



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

July 30, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-36

v.

Borough of Manasquan (Monmouth)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 June 25, 2019 Interim Order. Specifically, she responded in the extended time frame disclosing responsive records to the Complainant. Further, the Custodian explained how, to the best of her understanding, some of the original responsive photographs were replaced by updated versions. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian’s failure to timely respond to the subject OPRA request resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, both Ms. Palughi and the Custodian unlawfully denied access to said OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian did not fully comply with the Council’s January 31, 2019 Interim Order. However, the Custodian disclosed responsive CAMA data and photographs to the Complainant. Also, the Custodian complied with the Council’s June 25, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Ms. Palughi’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms. Palughi’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.

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 30th Day of July 2019

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 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-36

v.

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

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

Custodian of Record: Barbara J. Ilaria

Request Received by Custodian: January 3, 2014

Response Made by Custodian: January 21, 2014

GRC Complaint Received: January 21, 2014

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Council considered the June 18, 2019 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 comply fully with the Council’s January 31, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing responsive CAMA data and simultaneously providing certified confirmation of compliance to the Council Staff. However, the Custodian failed to address the photographs at the time of her response, which she later certified were being held by the Monmouth County Board of Taxation.
2. The Council is giving the Custodian a final opportunity to obtain and disclose the responsive photographs that existed at the time of the Complainant’s OPRA request. 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); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC

¹ No legal representation listed on record.

² Represented by Mark G. Kitrick, Esq., of King, Kitrick, Jackson & McWeeney, LLC (Brick, NJ).

Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of them. Further, should any of the above records not exist due to the newer revaluation, the Custodian must certify to this fact and provide an argument as to why same were not preserved pending the outcome of this complaint.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁴ to the Council Staff.⁵**
4. The Council defers analysis of whether the Custodian and/or Ms. Palughi knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 27, 2019, the Council distributed its Interim Order to all parties. On July 2, 2019, the Custodian responded to the Council's Order. Therein, the Custodian certified that all photographs were posted to the Monmouth County Board of Taxation ("County") website but were revised after the newer reassessment. The Custodian affirmed that she included information about the tax cards because it was her understanding that any existent photographs from the prior assessment would have been part of the cards. The Custodian noted that she was not aware if any photographs existed at the time of the OPRA request or destruction of the cards.

On July 3, 2019, the Government Records Council ("GRC") e-mailed the Custodian confirming receipt of her Interim Order response. The GRC noted that there appeared to be a misunderstanding of what actions the Custodian was required to take to comply with the Order. The GRC thus stated that the Custodian was required to obtain responsive photographs from the County and provide them to the Complainant (along with simultaneous certified confirmation of compliance to the Council Staff). The GRC noted that it would extend the response time frame through July 15, 2019 in order to facilitate compliance.

On July 12, 2019, the Custodian e-mailed the Complainant stating that she received responsive photographs from the County and downloaded them to Google® Drive. The Custodian sought confirmation from the Complainant as to whether this was acceptable.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

On July 15, 2019, the Custodian provided a supplemental response to the Council's Order. Therein, the Custodian certified that she obtained from the County photographs of the Borough's most recent assessment in 2016. The Custodian affirmed that she loaded said photographs onto Google® Drive and was providing a link to all parties via e-mail.

Analysis

Compliance

At its June 25, 2019 meeting, the Council ordered the Custodian to obtain and disclose the responsive photographs from the County. Further, the Council ordered the Custodian to, if applicable, certify if the responsive photographs no longer existed due to the newer reassessment and provide a reasoning as to why the previous photographs were not preserved. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules R. 1:4-4, to the Council Staff. On June 27, 2019, 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 July 8, 2019.⁶

On July 2, 2019, the third (3rd) business day after receipt of the Council's Order, the Custodian responded providing an explanation as to why older photographs did not exist. On July 3, 2019, in the absence of any disclosure, the GRC clarified the Council's Order and extended the compliance time frame through July 15, 2019. Within the extended time frame, the Custodian obtained and disclosed the responsive photographs to the Complainant through Google® Drive. The Custodian also provided certified confirmation of compliance, reiterating that all photographs were updated automatically through the County's website after the 2016 reassessment. Based on the forgoing, the GRC is satisfied that the Custodian complied with the relevant Order.

