



**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. 2014-26

v.

Borough of Freehold (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. 2014-26**

v.

**Borough of Freehold (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 Borough of Freehold (“Borough”), including property pictures.

**Custodian of Record:** Traci L. DiBenedetto

**Request Received by Custodian:** December 24, 2013

**Response Made by Custodian:** December 30, 2013

**GRC Complaint Received:** January 16, 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. The current Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. Specifically, the current Custodian responded in the extended time frame by disclosing the responsive records to the Complainant (through the GRC). However, the current Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director.
2. The original Custodian’s response was insufficient and she unlawfully denied access to the responsive CAMA data and photographs. Additionally, the current Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the current Custodian disclosed the responsive records to the Complainant (through the GRC). Additionally, the evidence of record does not indicate that the Custodians’ violations of OPRA had a positive element of conscious wrongdoing or were

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

<sup>2</sup> Represented by Kerry E. Higgins, Esq., of McKenna, DuPont, Higgins, & Stone, P.C. (Red Bank, NJ).

intentional and deliberate. Therefore, the Custodians' 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.

3. Pursuant to 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, the current Custodian disclosed responsive CAMA data and photographs to the Complainant in accordance with the Interim Order. Further, the relief ultimately achieved had a basis in law. 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  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**August 29, 2017 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-26

v.

Borough of Freehold (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. The Custodian complied with the Council’s July 25, 2017 Interim Order because she responded in the prescribed time frame by certifying that she provided the responsive CAMA data on May 2, 2016, and disclosing the responsive photographs on three (3) CDs on August 1, 2017. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian failed to respond timely to the Complainant’s OPRA request and unlawfully denied access to the responsive records, she timely complied with the Council’s July 25, 2017 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.
3. In accordance to the Council’s July 25, 2017 Interim Order, the Complainant has partially 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, the Custodian disclosed the responsive photographs in response to the Interim Order. However, the Custodian had previously disclosed the responsive CAMA data to the Complainant on May 2, 2016, after being alerted to the decision in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Further, the relief ultimately achieved had a basis in law. 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. 2014-26**

**v.**

**Borough of Freehold (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 Borough of Freehold (“Borough”), including property pictures.

**Custodian of Record:** Traci L. DiBenedetto

**Request Received by Custodian:** December 24, 2013

**Response Made by Custodian:** December 30, 2013

**GRC Complaint Received:** January 16, 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 clarified 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). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012).
2. The Custodian did not bear her burden of proving that she lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in

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

<sup>2</sup> Represented by Kerry E. Higgins, Esq., of McKenna, DuPont, Higgins, & Stone, P.C. (Red Bank, NJ).

accordance with prevailing case law because the evidence of record supports that the County maintained the data on behalf of the Borough. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, the responsive data does not fall within the “inter-agency or intra-agency advisory, consultative, or deliberative” material exemption. See Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian must disclose the responsive CAMA data.

3. The Custodian unlawfully denied access to the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian identified a number of responsive records and consented to disclosing same. However, to date, the Custodian has not disclosed any photographs to the Complainant. Further, the Complainant’s Counsel negated any privacy arguments by stating that the Complainant was not seeking any interior photographs. In the absence of any further arguments against disclosure, the Custodian must disclose the responsive photographs (to exclude interior views) to the Complainant.
4. **The Custodian shall comply with conclusion Nos. 2 and 3 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>**
5. 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.
6. 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 August 2, 2017, the Government Records Council (“GRC”) received the Custodian’s August 1, 2017 response to the Council’s Interim Order. Therein, the Custodian certified that she previously provided the Complainant the responsive CAMA data on May 2, 2016, after the Complainant alerted (via letter dated April 24, 2016) her to the Office of Administrative Law’s Initial Decision in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et*

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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.



*seq.* The Custodian certified that she did not at that time provide copies of the estimated 4,000 photographs because the Complainant did not mention them in his letter. Further, the Custodian affirmed that she had previously advised the Complainant that photographs were in paper copy only and that she would have needed to send them out to be copied. The Custodian certified that the Complainant did not authorize her to incur costs; thus, she did not obtain copies. However, the Custodian certified that the photographs were since digitized on three (3) compact discs. The Custodian certified that she over-nighted them to the Complainant on August 1, 2017, along with an updated set of photographs from the 2016 evaluation (although not requested).

On August 7, 2017, the Complainant e-mailed the GRC, advising that he received the responsive photographs but no CAMA data. In response via e-mail, the Custodian stated that she provided the responsive CAMA data on May 2, 2016. The Custodian also attached a copy of that e-mail and the data disclosed. Custodian's Counsel subsequently e-mailed the Complainant, asking for confirmation that he received the data. The Complainant replied in the affirmative.

