



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

May 21, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-45

v.

Township of Neptune (Monmouth)
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 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 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 21st Day of May 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: May 22, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-45

v.

**Township of Neptune (Monmouth)²
Custodial Agency**

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

Custodian of Record: Richard J. Cuttrell

Request Received by Custodian: January 7, 2014

Response Made by Custodian: January 8, 2014

GRC Complaint Received: January 23, 2014

Background

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Council considered the March 19, 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 complied with the Council's February 26, 2019 Interim Order because he responded in the prescribed time frame disclosing the responsive CAMA data and photographs to the Complainant on March 6, 2019. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's February 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Gene Anthony, Esq., of The Law Offices of Gene Anthony (Eatontown, NJ).

not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's February 26, 2019 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 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 March 28, 2019, the Council distributed its Interim Order to all parties. On April 25, 2019, Complainant's Counsel confirmed via e-mail to the Government Records Council ("GRC"), which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

Analysis

Prevailing Party Attorney's Fees

At its March 26, 2019 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 March 28, 2019, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on April 29, 2019.³ On April 25, 2019, Complainant's Counsel notified the GRC, copying Custodian's Counsel, that the fee issue was amicably resolved.

³ This calculation did not include April 19, 2019 as a business day due to a State holiday.

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 the Council find 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
Acting Executive Director

May 14, 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

March 26, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-45

v.

Township of Neptune (Monmouth)
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 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 complied with the Council’s February 26, 2019 Interim Order because he responded in the prescribed time frame disclosing the responsive CAMA data and photographs to the Complainant on March 6, 2019. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s February 26, 2019 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 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 26th Day of March, 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: March 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-45

v.

**Township of Neptune (Monmouth)²
Custodial Agency**

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

Custodian of Record: Richard J. Cuttrell

Request Received by Custodian: January 7, 2014

Response Made by Custodian: January 8, 2014

GRC Complaint Received: January 23, 2014

Background

February 26, 2019 Council Meeting:

At its February 26, 2019 public meeting, the Council considered the February 19, 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 unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the ALJ’s Final Decision supports that the Custodian 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 must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
2. The Custodian 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 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.

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Gene Anthony, Esq., of The Law Offices of Gene Anthony (Eatontown, NJ).

3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously 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 knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 28, 2019, the Council distributed its Interim Order to all parties. On March 7, 2019, the Government Records Council ("GRC") received the Custodian's response. Therein, the Custodian provided proof that he sent responsive CAMA data on a compact disc, as well as property photos on a jump drive, to the Complainant via U.S. mail on March 6, 2019. Additionally, the Custodian included his certified confirmation of compliance to the Council Staff.

Analysis

Compliance

At its February 26, 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 none existed. 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 28, 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 March 7, 2019.

On March 7, 2019, the fifth (5th) business day after receipt of the Council's Order, the GRC received the Custodian's compliance. Therein, the Custodian provided proof of his compliance on March 6, 2019, as well as certified confirmation of compliance. Thus, the Custodian satisfied the Council's Order.

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.

Therefore, the Custodian complied with the Council's February 26, 2019 Interim Order because he responded in the prescribed time frame disclosing the responsive CAMA data and photographs to the Complainant on March 6, 2019. Additionally, 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).

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 instant matter, the Custodian unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's February 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th 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 arguing that the Custodian unlawfully denied access to the responsive CAMA data and property photographs. In the Statement of Information, the Custodian argued that no records existed. In its February 26, 2019 Interim Order, the Council disagreed; holding that the Custodian unlawfully denied access to the CAMA data and potentially the responsive property photographs. The Council thus ordered the Custodian to disclose the responsive records (or certify to the non-existence of responsive photographs). On March 7, 2019, the GRC received the Custodian compliance package, wherein he disclosed all responsive records to the Complainant. 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 February 26, 2019 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 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 complied with the Council's February 26, 2019 Interim Order because he responded in the prescribed time frame disclosing the responsive CAMA data and photographs to the Complainant on March 6, 2019. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's February 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's February 26, 2019 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 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
Acting Executive Director

March 19, 2019



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-45

v.

Township of Neptune (Monmouth)
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council ("Council") considered the February 19, 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 unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the ALJ's Final Decision supports that the Custodian 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 must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
2. The Custodian 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 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.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,² to the Council Staff.³**

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



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

Interim Order Rendered by the
Government Records Council
On The 26th Day of February, 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 28, 2019

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
February 26, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-45

v.

**Township of Neptune (Monmouth)²
Custodial Agency**

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

Custodian of Record: Richard J. Cuttrell
Request Received by Custodian: January 7, 2014
Response Made by Custodian: January 8, 2014
GRC Complaint Received: January 23, 2014

Background³

Request and Response:

On January 7, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 8, 2014, the Custodian responded in writing denying the Complainant’s OPRA request because it would require the Township to create a record. The Custodian directed the Complainant to the Complainant to Monmouth County (“County”) Tax Board’s open public records site.

Denial of Access Complaint:

On January 23, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested CAMA data from the County on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality.

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Gene Anthony, Esq., of The Law Offices of Gene Anthony (Eatontown, 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 was the subject of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (June 2018).

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 Township 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,” requires⁵ all municipalities within the County to utilize the MODIV/CAMA program and there is a retention schedule for property record cards (“PRC”).
- Revaluation contracts require firms to deliver PRCs to the municipality, which utilize them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

Statement of Information:

On February 26, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 7, 2014. The Custodian certified that his search included consulting the Township Tax Assessor. The Custodian certified that he responded in writing on January 8, 2014 advising the Complainant that no records existed and the Township would be required to create a record to fulfill the OPRA request. The Custodian affirmed that he also directed the Complainant to the County’s public records website.

The Custodian asserted that no records exist as defined under N.J.S.A. 47:1A-1.1. The Custodian argued that the Complainant’s OPRA request directed the Township to create a record from County-issued software using certain commands. The Custodian argued that, under OPRA, he was not obligated to create any records to fulfill the subject request.

Additional Submissions:

On July 24, 2014, the Complainant’s Counsel submitted a letter brief disputing the Township’s position. Counsel argued that the Complainant identified an existing data folder; thus, the Township would not be required to create a new file. Further, Counsel noted that the

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

definition of a “government record” under OPRA includes “data processed” documents and “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1.

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

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). The Council’s decision here must take into account Administrative Law Judge (“ALJ”) Kimberly A. Moss’ Final Decision in Hopkins, GRC 2014-01 *et seq.*, because the ALJ held on whether CAMA data is a “government record” subject to access under OPRA.⁶ Therein, the ALJ found that “CAMA data are government records that are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter.” Id. at 18.

Here, 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

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

The GRC must also 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

⁶ The ALJ’s Initial Decision became final by operation of law on April 4, 2016.

required to coalesce basic information into an e-mail log and disclose same. Paff, 227 N.J. 24. The Appellate Court determined 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

Regarding the property photographs, the Custodian did not clearly identify 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 unlawfully denied access to copies of any responsive photographs.

Accordingly, the Custodian 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 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 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 unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the ALJ’s Final Decision supports that the Custodian 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 must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
2. The Custodian 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 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.

3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁸ to the Council Staff.⁹**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Acting Executive Director

February 19, 2019

⁷ 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.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.