Therefore, the Custodian complied with the Council's June 25, 2019 Interim Order. Specifically, she responded in the extended time frame disclosing responsive records to the Complainant. Further, the Custodian explained how, to the best of her understanding, some of the original responsive photographs were replaced by updated versions. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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).

⁶ The Custodian verbally confirmed to the GRC via telephone that the Borough was closed on both July 4, and 5, 2019 in observance of Independence Day.

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 before the Council, the Custodian's failure to timely respond to the subject OPRA request resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, both Ms. Palughi and the Custodian unlawfully denied access to said OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian did not fully comply with the Council's January 31, 2019 Interim Order. However, the Custodian disclosed responsive CAMA data and photographs to the Complainant. Also, the Custodian complied with the Council's June 25, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Ms. Palughi's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms. Palughi'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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 25, 2019 Interim Order. Specifically, she responded in the extended time frame disclosing responsive records to the Complainant. Further, the Custodian explained how, to the best of her understanding, some of the original responsive photographs were replaced by updated versions. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's failure to timely respond to the subject OPRA request resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, both Ms. Palughi and the Custodian unlawfully denied access to said OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian did not fully comply with the Council's January 31, 2019 Interim Order. However, the Custodian disclosed responsive CAMA data and photographs to the Complainant. Also, the Custodian complied with the Council's June 25, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Ms. Palughi's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms.

Palughi'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.

Prepared By: Frank F. Caruso
Acting Executive Director

July 23, 2019



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

June 25, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-36

v.

Borough of Manasquan (Monmouth)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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 comply fully with the Council’s January 31, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing responsive CAMA date and simultaneously providing certified confirmation of compliance to the Council Staff. However, the Custodian failed to address the photographs at the time of her response, which she later certified were being held by the Monmouth County Board of Taxation.
2. The Council is giving the Custodian a final opportunity to obtain and disclose the responsive photographs that existed at the time of the Complainant’s OPRA request. 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); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of them. Further, should any of the above records not exist due to the newer revaluation, the Custodian must certify to this fact and provide an argument as to why same were not preserved pending the outcome of this complaint.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,² to the Council Staff.³

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

Interim Order Rendered by the
Government Records Council
On The 25th Day of June 2019

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 27, 2019

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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**

**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-36

v.

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

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

Custodian of Record: Barbara J. Ilaria

Request Received by Custodian: January 3, 2014

Response Made by Custodian: January 21, 2014

GRC Complaint Received: January 21, 2014

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 22, 2019 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. Ms. Palughi unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Ms. Palughi 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

¹ No legal representation listed on record.

² Represented by Mark G. Kitrick, Esq., of King, Kitrick, Jackson & McWeeney, LLC (Brick, NJ).

Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the ALJ's Final Decision supports that Ms. Palughi 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 Ms. Palughi must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.

3. The Custodian unlawfully denied access to at least a portion of the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian has not provided any photographs to date, whether in whole or part, due to the exemptions asserted. Thus, the Custodian must disclose the requested photographs. Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of those same.
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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁴ to the Council Staff.⁵**
5. The Council defers analysis of whether the Custodian and/or Ms. Palughi knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 4, 2019, the Council distributed its Interim Order to all parties. On February 8, 2019, the Custodian e-mailed the Government Records Council ("GRC") advising that the Borough's e-mail suffix changed. The Custodian asked the GRC to update its contact information accordingly.