### **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 August 2, 2017, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the GRC received the Custodian's response to the Interim Order. Therein, the Custodian certified that she previously provided the responsive CAMA data to the Complainant on May 2, 2016, after he alerted her to the Hopkins decision. Further, the Custodian certified that she did not previously provide the photographs but did so in response to the Interim Order. Further, the Custodian provided simultaneous certification of compliance to the Executive Director.

The Complainant later confirmed receipt of all records after some confusion regarding the CAMA data. However, the evidence of record supports that the Custodian timely and fully complied between her certification on the May 2, 2016 CAMA data disclosure and the production of photographs on August 1, 2017.

Therefore, the Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the prescribed time frame by certifying that she provided the responsive CAMA data on May 2, 2016 and disclosing the responsive photographs on three (3) CDs on August 1, 2017. Further, the 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)).

Although the Custodian failed to respond timely to the Complainant’s OPRA request and unlawfully denied access to the responsive records, she timely complied with the Council’s July 25, 2017 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.

## **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.

The Complainant filed the instant complaint to request that the GRC order disclosure of the requested CAMA data and photographs. The Custodian argued in the Statement of Information that the County was the likely custodian for the responsive CAMA data. Further, the Custodian argued that responsive records were exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") and are exempt under the privacy exemption. Subsequent to the SOI, the Office of Administrative Law ("OAL") rendered a decision in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.*, which addressed the disclosure of the same CAMA data requested here. Based on that decision, the Complainant sent a letter to the Custodian on April 24, 2016, seeking disclosure of the CAMA data consistent with the Hopkins decision. The Custodian responded on May 2, 2016, providing access to the data but not the photographs. Thereafter, in its July 25, 2017 Interim Order, the Council ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs. On August 2, 2017, the GRC received the Custodian's compliance. Therein, she certified to her prior disclosure of the CAMA data and further certified that she was disclosing the photographs.

Taking into account all evidence submitted, the GRC finds that the instant complaint only brought about a partial result, warranting only a partial award of attorney's fees. The Custodian provided sufficient evidence to prove that the complaint was not the casual nexus for disclosing the requested CAMA data. Specifically, the Custodian disclosed the data over a year in advance of the July 25, 2017 Interim Order, based on the Complainant's letter regarding Hopkins. However, the Custodian did disclose the photographs because of the Order. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to a partial award of attorney's fees.

Therefore, in accordance with the Council's July 25, 2017 Interim Order, the Complainant has partially 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, the Custodian disclosed the responsive photographs in response to the Interim Order. However, the Custodian previously disclosed the responsive CAMA data to the Complainant on May 2, 2016, after being alerted to the decision in Hopkins, GRC 2014-01, *et seq.* Further, the relief ultimately achieved had a basis in law. 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. The Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the prescribed time frame by certifying that she provided the responsive CAMA data on May 2, 2016, and disclosing the responsive photographs on three (3) CDs on August 1, 2017. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian failed to respond timely to the Complainant's OPRA request and unlawfully denied access to the responsive records, she timely complied with the Council's July 25, 2017 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.
3. In accordance to the Council's July 25, 2017 Interim Order, the Complainant has partially 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, the Custodian disclosed the responsive photographs in response to the Interim Order. However, the Custodian had previously disclosed the responsive CAMA data to the Complainant on May 2, 2016, after being alerted to the decision in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Further, the relief ultimately achieved had a basis in law. 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



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

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins  
Complainant

Complaint No. 2014-26

v.

Borough of Freehold (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 clarified 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). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012).
2. The Custodian did not bear her burden of proving that she lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law because the evidence of record supports that the County maintained the data on behalf of the Borough. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, the responsive data does not fall within the “inter-agency or intra-agency advisory, consultative, or deliberative” material exemption. See Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian must disclose the responsive CAMA data.
3. The Custodian unlawfully denied access to the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian identified a number of responsive records and consented to disclosing same. However, to date, the Custodian has not disclosed any photographs to the Complainant. Further, the Complainant’s Counsel negated any privacy arguments by stating that the Complainant was not seeking any interior photographs. In the absence of any further arguments against disclosure, the



Custodian must disclose the responsive photographs (to exclude interior views) to the Complainant.

4. **The Custodian shall comply with conclusion Nos. 2 and 3 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>**
5. 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.
6. 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**

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<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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2014-26**

v.

**Borough of Freehold (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 Borough of Freehold (“Borough”), including property pictures.

