



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

PHILIP D. MURPHY  
*Governor*

LT. GOVERNOR SHEILA Y. OLIVER  
*Commissioner*

**FINAL DECISION**

**June 26, 2018 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-33

v.

Township of Howell (Monmouth)  
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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 June, 2018

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: June 29, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
June 26, 2018 Council Meeting**

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

**GRC Complaint No. 2014-33**

**v.**

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

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

**Custodian of Record:** Penny Wollman

**Request Received by Custodian:** January 3, 2014

**Response Made by Custodian:** January 22, 2014

**GRC Complaint Received:** January 21, 2014

**Background**

May 22, 2018 Council Meeting:

At its May 22, 2018 public meeting, the Council considered the May 15, 2018 Supplemental Findings and Recommendations of the Council Staff 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 fully comply with the Council’s April 24, 2018 Interim Order. Specifically, the Custodian disclosed the responsive CAMA data within the prescribed time frame. However, she did not disclose the property photographs or simultaneously provide certified confirmation of compliance to the Council Staff until one (1) business day after the compliance time frame expiration.
2. The Custodian’s failure to respond to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian and Mr. Hutchinson unlawfully denied access to the

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

<sup>2</sup> Represented by Joseph A. Clark, Esq. (Howell, NJ). Previously represented by McKenna G. Torcivia, Esq. (Howell, NJ).

Complainant's OPRA request. N.J.S.A. 47:1A-6. Finally, the Custodian did not fully comply with the Council's April 24, 2018 Interim Order. Notwithstanding, between April 30, and May 3, 2018, the Custodian disclosed all responsive records to the Complainant's satisfaction. Additionally, the evidence of record does not indicate that the Custodian's and Mr. Hutchinson's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Hutchinson's actions rose 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 April 24, 2018 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian, with assistance from Mr. Hutchinson, disclosed responsive records to the Complainant in accordance with the Council's 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 May 24, 2018, the Council distributed its Interim Order to all parties. On June 13, 2018, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

### Analysis

#### Prevailing Party Attorney's Fees

At its May 22, 2018 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 May 24, 2018, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on June 22, 2018. On June 13, 2018, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

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 Council Staff respectfully recommends 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.

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

June 19, 2018



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**May 22, 2018 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-33

v.

Township of Howell (Monmouth)  
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Supplemental Findings and Recommendations of the Council Staff 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 fully comply with the Council’s April 24, 2018 Interim Order. Specifically, the Custodian disclosed the responsive CAMA data within the prescribed time frame. However, she did not disclose the property photographs or simultaneously provide certified confirmation of compliance to the Council Staff until one (1) business day after the compliance time frame expiration.
2. The Custodian’s failure to respond to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian and Mr. Hutchinson unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Finally, the Custodian did not fully comply with the Council’s April 24, 2018 Interim Order. Notwithstanding, between April 30, and May 3, 2018, the Custodian disclosed all responsive records to the Complainant’s satisfaction. Additionally, the evidence of record does not indicate that the Custodian’s and Mr. Hutchinson’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor Mr. Hutchinson’s actions rose 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 April 24, 2018 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian, with assistance from Mr. Hutchinson, disclosed responsive



records to the Complainant in accordance with the Council's 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.**

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of May, 2018

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: May 24, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
May 22, 2018 Council Meeting**

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

**GRC Complaint No. 2014-33**

v.

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

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

**Custodian of Record:** Penny Wollman

**Request Received by Custodian:** January 3, 2014

**Response Made by Custodian:** January 22, 2014

**GRC Complaint Received:** January 21, 2014

**Background**

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 2018 Findings and Recommendations of the Council Staff 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).
2. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an

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

<sup>2</sup> Represented by Joseph A. Clark, Esq. (Howell, NJ). Previously represented by McKenna G. Torcivia, Esq. (Howell, NJ).

action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). For this reason, the Complainant's OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.