On February 15, 2019, the Custodian responded to the Council's Interim Order. The Custodian stated that she received the Council's Order on February 8, 2019 and was thus responding on the fifth (5th) business day after receipt of same. The Custodian certified that she provided a .zip file containing the responsive CAMA data to the Complainant on the same day. The Custodian further affirmed that she was including a "Request for Authorization for Records Disposal" ("Authorization") showing that property tax cards from 2004 through 2015 were destroyed on January 11, 2019.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

On March 3, 2019, the Complainant responded to the Custodian's compliance via e-mail questioning the inclusion of the Authorization. The Complainant stated that he did not seek property record cards in the subject OPRA request. Further, the Complainant asserted that he did not believe public agencies had a right to destroy records that are the subject of a pending Denial of Access Complaint.

On May 24, 2019, the GRC sought additional information from the Custodian. Therein, the GRC noted that the relevance of destroying property records to the Council's Order was unclear. The GRC also noted that it was unclear why the Custodian was unable to provide the 6,000 to 7,000 photographs identified as responsive in the Statement of Information ("SOI"). The GRC thus requested that the Custodian provide certified responses to the following:

1. Please explain how the destruction of property cards relates to compliance with the Council's January 29, 2019 Interim Order.
2. If records responsive to this complaint were included in the destruction, why did the Borough not ensure that those records at issue in this complaint were retained until the Council rendered a decision?
3. If the Borough destroyed records at issue here, was there another agency or contracted third party that maintained the records on your behalf?
 - a. If yes, please indicate whether you contacted that agency or third party to obtain said records.
 - b. If yes to a., please identify the date you received the records and, if applicable, disclosed same to the Complainant with supporting documentation.

The GRC requested that the Custodian respond to the above by close of business on May 30, 2019.

On May 28, 2019, the Custodian sought an extension of time to respond to the request for additional information because the Tax Assessor was unavailable. On the same day, the GRC granted said extension through June 6, 2019.

On June 5, 2019, the Custodian responded to the GRC's request for additional information. Therein, in response to question No. 1, the Custodian certified that the Borough contracted with Reality Appraisals to conduct a revaluation in 2004. The Custodian affirmed that Reality Appraisals sent the photographs directly to the Monmouth County Board of Taxation ("County"). The Custodian affirmed that the County's photographs were updated as part of a 2016 appraisal.

In response to question No. 2, the Custodian certified that no photographs were appended to the property tax cards. The Custodian certified that all photographs were sent to the County and were subsequently updated in 2016 after another revaluation by Appraisal Systems, Inc.

In response to question No. 3, the Custodian affirmed that the Borough maintained property cards, which it requested to destroy in accordance with its retention schedules. The Custodian certified that the County maintained the responsive photographs.

Analysis

Compliance

At its January 31, 2019 meeting, the Council ordered the Custodian to disclose the responsive CAMA data available at the time of the Complainant's OPRA request. Further, the Council ordered the Custodian to disclose responsive property photographs or certify if she believed any were exempt from disclosure. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On February 4, 2019, 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 February 11, 2019.

On February 8, 2019, the Custodian e-mailed the GRC advising that the Borough's e-mail address had recently changed. On February 15, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that the Borough received the Council's Order on February 8, 2019. The Custodian certified that she was sending the Complainant a drive containing all responsive CAMA data. The Custodian further included an Authorization for the destruction of property cards.

The Complainant took issue with this response, noting that he did not request property cards. The Complainant also argued that if the Borough indeed destroyed records responsive to the request, they did so improperly. The GRC, confused by the connection of the Authorization to the Custodian's compliance, sought additional information from the Custodian regarding the existence of responsive photographs. On June 5, 2019, the Custodian responded to the GRC's request confirming that the responsive photographs were not destroyed; they were maintained by the County.

In evaluating whether the Custodian complied with the Council's Order, the GRC first notes that a change in the Borough's e-mail accounts led to a delayed delivery of the Order to the Custodian. Thus, the Custodian's compliance response was timely. Also, the Custodian provided the Complainant access to the responsive CAMA within the prescribed time frame.

