receipt of all communications showing that the Complainant received the responsive records. However, the GRC reminded the parties that the Custodian was still required to submit certified confirmation of compliance to the Executive Director in order to satisfy compliance fully. On July 31, 2017, the Complainant e-mailed the GRC, confirming that he received all responsive records.

On August 1, 2017, Mr. Kineavy responded to the Council's Interim Order. Therein, Mr. Kineavy certified that he was the custodian of record for the responsive CAMA data and photographs. Mr. Kineavy certified that he initially denied the OPRA request in December 2013. Mr. Kineavy affirmed that, after receiving the GRC's meeting notice on July 18, 2017, he provided the responsive CAMA data to the Complainant (and Complainant's Counsel) via e-mail. Mr. Kineavy certified that he received the Council's Interim Order on July 27, 2017, at which point it became apparent that no one notified the GRC that records were disclosed.

Mr. Kineavy also certified that he had attempted to provide the photographs to the Complainant prior to receipt of the Interim Order, but a technological issue delayed disclosure. Mr. Kineavy affirmed that he sent a flash drive containing the photographs to the Complainant on July 27, 2017. Mr. Kineavy certified that the Complainant via e-mail confirmed receipt of the flash drive on July 31, 2017.

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<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

## Analysis

### Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 27, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 3, 2017.

On the same day as receipt of the Order, Mr. Kineavy notified the GRC that he provided all responsive records to the Complainant on July 18, and July 27, 2017, respectively. Thereafter, on August 1, 2017, Mr. Kineavy provided certified confirmation of compliance to the Executive Director, noting that he was the custodian of record for CAMA data and photographs. Based on the foregoing, the GRC finds that the Township complied with the Council's Order.

Therefore, Mr. Kineavy complied with the Council's July 25, 2017 Interim Order because he responded in the prescribed time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.

### Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian and Mr. Kineavy unlawfully denied access to responsive CAMA data and photographs. However, Mr. Kineavy, as the custodian of record for the Township's CAMA data and photographs, complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Kineavy's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Kineavy's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In the matter before the Council, the Complainant filed the instant complaint to dispute the Township’s denial of access to CAMA data and photographs. In the Statement of Information, the Custodian contended that the Complainant’s OPRA request required her to compile information and create a new record. The Custodian argued that OPRA did not require her to perform such an action. The Council disagreed, reasoning that the OPRA request only required the Custodian to utilize a few commands to run a report from a database. Further, the Council determined that the Custodian should have disclosed the responsive photographs.

Thus, in its July 25, 2017 Interim Order, the Council required disclosure of the responsive CAMA data and photographs. Mr. Kineavy, identifying himself as the custodian of record for the responsive data, fully complied with the Council’s Order on August 1, 2017, by way of certified confirmation of compliance affirming he disclosed the responsive CAMA data and photographs to the Complainant on or about July 18, and July 27, 2017, respectively. Based

on the foregoing, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney's fees.

Thus, in accordance with the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, Mr. Kineavy disclosed the responsive CAMA data and photos to the Complainant as a result of this complaint. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Mr. Kineavy complied with the Council's July 25, 2017 Interim Order because he responded in the prescribed time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian and Mr. Kineavy unlawfully denied access to responsive CAMA data and photographs. However, Mr. Kineavy, as the custodian of record for the Township's CAMA data and photographs, complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Kineavy's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Kineavy's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. In accordance with the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Mr. Kineavy disclosed the responsive CAMA data and photos to the Complainant as a result of this complaint. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of**

**reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

August 22, 2017



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INTERIM ORDER

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At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Thus, the Custodian must disclose the responsive CAMA data to the Complainant.
2. The Custodian unlawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive photographs to the Complainant by his preferred method of delivery.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. The Council defers analysis of whether the Custodian and/or Mr. Kineavy knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of July, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 27, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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July 25, 2017 Council Meeting**

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Complainant**

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**Township of Aberdeen (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Aberdeen (“Township”), including property pictures.