3. Mr. Hutchinson unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Hutchinson unlawfully denied access to 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 Mr. Hutchinson was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian and/or Mr. Hutchinson must disclose the responsive CAMA data to the Complainant.
4. The Custodian and/or Mr. Hutchinson may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Hutchinson must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
5. **The Custodian and/or Mr. Hutchinson shall comply with conclusion Nos. 3 and 4 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 Council Staff.<sup>4</sup>**
6. The Council defers analysis of whether the Custodian and/or Mr. Hutchinson 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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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.



## Procedural History:

On April 25, 2018, the Council distributed its Interim Order to all parties. On May 3, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that Custodian's Counsel e-mailed the responsive CAMA data to Complainant's Counsel on April 30, 2018. Additionally, the Custodian certified that Mr. Hutchinson went to the Monmouth County Hall of Records on May 2, 2018 to retrieve responsive photographs. The Custodian certified that Mr. Hutchinson was informed that a USB drive containing the records would be available on May 3, 2018. The Custodian noted that the photograph file size was too large to e-mail to the Complainant, hence the need for the USB drive. The Custodian affirmed that the Township received the USB drive on May 3, 2018 and sent it to the Complainant via regular mail. The Complainant's Counsel, via e-mail, confirmed receipt of all records on May 8, 2018.

## Analysis

### Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian and/or Mr. Hutchinson to disclose responsive CAMA data to the Complainant. Further, the Council ordered the Custodian and/or Mr. Hutchinson to either disclose responsive photographs or certify that no such records existed. Finally, the Council ordered the Custodian and/or Mr. Hutchinson to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Council Staff. On April 25, 2018, 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 May 2, 2018.

On May 3, 2018, the first (1<sup>st</sup>) business day after expiration of the compliance time frame, the Custodian submitted certified confirmation of compliance to Council Staff. Therein, she certified that Custodian's Counsel sent the responsive CAMA data to the Complainant via e-mail on April 30, 2018. Further, the Custodian certified that she sent a USB drive containing the responsive photographs to the Complainant on May 3, 2018. Although the Custodian timely disclosed the CAMA data through Counsel, she did not provide the property photographs until one (1) day after the expiration of the prescribed compliance time frame. Further, the Custodian did not provide certified confirmation of compliance within the prescribed time frame. Further, there is no evidence that she sought an extension of time to obtain the USB drive, which appeared to be cause a delay in compliance . Thus, the Custodian did not fully comply with the Council's Order.

Therefore, the Custodian did not fully comply with the Council's April 24, 2018 Interim Order. Specifically, the Custodian disclosed the responsive CAMA data within the prescribed time frame. However, she did not disclose the property photographs or simultaneously provide certified confirmation of compliance to the Council Staff until one (1) business day after the compliance time frame expiration.

## **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 to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian and Mr. Hutchinson unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Finally, the Custodian did not fully comply with the Council’s April 24, 2018 Interim Order. Notwithstanding, between April 30, and May 3, 2018, the Custodian disclosed all responsive records to the Complainant’s satisfaction. Additionally, the evidence of record does not indicate that the Custodian’s and Mr. Hutchinson’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor Mr. Hutchinson’s actions rose 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 Township did not deny access; rather, she was waiting to learn the results of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Further, the Custodian contended that the request was invalid because it sought information. In its April 24, 2018 Interim Order, the Council disagreed and ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs, if they existed. Thereafter, between April 30, and May 3, 2018, the Custodian disclosed responsive records, including photographs, to the Complainant’s satisfaction. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s April 24, 2018 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 Custodian, with assistance from Mr. Hutchinson, disclosed responsive records to the Complainant in accordance with the Council’s 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.**

### Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s April 24, 2018 Interim Order. Specifically, the Custodian disclosed the responsive CAMA data within the prescribed time frame. However, she did not disclose the property photographs or simultaneously provide certified confirmation of compliance to the Council Staff until one (1) business day after the compliance time frame expiration.

2. The Custodian's failure to respond to the subject OPRA request within the statutory response time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian and Mr. Hutchinson unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Finally, the Custodian did not fully comply with the Council's April 24, 2018 Interim Order. Notwithstanding, between April 30, and May 3, 2018, the Custodian disclosed all responsive records to the Complainant's satisfaction. Additionally, the evidence of record does not indicate that the Custodian's and Mr. Hutchinson's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Hutchinson's actions rose 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 April 24, 2018 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian, with assistance from Mr. Hutchinson, disclosed responsive records to the Complainant in accordance with the Council's 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.**

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

May 15, 2018



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**April 24, 2018 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-33

v.