However, the Custodian did not address the photographs as part of her response, instead identifying that property cards were destroyed in accordance with municipal retention requirements. Confused by this response, the GRC sought additional information regarding whether the photographs, previously identified in the SOI as in existence, were destroyed with the property cards. The Custodian subsequently certified that the photographs were not destroyed; rather, they were maintained by the County. Thus, the evidence of record clearly indicates that the photographs still existed, albeit possessed by the County. Notwithstanding their existence, the Custodian did not address the disclosure of them, as required by the Council's Order. The GRC is thus persuaded that the Custodian did not fully comply with the Order as it relates to the property photographs.

Therefore, the Custodian did not comply fully with the Council's January 31, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing responsive

CAMA data and simultaneously providing certified confirmation of compliance to the Council Staff. However, the Custodian failed to address the photographs at the time of her response, which she later certified were being held by the County.

In the past, the GRC has provided custodians a “final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure.” See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council’s September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with the its Order and provided him “a ‘final opportunity’” to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7).

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 v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010) 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 v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (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 v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012) (holding that an agency had an obligation to obtain records from another agency maintaining same in accordance with a shared services agreement).

Moreover, based on past decisions in other complaints filed by the Complainant that involved requests for CAMA data, the GRC knows that municipalities with the County entered into shared services agreements to utilize Microsystem’s software to input and store CAMA data. See *e.g.* Hopkins v. Borough of Fair Haven (Monmouth), GRC Complaint No. 2014-24 (Interim Order dated July 25, 2017) (holding that the custodian had an obligation to obtain responsive records from the County pursuant to a shared services agreement).

It is not clear here whether the Borough similarly entered into such an agreement. However, the Borough’s access to Microsystems’ software to manage CAMA data is compelling that some type of agreement like the one above exists. Notably, the Custodian eventually certified that the County possessed photographs of both a 2004 and 2016 revaluation conducted by separate third-party entities contracted by the Borough. The Custodian also certified that the entities sent the photographs directly to the County. The Custodian further affirmed that the importance of the

Authorization in her initial compliance response was to illustrate that the County's records were updated after receipt of the 2016 revaluation. This evidence further supports the existence of an agreement between the Borough and County regarding the responsive photographs.

Notwithstanding the forgoing, the Custodian made no attempts to obtain responsive photographs from the County and disclose them accordingly, as prescribed in Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220. Thus, it is clear that compliance was incomplete here, as was the case in Carter, GRC 2014-218. An additional order should ensure that the Borough provides the Complainant with all responsive photographs subject to disclosure and explain whether other photographs either should not be disclosed or no longer exist.

Accordingly, the Council is giving the Custodian a final opportunity to obtain and disclose the responsive photographs that existed at the time of the Complainant's OPRA request. Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220; Carter, GRC 2014-218. Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of them. Further, should any of the above records not exist due to the newer revaluation, the Custodian must certify to this fact and provide an argument as to why same were not preserved pending the outcome of this complaint.

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Ms. Palughi 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council's January 31, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing responsive CAMA date and simultaneously providing certified confirmation of compliance to the Council Staff. However, the Custodian failed to address the photographs at the time of her response, which she later certified were being held by the Monmouth County Board of Taxation.
2. The Council is giving the Custodian a final opportunity to obtain and disclose the responsive photographs that existed at the time of the Complainant's OPRA request. 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); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of them. Further, should any of the above records not exist due to the newer revaluation, the Custodian must

certify to this fact and provide an argument as to why same were not preserved pending the outcome of this complaint.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁷ to the Council Staff.⁸**
4. The Council defers analysis of whether the Custodian and/or Ms. Palughi knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Acting Executive Director

June 18, 2019

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "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."

⁸ 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
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

January 31, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-36

v.

Borough of Manasquan (Monmouth)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 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 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. Ms. Palughi unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Ms. Palughi 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 ALJ’s Final Decision supports that Ms. Palughi 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 Ms. Palughi must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
3. The Custodian unlawfully denied access to at least a portion of the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian has not provided any photographs to date, whether in whole or part, due to the exemptions asserted. Thus, the Custodian must disclose the requested photographs. Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of those same.