**Custodian of Record:** Karen Ventura  
**Request Received by Custodian:** December 27, 2013  
**Response Made by Custodian:** December 31, 2013  
**GRC Complaint Received:** January 9, 2014

**Background<sup>3</sup>**

**Request and Response:**

On December 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 31, 2013, Tax Assessor Scott Kineavy responded in writing on behalf the Custodian, advising that, based on Custodian Counsel’s advice, the Complainant’s request was invalid because it failed to identify a government record. Further, Mr. Kineavy stated that the Township could not create a record that did not exist.

**Denial of Access Complaint:**

On January 9, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested CAMA data from the Monmouth County (“County”) Tax Board on December 18, 2013.<sup>4</sup> The

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<sup>1</sup> Represented by Richard Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by Daniel J. McCarthy, Esq., of Rogut McCarthy, LLC (Cranford, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> This request was the subject of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.*

Complainant stated that the County advised him to request the data individually from each municipality. The Complainant disputed the Township's denial of access.

The Complainant argued that the requested CAMA data has been stored in a database that the County has paid for and maintained since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the County unlawfully denied access to the requested data because:

- The County funds, maintains, and operates the software program under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled "Monmouth Assessment Demonstration Program," requires<sup>5</sup> all municipalities within the County to utilize the MODIV/CAMA program, and there is a retention schedule for property record cards ("PRC").
- Revaluation contracts require firms to deliver PRCs to the municipality, who utilize them to make the data files.
- The Tax Assessor's handbook refers to permanent PRCs and information that should be contained within an assessor's files.

#### Statement of Information:

On February 4, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 27, 2013, upon her return to the office. The Custodian certified that her search included locating approximately 7,000 pages of pictures in the CAMA database. The Custodian certified that Mr. Kineavy responded in writing on her behalf on December 31, 2013, denying the OPRA request as invalid.

The Custodian argued that the Complainant's request did not identify a particular record; rather, it required the Township to compile information and create a new record. The Custodian contended that the Township was not required to perform such a task under OPRA. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Fang v. NJ Dep't of Transp., GRC Complaint No. 2006-93 (May 2007). The Custodian noted that the Township could, however, print the 7,000 pages of pictures.

#### Additional Submissions:

On July 26, 2014, Complainant's Counsel submitted a letter brief, disputing the Township's position that the Complainant's request was invalid. Counsel contended that the Township maintains CAMA data through the Monmouth Assessment Demonstration program based on a shared services agreement with the County. Counsel contended that, when applying

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<sup>5</sup> On January 10, 2011, the Senate passed S-2234 (Sca) 1R by a vote of 39-0. On that same date, the bill was received in the Assembly and referred to the Assembly Housing and Local Government Committee. Neither S-2234 nor its Assembly counterpart, A-3227, saw any further action in the Assembly during the 2010-2011 legislative session. The Complainant might instead be referring to S-1213, which Governor Christie signed into law as L. 2013, c. 15, on January 25, 2013.

Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012), the Custodian was obligated to obtain and disclose the responsive information. *See also* Burnett v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010).

Additionally, Counsel argued that the Complainant identified an existing data folder; thus, the Township would not be required to create a new file. Further, Counsel noted that the definition of a “government record” under OPRA includes “data processed” documents and “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1. Counsel argued that copying of a database folder or file amounts to searching for and not creating records.

Finally, Counsel contended that the Township unlawfully denied access to the pictures on basis that the Complainant could obtain them from another source. Counsel argued that such a basis for denial is not a legitimate.

### **Analysis**

#### **Validity of Request**

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” *Id.* at 549 (emphasis added). *Bent*, 381 N.J. Super. at 37;<sup>6</sup> *NJ Builders Assoc. v. NJ Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

Most recently, in *Paff v. Twp. of Galloway*, 2017 N.J. LEXIS 680 (2017), the Supreme Court determined that an agency’s electronically stored information is a “government record” under OPRA, unless otherwise exempt. The Court accepted plaintiff’s appeal from the Appellate Division’s decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court had reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division’s statement that “OPRA only allows requests for records, not requests for information.” *Paff*, 444 N.J. Super. at 503, (*quoting* [*Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA’s plain language or its objectives in dealing with electronically stored information.