Township of Howell (Monmouth)  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 Findings and Recommendations of the Council Staff 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 he 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 to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). For this reason, the Complainant’s OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.
3. Mr. Hutchinson unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Hutchinson unlawfully denied access to 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 Mr. Hutchinson was required



to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian and/or Mr. Hutchinson must disclose the responsive CAMA data to the Complainant.

4. The Custodian and/or Mr. Hutchinson may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Hutchinson must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
5. **The Custodian and/or Mr. Hutchinson shall comply with conclusion Nos. 3 and 4 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 Council Staff.<sup>2</sup>**
6. The Council defers analysis of whether the Custodian and/or Mr. Hutchinson 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.
7. 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 24<sup>th</sup> Day of April, 2018

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: April 25, 2018**

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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 Council Staff  
April 24, 2018 Council Meeting**

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

**GRC Complaint No. 2014-33**

v.

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

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

**Custodian of Record:** Penny Wollman  
**Request Received by Custodian:** January 3, 2014  
**Response Made by Custodian:** January 22, 2014  
**GRC Complaint Received:** January 21, 2014

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

**Request and Response:**

On January 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 3, 2014, Clerk’s Office employee Donna Belton forwarded the Complainant’s OPRA request to various individuals within the Township.

On January 13, 2014, Tax Assessor Gregory Hutchinson provided Ms. Belton a response to the Complainant’s OPRA request. Therein, Mr. Hutchinson acknowledged that he knew that the Complainant submitted the same OPRA request to Monmouth County (“County”) Tax Board. Further, Mr. Hutchinson acknowledged that the Complainant filed a Denial of Access Complaint<sup>4</sup> regarding the County’s denial of one of the OPRA requests. Mr. Hutchinson stated that the Township was not denying access to any records, but sought sufficient time to allow the Government Records Council (“GRC”) to adjudicate the pending Denial of Access Complaint before disclosing any records.

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

<sup>2</sup> Represented by McKenna G. Torcivia, Esq. (Howell, NJ).

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

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



### Denial of Access Complaint:

On January 21, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant stated that he previously requested CAMA data from the County on December 18, 2013.<sup>5</sup> The Complainant stated that the County advised him to request the data individually from each municipality.

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 his belief 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, L.L.C. (Microsystems) 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,” requires<sup>6</sup> all municipalities within the County to utilize the MODIV/CAMA program and there is a retention schedule for property record cards (“PRC”).
- Revaluation contracts require firms to deliver PRCs to the municipality, which utilize them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

### Supplement Response

On January 22, 2014, the thirteenth (13<sup>th</sup>) business day after receipt of the OPRA request, Ms. Belton responded in writing on behalf of the Custodian responded forwarding Mr. Hutchinson’s response to the Complainant. Ms. Belton noted that she thought she already forwarded Mr. Hutchinson’s response to the Complainant. Ms. Belton apologized for the delay and noted that she just found out that she did not forward the response.

Later the same day, Ms. Belton e-mailed the Complainant inquiring if he would withdraw the instant complaint pending a resolution to other complaints currently before the GRC for the

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<sup>5</sup> Ibid.

<sup>6</sup> On January 10, 2011, the Senate passed S-2234 (Sca) 1R by a vote of 39-0. On that same date, the bill was received in the Assembly and referred to the Assembly Housing and Local Government Committee. Neither S-2234 nor its Assembly counterpart, A-3227, saw any further action in the Assembly during the 2010-2011 legislative session. The Complainant might instead be referring to S-1213, which Governor Christie signed into law as L. 2013, c. 15, on January 25, 2013.

same records.<sup>7</sup> Ms. Belton stated that the Township was not denying access to records; rather, they were simply awaiting the GRC's decision. Ms. Belton noted that she appreciated that other municipalities disclosed responsive records; however, the Township is hesitant to disclose records in the absence of any GRC decision requiring disclosure thereof. Ms. Belton thus asked that the instant complaint be stayed.