**Custodian of Record:** Traci L. DiBenedetto

**Request Received by Custodian:** December 24, 2013

**Response Made by Custodian:** December 30, 2013

**GRC Complaint Received:** January 16, 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 30, 2013, the Custodian responded in writing, asking the Complainant to clarify whether the subject OPRA request was instead meant for Monmouth County (“County”). Specifically, the Custodian noted that the Complainant submitted his request on the County’s official OPRA request form and the County uses CAMA data as part of its system.

On the same day, the Complainant responded, stating that he previously requested the CAMA data from the County, who advised him to submit requests to each individual municipality. The Complainant thus confirmed that the request was for the Borough.

**Denial of Access Complaint:**

On January 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested

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

<sup>2</sup> Represented by Kerry E. Higgins, Esq., of McKenna, DuPont, Higgins, & Stone, P.C. (Red Bank, 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.



CAMA data from the County on December 18, 2013.<sup>4</sup> The Complainant stated that the County advised him to request the data individually from each municipality. The Complainant disputed the Borough's failure to provide any further response after December 30, 2013.

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 Borough unlawfully denied access to the requested data because:

- Six (6) 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, LLC. ("Microsystems") as their MOD-IV/CAMA vendor.
- The County funds, maintains, and operates the software program under a 1996 shared services agreement.
- Monmouth accesses various information from the database.
- S-2234, entitled "Monmouth Assessment Demonstration Program," requires all municipalities with the County to utilize the MOD-IV/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.

### Supplemental Response

On January 16, 2014, the Borough Administrator purportedly sought a verbal extension of time based on holidays and municipal reorganization. Also, the Administrator stated that the Borough was still trying to determine whether the records were maintained by them or the County.

On January 21, 2014, Tax Assessor Mitchell Elias sent a memorandum to the Custodian, stating that he did not believe the responsive data should be disclosed because it fell under the control of the County. Mr. Elias noted that the Complainant was seeking a record that required creation. Mr. Elias also noted that the CAMA data is a work file subject to change and that the MOD-IV file is the finalized version of CAMA data. Further, Mr. Elias stated that the County paid for, supplied, installed, and provided maintenance for the computer and CAMA software. Mr. Elias confirmed that responsive photographs are on paper in excess of 4,000 pages and that the revaluation company did not supply them in any other format. Finally, Mr. Elias acknowledged that a complaint was pending before the GRC on disclosure of CAMA data. Thus, he requested that the Custodian seek sufficient time to allow the GRC to decide on that complaint.

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

On January 27, 2014, the Custodian responded to the Complainant's OPRA request, thanking him for allowing an extension of time. The Custodian raised several concerns with disclosure of the requested CAMA data as follows:

- CAMA data is essentially a snapshot in time and can change from day to day. The Custodian asked the Complainant to provide a specific date for the responsive data in order to provide the most accurate data sought.
- The requested CAMA data contain "notes" fields that may require redaction; however, this could force the Borough to review thousands of fields. The Custodian thus alerted the Complainant that the Borough might assess a special service charge if an extraordinary amount of time and effort is necessary to review and redact the responsive data.
- Many of the responsive 4,000 pictures are of interiors, backyards, and other views not readily available to the public. Disclosure of these photographs could create security and privacy issues for the relevant property owners. The Custodian thus requested that the Complainant narrow his request so as to not violate any citizen's privacy.

Finally, the Custodian noted that she is aware that the Complainant filed a Denial of against the County after it denied access to CAMA data. The Custodian requested that the Complainant advise whether he would be willing to stay the subject OPRA request pending the GRC's decision in that complaint.

Statement of Information:

On February 3, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 24, 2013. The Custodian certified that her search included contacting Mr. Elias, the Borough's part-time Tax Assessor. The Custodian certified that Mr. Elias contacted the County for guidance based on his concerns related to disclosing "work product" data. Additionally, the Custodian certified that Borough staff attempted to access the requested CAMA data using the instructions the Complainant provided in his OPRA request. The Custodian affirmed that the Borough's computer program produced a prompt at the time staff attempted to retrieve the information: Borough staff was not familiar with the prompt. The Custodian affirmed that the Borough contacted Microsystems for additional guidance and was advised that the County was handling the request. The Custodian certified that the Borough was unable to access the requested information without further technical support or the County's permission.

The Custodian certified that she initially responded in writing on December 30, 2013, asking the Complainant to advise whether the request was for the Borough. The Custodian affirmed that, upon clarification that the OPRA request was for them, the Borough took a number of steps to extend the time frame. The Custodian averred that the Borough then attempted to determine: 1) whether they possessed the responsive records; 2) whether said records were disclosable; and 3) whether the County was handling disclosure as the custodian of the responsive records. The Custodian contended that, upon undertaking the task of locating responsive records, she questioned the disclosability of them under OPRA.

