



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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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. 2014-12

v.

Borough of Allenhurst (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:

1. The current Custodian complied with the Council’s July 25, 2017 Interim Order because, on her behalf, Mr. Barnett responded in the prescribed time frame by providing CAMA data to the Complainant. Further, the current Custodian certified, and the evidence of record shows, that no photographs existed. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond timely resulted in a “deemed” denial of the subject OPRA request. Further, the Custodian unlawfully denied access to the responsive CAMA data. However, the Custodian did not unlawfully deny access to the requested photographs because none existed. Further, the current Custodian timely complied with the Council’s Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 26th 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**

**Supplemental Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-12

v.

**Borough of Allenhurst (Monmouth)²
Custodial Agency**

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

Custodian of Record: Lori Osborn³
Request Received by Custodian: December 23, 2013
Response Made by Custodian: None
GRC Complaint Received: January 14, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹ No legal representation listed on record.

² Represented by David A. Laughlin, Esq., of Birdsall & Laughlin, LLC (Wall, NJ).

³ The current Custodian of Record is Donna Campagna, who was named to the Acting Clerk position following Ms. Osborn’s retirement.

2. The Custodian unlawfully denied access the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge's Final Decision supports that the Custodian was required to disclose the responsive CAMA data, and the Custodian provided no lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). The Custodian must thus disclose all responsive records to the Complainant, where applicable. Should no photographs exist, then the Custodian must certify to that fact.
3. **The Custodian shall comply with conclusion No. 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 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian 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.

Procedural History:

On July 27, 2017, the Council distributed its Interim Order to all parties. On the same day, Tax Assessor Peter Barnett sent the Complainant CAMA data via e-mail. Also on the same day, Custodian's Counsel sent the current Custodian's response to the Interim Order to the Complainant via e-mail.⁶ Therein, the current Custodian certified that, upon receiving the Order, she contacted Counsel to facilitate compliance. The current Custodian certified that she contacted Mr. Barnett to obtain CAMA data from Microsystems-NJ.com, LLC ("Microsystems"), because she did not have access to their software. The current Custodian affirmed that Mr. Barnett secured the data and e-mailed it to the Complainant. The current Custodian also affirmed that it is her understanding that no photographs existed. The current Custodian also questioned whether she was technically the "Custodian of Record" for CAMA data due to her lack of access to the software and lack of knowledge on "MODIV/CAMA" providers.

On July 28, 2017, the Complainant e-mailed Mr. Barnett, stating that the CAMA data was current; his OPRA request sought CAMA data from December 2013. The Complainant also noted that his request sought photographs. Subsequently, the Complainant e-mailed Custodian's

⁴ "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."

⁵ 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.

⁶ Custodian's Counsel noted in his cover letter that he sent the Order response to the Complainant via e-mail only because Counsel did not possess a home address for him.

Counsel, providing an excerpt on the definition of a “Custodian of Record” from the Government Records Council’s (“GRC”) website. The Complainant questioned how the current Custodian could assert that she was not the “Custodian of Record” based on the definition. Notwithstanding, the Complainant noted that he alerted Mr. Barnett that the disclosed CAMA data was not correct. The Complainant also noted that the Borough has not advised whether any photographs exist.

Later in the day, Custodian’s Counsel e-mailed the Complainant, stating that the Borough was making every attempt to comply with the Council’s Order. Counsel also asserted that neither the Custodian nor the current Custodian was ever designated as the “Custodian of Record” for CAMA data. Counsel specifically asserted that the Borough did not contract with Microsystems and did not have their software on the Borough’s computers. Notwithstanding, Counsel stated that the Borough was committed to complying with the Council’s Order and would reach out to Microsystems to obtain the correct CAMA data. Counsel also noted that no photographs exist.

On July 31, 2017, Mr. Barnett e-mailed the Complainant, asking him to confirm that he sought CAMA data and photographs for 2013. Mr. Barnett stated that he would contact Microsystems and attempt to obtain the 2013 CAMA data. Further, Mr. Barnett stated that he may possess a photograph CD from the last revaluation and would search for it in his Borough office when there. On the same day, the Complainant responded via e-mail, confirming that he sought 2013 CAMA data and photographs. Later that day, Mr. Barnett e-mailed the Complainant, advising that he would reach out to Microsystems.