On the same day, the Complainant responded to Ms. Belton advising that he would not withdraw his complaint. The Complainant indicated that other agencies attempted to withhold responsive records pending the GRC's adjudication of Hopkins, GRC 2014-01, *et seq.* The Complainant also indicated that the County previously advised him to submit OPRA requests to each individual municipality who in turn denied access in an apparent coordinated effort.

Additionally, the Complainant stated that under OPRA, a custodian is required to respond in writing within seven (7) business days granting access, denying access, seeking clarification, or requesting an extension of time. The Complainant noted that the response must also address each individual request item, address the preferred method of delivery, an estimated special service charge (where applicable), and a document index. The Complainant averred that verbal responses are not lawful under OPRA. The Complainant stated that he attached to the e-mail a document index for Mr. Hutchinson to review and advise whether any information should be redacted. The Complainant expressed dissatisfaction with the Township's inability to disclose a record that "takes less than [five] (5) minutes to produce in the . . . CAMA program."

On January 24, 2014, Mr. Hutchinson forwarded a response to Ms. Belton for dissemination to the Complainant. Therein, Mr. Hutchinson noted that he believed waiting until the GRC decided Hopkins was the most "common sense" approach for handling the subject request. Mr. Hutchinson stated that he was aware that his initial response was not an official denial; however, it was necessary to deny the request based on the proprietary exemption. However, Mr. Hutchinson noted that the Complainant stated that he sought information from the Township's property record cards: the Township would provide a .pdf copy of all 24,978 line items if the Complainant wishes. Mr. Hutchinson noted that all property record cards are available on the County's website.

On the same day, Ms. Belton forwarded Mr. Hutchinson's response to the Complainant via e-mail.

#### Statement of Information:

On February 25, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 2, 2014. The Custodian certified that Ms. Belton forwarded the request to Mr. Hutchinson, who composed a response. The Custodian certified that thereafter, the Township believed it had forwarded Mr. Hutchinson's response to the Complainant. However, the Custodian affirmed that upon receipt of the instant complaint, she realized she had forgotten to send Mr. Hutchinson's response to the

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<sup>7</sup> These complaints are Hopkins v. Borough of Freehold (Monmouth), GRC Complaint No. 2014-26, Hopkins v. Freehold Twp. (Monmouth), GRC Complaint No. 2014-27, and Hopkins v. Borough of Manasquan (Monmouth), GRC Complaint No. 2014-36.

Complainant. The Custodian certified that Ms. Belton responded in writing on her behalf on January 22, 2014 providing the Complainant with Mr. Hutchinson's response.

The Custodian first argued that she acknowledges the Township failed to respond in a timely manner; however, it was a simple mistake. The Custodian asserted that the Township clearly intended to respond in writing prior to end of the statutory time frame. The Custodian asserted that the Township was working under the good faith assumption that the Complainant received their response. The Custodian asserted that the Township's failure to do so was not knowing and willful in nature.

The Custodian contended that Mr. Hutchinson's initial response was not a denial of access; rather, it was an opportunity for the Township to learn the results of Hopkins, GRC 2014-01, *et seq.* prior to acting on the request. The Custodian asserted that the Township would have bound itself to the GRC's decision and proceeded accordingly.

However, the Custodian asserted that should the GRC find that the Township's response was an effective denial of access, her position is that the request was invalid and the denial lawful. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Specifically, the Custodian argued that the Complainant's request failed to specify with reasonable clarity the records sought. The Custodian contended that the request required her to create a report: a custodian is not required to perform such a task. Further, the Custodian contended that the Complainant did not provide a time frame or identify specific properties that the Custodian could utilize to locate records or photographs. The Custodian contended that, in the absence of any of specifying details as noted above, the Complainant's request was akin to a request for all of the Township's records. Bent, 381 N.J. Super. at 37.