Regarding the CAMA data, the Custodian first questioned whether the Borough was the appropriate custodian of record. N.J.S.A. 47:1A-1.1. The Custodian stated that the County entered into a shared services agreement that required the Borough to input CAMA data into a system purchased, funded, maintained, and operated by the County. The Custodian contended that the Borough enters the data into the County's system, at which point the County maintains the responsive data. However, the Custodian noted that the Borough would provide the responsive records if ordered to do so by the GRC.

Moreover, the Custodian asserted that both her and Mr. Elias believe that the records are exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material. *See* N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Ins. Co., 165 N.J. 75, 81 (2000); O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (Final Decision dated October 14, 2004). The Custodian argued that the records are a work-in-progress and subject to change on a daily basis. The Custodian asserted that the MOD-IV aspect of the County software program is the finalized version and is available for public inspection; however, the CAMA portion is not subject to same. The Custodian argued that the responsive CAMA data is composed of a tax assessor's thoughts, notes, ideas, and opinions that he utilizes to determine a final assessment for a property. The Custodian noted that once the tax assessor makes a final decision, he enters these numbers into the MOD-IV, which then become a permanent public record.

Regarding the photographs, the Custodian contended that a number of them contained information not subject to disclosure under the privacy exemption. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). The Custodian asserted that she advised the Complainant that the Borough would disclose all photographs, with redactions where applicable. However, the Custodian stated that the Borough sought a reasonable period of time to perform this task due to the existence of over 4,000 photographs. The Custodian noted that the photographs only exist in paper copy and that the Borough would copy and provide them to the Complainant.

#### Additional Submissions:

On July 31, 2014, the Complainant's Counsel submitted a letter brief disputing the Borough's position. Counsel contended that the Borough maintained CAMA data through the Monmouth Assessment Demonstration program based on a shared services agreement with the County. Counsel contended that, when applying 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 responsive CAMA data does not fit within the ACD exemption. Counsel asserted that none of the responsive data fits within the "deliberations" or "draft" categories. Further, Counsel contended that the Complainant was not seeking any notes or comments; he sought access to data that is merely electronic versions of property card records. Counsel argued that the data is already publically available in property cards and on the MOD-IV website, the data is not pre-decisional, and the data is factual in nature.

Counsel also disputed that staff could not access the responsive files, because Mr. Elias can obtain the records. Counsel noted that eighty-three (83) other municipalities were able to comply with an identical request. Further, Counsel asserted that the Complainant did not seek interior photographs and that, despite the Custodian's SOI statements, the Borough has yet to disclose any of them.

## 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. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>5</sup> 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).

Moreover, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012)(holding that the custodian's failure to respond within the new time frame following receipt of clarification resulted in a "deemed" denial of access).

On December 30, 2013, the Custodian sought clarification as to whether the subject OPRA request was meant for the Borough or the County. On that same day, the Complainant confirmed that the request was for the Borough. At that point, the time frame began anew, giving the Custodian until January 9, 2014, to respond to the Complainant's OPRA request. However, the Custodian failed to respond in that time frame. In fact, the only evidence of a response is the Borough Administrator's verbal response seeking an extension on January 16, 2014, five (5) business days after the expiration of the new time frame.

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 clarified 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. See Carter, GRC 2011-100.

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<sup>5</sup> 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.

## 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.

## CAMA Data

In this matter, the Custodian initially questioned whether the Borough was the actual custodial agency and whether the County was the appropriate agency from which the Complainant should have obtained the responsive CAMA data. The Custodian also contended that the responsive data was exempt as ACD material.

In the instance that another agency or third party creates or maintains records on behalf of the agency in receipt of an OPRA request, the Court’s decision in Burnett, 415 N.J. Super. 506 controls. There, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The Court’s decision largely fell on the fact that there was no question that the broker was working on behalf of defendants to execute settlement agreements. The Court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the Court noted that the facts there differed from those in Bent, 381 N.J. Super. 30, 38-39 (App. Div. 2005)(holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency). The Council later applied the Court’s holding to a complaint involving disclosure of records held by another public agency as part of a shared services agreement. *See* Michalak, GRC 2010-220 (holding that an agency had an obligation to obtain records from another agency maintaining same in accordance with a shared services agreement).

Regarding the possession issue, the Custodian certified in the SOI that the Borough entered into a shared services agreement whereby it entered data into a system the County purchased, funded, maintained, and operated. The Custodian also noted that the Borough would comply with a Council’s order for disclosure.