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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,² to the Council Staff.³**
5. The Council defers analysis of whether the Custodian and/or Ms. Palughi knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2019

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: February 4, 2019

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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
January 31, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-36

v.

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

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

Custodian of Record: Barbara J. Ilaria
Request Received by Custodian: January 3, 2014
Response Made by Custodian: January 21, 2014
GRC Complaint Received: January 21, 2014

Background³

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 9, 2014, Tax Assessor Robyn Palughi composed a letter in response to the Complainant’s OPRA request. Therein, Ms. Palughi acknowledged that the Complainant filed a Denial of Access Complaint⁴ regarding the Monmouth County (“County”) Tax Board’s denial of one of the OPRA requests. Ms. Palughi stated that the Borough was not denying access to any records but sought sufficient time to allow the Government Records Council (“GRC”) to adjudicate the pending complaint before disclosing any records.

¹ No legal representation listed on record.

² Represented by Mark G. Kitrick, Esq., of King, Kitrick, Jackson & McWeeney, LLC (Brick, NJ).

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

⁴ This request is currently 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, 2013.⁵ 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,” requires⁶ 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.

Supplemental Response:

On January 21, 2014, the eleventh (11th) business day after receipt of the OPRA request, the Custodian responded in writing apologizing for not sending Ms. Palughi’s letter to the Complainant prior to the expiration of the deadline. The Custodian noted that she was under the impression that Ms. Palughi sent the letter to the Complainant copying her; thus, she filed the letter instead of forwarding it to him. The Custodian stated she was attaching the letter at that time.

⁵ Ibid.

⁶ 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.

Statement of Information:

On February 28, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 3, 2014. The Custodian certified that her search included forwarding the request to Ms. Palughi. The Custodian affirmed that the responsive CAMA data did not exist in the requested medium, but that she sought assistance to convert same. The Custodian certified that Ms. Palughi prepared a response on January 9, 2014 and e-mailed it to her. The Custodian affirmed that she believed at the time that Ms. Palughi sent the response directly to the Complainant. The Custodian certified that, after receiving the instant complaint, she realized that the Complainant did not receive Ms. Palughi’s letter. Thus, the Custodian certified that she responded in writing on January 21, 2014 providing to the Complainant Ms. Palughi’s letter.

The Custodian affirmed that it was not until February 25, 2014 that Ms. Palughi was able to convert the raw CAMA data into the requested medium. The Custodian certified that the resulting five (5) spreadsheets contained more than two million separate cells of data. Additionally, the Custodian certified that the Borough possessed between 6,000 and 7,000 interior and exterior photographs. The Custodian certified that the photographs were contained on multiple compact discs (“CD”). The Custodian contended that the Borough did not deny access to the responsive records in their entirety. The Custodian asserted that she requested additional time to allow the GRC to adjudicate Hopkins, GRC 2014-01, *et seq.*

The Custodian, however, also argued that the request was invalid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). The Custodian argued that the Complainant requested records in a medium that the Borough did not maintain; thus, the Borough was required to create a new record. The Custodian asserted that the Borough needed additional time to create said record, which it accomplished on February 25, 2014.

The Custodian contended that the Borough would now require additional time to review the over two million individual cells to determine if any information should be redacted. N.J.S.A. 47:1A-1.1. Specifically, the Custodian asserted that the date may include “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material. See Ciesla v. NJ Dep’t of Health & Senior Serv., Div. of Health Care Quality & Oversight, GRC Complaint No. 2010-38 (June 2012) (*aff’d* 429 N.J. Super. 127 (App. Div. 2012)). The Custodian also asserted that the Borough was aware of additional licensing issues that have surfaced in Hopkins, which the GRC is addressing as part of its adjudication. Finally, the Custodian asserted that many of the photographs of home interiors could invoke privacy, security, and safety exemptions. N.J.S.A. 47:1A-1.

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).⁷ 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).