The Custodian asserted that the Council's decision in Baum v. Twp. of Rockaway (Morris), GRC Complaint No. 2012-291 (July 2013) should control. The Custodian stated that there, the Council determined that the complainant's request items seeking certain tax assessment information (to include methods of valuations) was invalid in accordance with MAG, 375 N.J. Super. at 546. Thus, the Custodian contended that the Township properly denied the Complainant's OPRA request because it was invalid. The Custodian requested that the Council determine that: 1) their timeliness violation was not knowing and willful in nature; 2) Mr. Hutchinson's January 13 and January 24, 2014 e-mails did not amount to a denial of access; and 3) the Complainant's OPRA request was invalid.

#### Additional Submissions:

On July 24, 2014, the Complainant's Counsel submitted a letter brief disputing the Township's position. First, the Complainant's Counsel contended that the Township's response was both untimely and insufficient. Specifically, the Complainant's Counsel asserted that the Township's request to delay a response until after the conclusion of Hopkins was unreasonable and thus unlawful.

The Complainant's Counsel next stated that in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division held that a custodian was not required to perform research, compile information or create a new file. Counsel argued that the facts here are contrary to Burnett because the Complainant specifically identified the data file sought. Counsel noted that the Complainant provided the Custodian with specific instructions to locate the compressed data folder.

Moreover, the Complainant's Counsel argued that the Complainant's request for photographs was specific and valid. The Complainant's Counsel argued that Burnett supported that the Complainant did not need to seek photographs for specific properties; he clearly sought all photographs for every property in the Township. Further, the Complainant's Counsel argued that the Custodian could easily locate photographs with a reasonable amount of effort. See Burke v. Brandes, 429 N.J. Super. 169, 176-77 (App. Div. 2012). Counsel also noted that numerous other municipalities have already complied with an identical request, which further supports that the request is valid.

On July 8, 2016, the Complainant's Counsel requested that the GRC proceed with the adjudication of this complaint because, in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.*, Microsystems waived its claim of confidentiality. Further, Counsel noted that Microsystems agreed to provide responsive CAMA data for all municipalities in the County.

### 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>8</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).

Here, the Custodian certified in the SOI that the Township intended to respond in a timely manner, but did not realize that it failed to send Mr. Hutchinson's written response to the Complainant until it received the Denial of Access Complaint. The Custodian certified that the Township sent Mr. Hutchinson's thirteen (13) business days after receipt of the OPRA request. Further, the Custodian acknowledged the Township's failure to timely respond, asserting that it did not represent a knowing and willful violation. Thus, the evidence supports that a timeliness violation occurred.

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<sup>8</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.

Therefore, the Custodian did not bear her burden of proof that he 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.

### **Validity of Request**

The New Jersey Appellate Division has held that:

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

[MAG, 375 N.J. Super. 534 (emphasis added).]

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;<sup>9</sup> N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Most recently, the Supreme Court addressed a custodian's obligation to coalesce information stored electronically into a single record. In Paff v. Twp. of Galloway, 229 N.J. 340 (2017), 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

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<sup>9</sup> Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

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 Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

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

....

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

[Id. at 353, 356.]

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

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

The Council first noted that the definition of a “government record” included “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the

responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

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

[Id. at 12 (emphasis added).]

In this matter, the Custodian argued in the SOI that the Complainant's OPRA request seeking CAMA data and property photographs failed to identify the records sought. The Custodian contended that she properly denied the request because same was invalid: the Township was not required to compile information and create a new record. Bent, 381 N.J. Super. at 37. The Custodian also argued that the portion of the request seeking photographs was equally invalid because the Complainant failed to identify specific properties. The Custodian argued that the Council's decision Baum, GRC 2012-291, controlled here. In a July 29, 2014 letter brief, Complainant's Counsel refuted the Township's position, stating that the Custodian was merely required to retrieve a file or folder from a database.

The threshold issue before the Council is whether the Complainant's request, including any responsive property photographs that may exist, was invalid because it failed to identify a specific record and would have required the Borough to create a new record.