On August 2, 2017, Mr. Barnett e-mailed the responsive CAMA data to the Complainant. Also on the same day, Custodian’s Counsel e-mailed the Complainant, stating that the Borough confirmed with Microsystems that no photographs exist.

On August 3, 2017, the GRC received the current Custodian’s July 27, 2017 response to the Council’s Interim Order via U.S. mail.

On September 15, 2017, the Complainant e-mailed the GRC, advising that he received the responsive CAMA data; however, it is still unclear whether photographs exist. The Complainant noted that Mr. Barnett was supposed to advise whether he located a CD from the last revaluation. The Complainant stated that he received no follow-up communications. On September 18, 2017, Custodian’s Counsel e-mailed the parties, advising that Mr. Barnett confirmed that he did not locate any pictures. Counsel noted that this is consistent with the current Custodian’s certification and Microsystems’ confirmation. Counsel stated that the Borough has complied because the Complainant received the responsive CAMA data and no photographs exist.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose all responsive CAMA data to the Complainant and to certify whether any responsive photographs existed. The

Council also ordered the Custodian 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 July 27, 2017, Mr. Barnett e-mailed CAMA data to the Complainant. The current Custodian also executed certified confirmation of compliance to the Executive Director and sent same via U.S. mail. Therein, the current Custodian certified that the Borough provided responsive CAMA data to the Complainant and no photographs existed. On July 28, 2017, the Complainant advised that the CAMA data provided was not responsive to his OPRA request. Over the ensuing four (4) business days, the parties communicated in order to fulfill compliance. Ultimately, on August 3, 2017, the fifth (5th) business day after receipt of the Council's Order, Mr. Barnett provided the correct CAMA data to the Complainant and Custodian's Counsel confirmed that no photographs existed.

Therefore, the current Custodian complied with the Council's July 25, 2017 Interim Order because, on her behalf, Mr. Barnett responded in the prescribed time frame by providing CAMA data to the Complainant. Further, the current Custodian certified, and the evidence of record shows, that no photographs existed. Finally, the current Custodian simultaneously provided 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)).

In the matter currently before the Council, the Custodian's failure to respond timely resulted in a "deemed" denial of the subject OPRA request. Further, the Custodian unlawfully denied access to the responsive CAMA data. However, the Custodian did not unlawfully deny access to the requested photographs because none existed. Further, the current Custodian timely complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's July 25, 2017 Interim Order because, on her behalf, Mr. Barnett responded in the prescribed time frame by providing CAMA data to the Complainant. Further, the current Custodian certified, and the evidence of record shows, that no photographs existed. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond timely resulted in a "deemed" denial of the subject OPRA request. Further, the Custodian unlawfully denied access to the responsive CAMA data. However, the Custodian did not unlawfully deny access to the requested photographs because none existed. Further, the current Custodian timely complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

September 19, 2017



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-12

v.

Borough of Allenhurst (Monmouth)
Custodian of Record

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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that the Custodian was required to disclose the responsive CAMA data, and the Custodian provided no lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). The Custodian must thus disclose all responsive records to the Complainant, where applicable. Should no photographs exist, then the Custodian must certify to that fact.
3. **The Custodian shall comply with conclusion No. 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 1:4-4,¹ to the Executive Director.²

4. The Council defers analysis of whether the Custodian 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.

Interim Order Rendered by the
Government Records Council
On The 25th 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

¹ "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."

² 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-12

v.

**Borough of Allenhurst (Monmouth)²
Custodial Agency**

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

Custodian of Record: Lori Osborn
Request Received by Custodian: December 23, 2013
Response Made by Custodian: None.
GRC Complaint Received: January 14, 2014

Background³

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. The Custodian did not respond to the OPRA request.

Denial of Access Complaint:

On January 14, 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 (“the County”) Tax Board on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality. The Complainant asserted that the Borough failed to respond to his OPRA request.

¹ No legal representation listed on record.

² Represented by David A. Laughlin, Esq., of Birdsall & Laughlin, LLC (Wall, NJ).