In the instant complaint, the Complainant argued that the Custodian failed to respond to his OPRA request. On the same day as receipt of the Denial of Access Complaint, the Custodian forwarded Ms. Palughi's response to him. The Custodian asserted that she thought the letter was simultaneously sent to both the Complainant and herself via e-mail; thus, she filed it away. The Custodian, although eventually providing Ms. Palughi's response to the Complainant, did so beyond the seven (7) business day time frame. For this reason, the evidence of record supports that the Complainant's OPRA request was "deemed" denial.

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

Unlawful Denial of Access

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

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

⁷ 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.

(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, Ms. Palughi 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 Ms. Palughi did not deny access to responsive records; rather, she sought an opportunity for the Township to respond based on Hopkins, GRC 2014-01, *et seq.* However, Ms. Palughi’s attempt to delay a response until after Hopkins violated OPRA. See Paff, GRC 2013-195.

Additionally, the Council’s decision here must take into account Hopkins because the ALJ determined that CAMA data is a “government record” subject to access under OPRA.⁸ Hopkins supports a finding in this complaint that the responsive CAMA data is disclosable under OPRA. Specifically, the ALJ deemed 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.

Hopkins also addresses this Custodian’s assertion that over 2 million cells of data may contain information nondisclosable under the ACD exemption. There, the Counties similarly argued that the ACD and personal privacy exemptions applied to the responsive CAMA data because it was never finalized and some of the data ultimately made up the MOD-IV program. In reaching the conclusion that neither exemption 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.]

Here, the Custodian argued that the CAMA data could be exempt as ACD material. Like the ACD argument in Hopkins, the Custodian asserted that certain data could be exempt under the ACD exemption, such as advisory opinions, recommendations, and deliberations. The Custodian asserted that it would take time to review and redact that much information. As was

⁸ The ALJ’s Initial Decision became final by operation of law on April 4, 2016.

the case in Hopkins, the GRC does not find this argument persuasive for the reasons contemplated by the ALJ.

Accordingly, Ms. Palughi unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Ms. Palughi 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 Ms. Palughi was required to disclose the responsive CAMA data. Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian and/or Ms. Palughi must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.

Finally, the GRC must note that the Supreme Court's recent decision in Paff v. Twp. of Galloway, 229 N.J. 340 (2017) is binding on requests for electronic data. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant was not required to coalesce basic information into an e-mail log and disclose same. Paff, 227 N.J. 24. The Appellate Court that such action was akin to creating a "government record," which OPRA does 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 GRC notes that Paff effectively negates any argument that disclosure of CAMA data would require the Custodian to create a record.

Property Photographs

In the SOI, the Custodian certified that the Borough possessed between 6,000 and 7,000 photographs on multiple CDs. The Custodian further argued that disclosure of interior property photographs could invoke privacy, security, and safety exemptions OPRA. N.J.S.A. 47:1A-1.1. Notwithstanding, there is no additional evidence that the Custodian disclosed said photographs, in part or whole, to the Complainant. Considering all arguments and facts presented in this complaint, the GRC finds that the Custodian unlawfully denied access to at least some of the responsive photographs. The Custodian did not provide those photographs she located, and further did not prove that every one of the 6,000 to 7,000 photographs should have been withheld.

Accordingly, the Custodian unlawfully denied access to at least a portion of the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian has not provided any photographs to date, whether in whole or part, due to the exemptions asserted. Thus, the Custodian must disclose the requested photographs. Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of those same.

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Ms. Palughi 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Ms. Palughi unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Ms. Palughi 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 ALJ's Final Decision supports that Ms. Palughi 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 Ms. Palughi must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
3. The Custodian unlawfully denied access to at least a portion of the responsive property photographs. N.J.S.A. 47:1A-6. Specifically, the Custodian has not provided any photographs to date, whether in whole or part, due to the exemptions asserted. Thus, the Custodian must disclose the requested photographs. Should the Custodian believe that any photographs fall within the cited exemptions, the Custodian must certify to the number of records withheld and the content of those same.
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 deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,¹⁰ to the Council Staff.¹¹**

⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "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."

¹¹ 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 and/or Ms. Palughi knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Acting Executive Director

January 22, 2019