*Id.* at 24, 28.

Moreover, in *Fang v. Dep’t of Transp.*, GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records might contain. The custodian certified that no records existed that contained a compilation of the information specified by the complainant in the request. The Council, relying upon the Court’s decision in *MAG*, 375 N.J. Super. 534, held that “[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. *See* [*MAG*].” *Id.* at 11.

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<sup>6</sup> Affirming *Bent v. Stafford Police Dep’t*, GRC Case No. 2004-78 (October 2004).

Conversely, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record in order to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

The Council first noted that the definition of a "government record" included "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

The Morgano decision refers to compiling certain disclosable information from a paper record and listing or creating another paper record responsive to a request. However, in terms of certain electronic filing systems, *general querying of information cannot be viewed as equal to creating a new paper record*. While information stored electronically may include additional pieces of information/fields, many programs have the capability to extract requested information/fields for disclosure . . . Further, querying electronic file systems for responsive information is not unlike searching an e-mail account for e-mails responsive to an OPRA request.

Id. at 12 (emphasis added).

In this matter, Mr. Kineavy initially denied the Complainant's OPRA request on the basis that the Township was not required to create a record. In response to the Complainant's Denial of Access Complaint, the Custodian argued that it properly denied the request because same was invalid. The Custodian contended that the Township was not required to compile information and create a new record. Bent, 381 N.J. Super. at 37; Fang, GRC 2006-93. In his July 26, 2014, letter brief, Complainant's Counsel refuted the Township's position, stating that the Custodian was merely required to retrieve a file or folder from a database.

Initially, the GRC notes that the evidence of record here supports that CAMA data exists within a database system provided to the Township as part of a shared services agreement with the County. For this reason, the GRC is satisfied that the requested CAMA data falls under the definition of a "government record" as "information stored or maintained electronically" in a database. Thus, the threshold issue before the Council is whether the Complainant's request (excluding the 7,000 photographs located in paper form) was invalid because it failed to identify a specific record and would have required the Township to create a new record.

In determining whether the Complainant's request seeking CAMA data was invalid, the Council distinguishes the instant complaint from Fang. Specifically, the requests at issue there

sought general records inclusive of certain personnel information. However, the complaint here more closely fits on the square with Zahler, GRC 2013-266, notwithstanding that it was decided during the pendency of the instant complaint. The Court's decision in Paff, 2017 N.J. LEXIS 680, although decided after the pendency of this complaint, is binding here. Specifically, the Complainant identified a specific type of record, CAMA data, which was accessible from a database by utilizing a few simple commands. The GRC notes that the Complainant included instructions that the Custodian and/or Mr. Kineavy could utilize to extract the responsive compressed file from the database. As was the case in Zahler, the Custodian was not required to create a record; rather, she was required to extract the CAMA data from a database. A similar type of compilation was also contemplated in Paff. *See also* McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler, GRC 2013-266. *See also* Paff, 2017 N.J. LEXIS 680; McBride, GRC 2014-54. Thus, the Custodian must disclose the responsive CAMA data to the Complainant.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Regarding the responsive photographs, the Custodian certified in the SOI that she identified approximately 7,000 records that she could print from a database. The Custodian did not argue that any of the photographs were exempt or that this portion of the request was invalid. However, the evidence of record does not support that the Custodian ever disclosed any responsive photographs to the Complainant in paper format, let alone by his preferred method of delivery (e-mail).

Accordingly, the Custodian unlawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive photographs to the Complainant by his preferred method of delivery.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian and/or Mr. Kineavy knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Thus, the Custodian must disclose the responsive CAMA data to the Complainant.
2. The Custodian unlawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive photographs to the Complainant by his preferred method of delivery.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. The Council defers analysis of whether the Custodian and/or Mr. Kineavy knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

July 18, 2017

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.