The Court's decision in Paff, 229 N.J. 340 (2017), also decided after the pendency of this complaint, is binding here as well because the court determined that, barring a clear exemption, electronically stored information is a government record. In determining whether the Complainant's request seeking CAMA data was invalid, the Council distinguishes the instant complaint from Fang. Specifically, the requests at issue there sought general records inclusive of certain personnel information. However, the complaint here more closely fits with Zahler, GRC 2013-266, notwithstanding that it was decided during the pendency of the instant complaint. Specifically, the Complainant identified a specific type of record, CAMA data, which was accessible from a database by utilizing a few simple commands. The GRC notes that the Complainant included instructions that the Custodian could utilize to extract the responsive compressed file from the database. As was the case in Zahler, the Custodian was not required to create a record; rather, she was required to extract the CAMA data from a database. A similar type of compilation was also contemplated in Paff. See also McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

Regarding the portion of the request seeking photographs, Custodian argued in the SOI that it was similarly invalid as a blanket request. In his July 29, 2014 letter brief, Complainant's Counsel argued that the portion of the request seeking photographs was specific.

The GRC is not persuaded by the Township's position: the request identifies a type of record (photographs) associated with the CAMA data sought. Thus, it is not unreasonable to believe that those photographs submitted to correspond with the data at that time, if any, were responsive to request. The GRC does not find that the portion of the request seeking photographs would require an "open-ended" search of every agency record.

The GRC also notes that neither portion of the Complainant's OPRA request is comparable to those in Baum, GRC 2012-291. The relevant items that the Council found to be invalid there sought explanations and valuation methods. The subject OPRA request here sought actual data and photographs, not explanations on them.

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler, GRC 2013-266. For this reason, the Complainant's OPRA request seeking CAMA data is valid. See also Paff, 229 N.J. 340; McBride, GRC 2014-54. Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.

### **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**

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) 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).

Regarding the existence of parallel litigation in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016), 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.

Hopkins, GRC 2014-01, *et seq.*, as a deemed adopted decision of the Council, applies here because there, the Administrative Law Judge 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 ...” Id. at 18.

Initially, Mr. Hutchinson responded through the Clerk’s Office seeking additional time to await the Council’s holding in Hopkins, before responding to the subject OPRA request. As part of the SOI submitted in this matter, the Custodian contended that Mr. Hutchinson did not deny access to responsive records; rather, he sought an opportunity for the Township to respond based on Hopkins, GRC 2014-01, *et seq.* The Custodian noted that the Township would have bound itself to the Council’s decision and proceeded accordingly. However, Mr. Hutchinson’s attempt to delay a response until after Hopkins violated OPRA. See Paff, GRC 2013-195.

Additionally, Hopkins supports a finding in this complaint that the responsive CAMA data is disclosable under OPRA. Specifically, the ALJ considered the responsive CAMA data a “government record” not otherwise exempt under OPRA. The GRC finds the ALJ’s reasoning in Hopkins, as instructive here as a similar set of facts exists.

Accordingly, Mr. Hutchinson unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Hutchinson unlawfully denied access to 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 Mr. Hutchinson was required to disclose the responsive CAMA data. Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian and/or Mr. Hutchinson must disclose the responsive CAMA data to the Complainant.

### Property Photographs

Regarding the property photographs, neither the Custodian nor Mr. Hutchinson clearly identified whether any records existed either in the initial response or in the SOI. Because it is now unclear whether any responsive photographs exist, it is possible that the Custodian and/or Mr. Hutchinson unlawfully denied access to copies of any responsive photographs.

Accordingly, the Custodian and/or Mr. Hutchinson may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Hutchinson must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian and/or Mr. Hutchinson 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that he 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 to the Complainant's OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). For this reason, the Complainant's OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.
3. Mr. Hutchinson unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Hutchinson unlawfully denied access to 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 Mr. Hutchinson was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim

Order dated July 26, 2016). Thus, the Custodian and/or Mr. Hutchinson must disclose the responsive CAMA data to the Complainant.

4. The Custodian and/or Mr. Hutchinson may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Hutchinson must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
5. **The Custodian and/or Mr. Hutchinson shall comply with conclusion Nos. 3 and 4 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>10</sup> to the Council Staff.<sup>11</sup>**
6. The Council defers analysis of whether the Custodian and/or Mr. Hutchinson 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.
7. 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

April 17, 2018

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<sup>10</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>11</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.