³ 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.

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

The Complainant argued that the requested CAMA data has been stored in a database that has been paid for and maintained by the County 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 Borough unlawfully denied access to the requested data because:

- Six municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C., as their MODIV/CAMA vendor.
- The software program is funded, maintained, and operated by the County under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires⁵ 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, which utilizes 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 23, 2013. The Custodian certified that she did not respond to the OPRA request based on the pending request submitted to the County.

The Custodian asserted that she believed the request sought electronic records maintained by the Borough Tax Assessor. The Custodian contended that she was not denying access; rather, she was waiting for a determination on Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.*, to provide adequate guidance on whether to disclose the responsive CAMA data and to what extent. The Custodian asserted that the Council should therefore not consider her failure to respond a denial of access.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id.

⁵ 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.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOI that she received the Complainant's OPRA request on December 23, 2013. The Custodian further certified that she did not respond to the Complainant's OPRA request because of a pending request submitted to the County. However, the Custodian had an obligation to respond in accordance with N.J.S.A. 47:1A-5(i). More specifically, the Custodian could have sought an extension of time until a date certain if she believed one was required.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

In Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014), the custodian denied access to the subject OPRA request, arguing that it was the subject of Paff v. City of Union City (Union), GRC Complaint No. 2012-262 (August 2013). The Council initially noted that pending litigation was not a lawful basis to deny access to a record (*citing* Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011)). The Council then took judicial notice of the facts in Paff, GRC 2012-262, and determined that the custodian unlawfully denied access to the responsive record. Paff, GRC 2013-195 at 3-4.

Notwithstanding the Custodian's failure to respond to the request, she argued in the SOI that she was waiting for the Council to render a decision in Hopkins. The GRC thus looks to the Council's decision in Paff, GRC 2013-195, as a reasonable approach to the instant complaint.

⁶ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), an agency or judge may take official notice of judicially noticeable facts (as explained in the New Jersey Rules of Evidence at N.J.R.E. 201) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974). The Council's decision here must take into account the Final Decision of the Honorable Kimberly A. Moss, Administrative Law Judge ("ALJ"), in Hopkins, GRC 2014-01, *et seq.* (Interim Order dated July 26, 2016), because the ALJ held that CAMA data is a "government record" that is subject to access under OPRA.⁷ Further, the ALJ held that "CAMA data . . . are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter." Id. at 18.

As a threshold issue, the Custodian violated OPRA when she withheld her response and disclosure of any records based on the Council's pending adjudication of Hopkins. Additionally, having received a decision in Hopkins, the GRC finds that the Custodian unlawfully denied access to the responsive records. Specifically, the ALJ considered the responsive CAMA data a "government record" not otherwise exempt under OPRA. Regarding the requested property photographs, the Custodian did not address them in the SOI. The GRC finds that the Custodian may have unlawfully denied access to these records, absent any arguments as to their existence or applicable exemptions.

Accordingly, the Custodian unlawfully denied access the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195. Additionally, the ALJ's Final Decision supports that the Custodian was required to disclose the responsive CAMA data, and the Custodian provided no lawful basis for denying access to the responsive property photographs if they exist. Hopkins, GRC 2014-01, *et seq.* The Custodian must therefore disclose all responsive records to the Complainant, where applicable. Should no photographs exist, then the Custodian must certify to that fact.

Finally, the Supreme Court's recent decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017) is binding on requests for electronic data. There, 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 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 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 GRC notes that Paff effectively negates any argument that disclosure of CAMA data would require the Custodian to create a record (although the Custodian here did not make such an argument).

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the

⁷ The ALJ's Initial Decision became final by operation of law on April 4, 2016.

Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge's Final Decision supports that the Custodian was required to disclose the responsive CAMA data, and the Custodian provided no lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). The Custodian must thus disclose all responsive records to the Complainant, where applicable. Should no photographs exist, then the Custodian must certify to that fact.
3. **The Custodian shall comply with conclusion No. 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 1:4-4,⁸ to the Executive Director.⁹**
4. The Council defers analysis of whether the Custodian 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.

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

July 18, 2017

⁸ "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."

⁹ 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.