The evidence of record here indicates that: 1) the Borough entered into a shared services agreement with the County to maintain CAMA data; and 2) the Custodian acknowledged that the Borough created the data by entering same into the County’s system. Based on all of the foregoing, the GRC finds that the facts of this complaint mirror those in Burnett and especially Michalak. Specifically, the Borough entered the responsive data into the County’s system, who maintained the data on the Borough’s behalf. The GRC therefore concludes that the Custodian had an affirmative obligation either to contact the County and obtain the responsive data or prepare same internally through the Borough’s access to the system, if possible.

Regarding the application of the ACD exemption, pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of 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 Administrative Law Judge ("ALJ") Kimberly A. Moss' Final Decision in Hopkins, GRC 2014-01, *et seq.*, because the ALJ held on whether CAMA data is a "government record" subject to access under OPRA.<sup>6</sup> Therein, the ALJ found that "CAMA data are government records that 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.

In Hopkins, the Counties similarly argued that the ACD exemption applied to the responsive CAMA data because it is never finalized and some of the data ultimately made up the MOD-IV program. In reaching the conclusion that no exemptions applied, the ALJ noted that:

There was no testimony that CAMA data was used in the formulation of policy. CAMA data is facts about properties. The CAMA documents do not contain opinions, recommendations, or advice about agency policy as expressed in [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]. There was no testimony that the CAMA data contained opinions, recommendations, or [advice]. The CAMA data contains facts. . . . Some of the CAMA data, the Mod-4, and SR1A data, is on the [I]nternet.

Id. at 16

The GRC finds the foregoing instructive here. Specifically, the Custodian and Mr. Elias both believed that the CAMA data was exempt as ACD material. Similar to the ACD argument in Hopkins, the Custodian asserted that the data was a "work-in-progress" and not finalized. Further, the Custodian asserted that the data included thoughts, ideas, and notes that would take time to review and redact. As was the case in Hopkins, the GRC does not find this argument compelling for the reasons contemplated by the ALJ.

Therefore, the Custodian did not bear her burden of proving that she lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law because the evidence of record supports that the County maintained the data on behalf of the Borough. Burnett, 381 N.J. Super. 506; Michalak, GRC 2010-220. Further, the responsive data does not fall within the ACD exemption. *See Hopkins*, GRC 2014-01, *et seq.* Thus, the Custodian must disclose the responsive CAMA data.

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

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<sup>6</sup> The ALJ's Initial Decision became final by operation of law on April 4, 2016.

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).

### Property Photographs

Regarding the property photographs, the Custodian certified in the SOI that she would disclose the responsive records with redactions where applicable based on privacy concerns. N.J.S.A. 47:1A-1; Burnett, 198 N.J. 408. Specifically, the Custodian asserted that a number of the photographs contained interior views, backyards, and other views not otherwise readily available to the public.

Notwithstanding the Custodian’s offer to disclose the photographs, the Complainant’s Counsel advised the GRC on July 31, 2014, that the Complainant had not received any photographs. Additionally, Counsel negated the privacy argument by stating that the Complainant was not seeking interior photographs.

Taking into account all arguments, the GRC finds that the Custodian unlawfully denied access to the responsive photographs. The Custodian identified responsive photographs and consented to disclosure, but the evidence of record supports that she has not disclosed any photographs to date. Further, the Complainant was not seeking interior photographs: that admission effectively cures the Custodian’s concerns of privacy.

Accordingly, the Custodian unlawfully denied access to the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian identified a number of responsive records and consented to disclosing same. However, to date, the Custodian has not disclosed any photographs to the Complainant. Further, the Complainant’s Counsel negated any privacy arguments by stating that the Complainant was not seeking any interior photographs. In the absence of any further arguments against disclosure, the Custodian must disclose the responsive photographs (to exclude interior views) to the Complainant.

### 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 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 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 clarified 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). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012).
2. The Custodian did not bear her burden of proving that she lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law because the evidence of record supports that the County maintained the data on behalf of the Borough. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, the responsive data does not fall within the "inter-agency or intra-agency advisory, consultative, or deliberative" material exemption. See Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian must disclose the responsive CAMA data.
3. The Custodian unlawfully denied access to the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian identified a number of responsive records and consented to disclosing same. However, to date, the Custodian has not disclosed any photographs to the Complainant. Further, the Complainant's Counsel negated any privacy arguments by stating that the Complainant was not seeking any interior photographs. In the absence of any further arguments against disclosure, the Custodian must disclose the responsive photographs (to exclude interior views) to the Complainant.
4. **The Custodian shall comply with conclusion Nos. 2 and 3 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>**

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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.



5. 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.
6. 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