



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-46

v.

Borough of Red Bank (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 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 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 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Prevailing Party Attorney's Fees*
Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-46

v.

**Borough of Red Bank (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 Red Bank ("Borough") including property photographs.

Custodian of Record: Pamela Borghi

Request Received by Custodian: January 8, 2014

Response Made by Custodian: January 8, 2014

GRC Complaint Received: January 23, 2014

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 23, 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 March 26, 2019 Interim Order. First, the Custodian disclosed the responsive CAMA data to the Complainant within the prescribed time frame to do so. Second, the Custodian disclosed those photographs that were recoverable from a corrupted compact disc to the Complainant within the extended time frame to comply. Finally, the Custodian provided certified confirmation of compliance to the Council Staff, also within the extended time frame.
2. The Custodian and Mr. Elias unlawfully denied access to the subject OPRA request on the basis that same was invalid. Further, Mr. Elias unlawfully denied to the request due to pending litigation. Also, both the Custodian and Mr. Elias unlawfully denied access

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

² Represented by Gregory J. Cannon, Esq. of Sobel, Hans & Cannon, LLP (Englewood Cliffs, NJ). Previously represented by Daniel O'Hern, Esq., of Byrnes, O'Hern, & Heugle, LLC (Red Bank, NJ).

to both the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's March 26, 2019 Interim Order, notwithstanding the technological issues in doing so. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Elias' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Elias' actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's March 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 CAMA data and photographs to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On May 2, 2019, the Council distributed its Interim Order to all parties. On May 28, 2019, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved and that the complaint may be dismissed.

Analysis

Prevailing Party Attorney's Fees

At its April 30, 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 May 2, 2019, the Council distributed its Interim Order to all parties; thus, their response was due by close of business on May 31, 2019. On May 28, 2019, the Complainant's Counsel confirmed via e-mail, copying Custodian's Counsel, that the fee issue was resolved and that this complaint may be dismissed.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Acting Executive Director

June 18, 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

April 30, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-46

v.

Borough of Red Bank (Monmouth)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 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 March 26, 2019 Interim Order. First, the Custodian disclosed the responsive CAMA data to the Complainant within the prescribed time frame to do so. Second, the Custodian disclosed those photographs that were recoverable from a corrupted compact disc to the Complainant within the extended time frame to comply. Finally, the Custodian provided certified confirmation of compliance to the Council Staff, also within the extended time frame.
2. The Custodian and Mr. Elias unlawfully denied access to the subject OPRA request on the basis that same was invalid. Further, Mr. Elias unlawfully denied the request due to pending litigation. Also, both the Custodian and Mr. Elias unlawfully denied access to both the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s March 26, 2019 Interim Order, notwithstanding the technological issues in doing so. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Elias’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor Mr. Elias’ actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s March 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 CAMA data and photographs 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 30th Day of April 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 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-46

v.

**Borough of Red Bank (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 Red Bank (“Borough”) including property photographs.

Custodian of Record: Pamela Borghi

Request Received by Custodian: January 8, 2014

Response Made by Custodian: January 8, 2014

GRC Complaint Received: January 23, 2014

Background

Procedural History:

On March 25, 2019, the Custodian e-mailed the Complainant providing access to CAMA data received from Tax Assessor Mitchell Elias. Additionally, the Custodian noted that a compact disc (“CD”) containing the responsive pictures was apparently damaged and unreadable. The Custodian stated that “to the best of [her] knowledge,” no additional records exist.

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Council considered the March 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 and Mr. Elias unlawfully denied access to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty.

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

² Represented by Gregory J. Cannon, Esq. of Sobel, Hans & Cannon, LLP (Englewood Cliffs, NJ). Previously represented by Daniel O’Hern, Esq., of Byrnes, O’Hern, & Heugle, LLC (Red Bank, NJ).

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

2. Mr. Elias unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Elias 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 Mr. Elias was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian and/or Mr. Elias must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
3. The Custodian and/or Mr. Elias may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Elias 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.
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 Mr. Elias knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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.

Additional Procedural History:

On March 28, 2019, the Council distributed its Interim Order to all parties. On April 3, 2019, the Custodian resent CAMA data to the Complainant, asking him to confirm whether he was able to access it. On April 4, 2019, the Complainant confirmed receipt of the “correct file.”

On April 4, 2019, the Government Records Council (“GRC”) e-mailed the Custodian confirming receipt of her March 25, 2019 e-mail. The GRC noted that the Council’s Order also required the Custodian to submit certified confirmation of compliance. The GRC further noted that the compliance time frame expired at the end of the day.

On the same day, the Custodian e-mailed the GRC stating the responsive CAMA data was already provided to the Complainant. The Custodian also stated that the Borough’s Information Technology (“IT”) Director was attempting to access photographs from the CD that had been “corrupted.” The Custodian stated that any pictures retrieved would be provided in a Google® Drive link. The Custodian asserted that she believed the Borough would be able to respond by the end of the following week. The GRC responded providing an extension of time to comply with the Council’s Order through April 11, 2019.

On April 9, 2019, the Custodian e-mailed the Complainant stating that the IT Director was able to recover some photographs from the CD, but the remainder of the files were permanently lost. The Custodian stated that those photographs retrieved were available through Google® Drive, to which she provided a link.

On April 11, 2019, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that she collaborated with Mr. Elias to provide the Complainant with the responsive CAMA data. The Custodian certified that she sent said data to the Complainant on April 3, 2019. The Custodian also confirmed that she was unable to provide “all responsive photographs” due to a “corrupted” CD. The Custodian certified that the Borough’s IT Director was able to recover some of the photographs and load them into Google® Drive. The Custodian certified that because certain photographs were “unidentifiable and non-retrievable,” she provided all others that existed to the Complainant on April 9, 2019.

Analysis

Compliance

At its March 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 March 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 April 4, 2019.

On April 3, 2019, the Custodian e-mailed responsive CAMA data to the Complainant, of which he confirmed receipt on the next day. On April 4, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian obtained an extension of time until April 11, 2019 to respond to the Council's Order. On April 9, 2019, the Custodian e-mailed the Complainant apprising him of the IT Director's success in retrieving photographs from a "corrupted" CD. The Custodian disclosed those photographs via link to Google® Drive. On April 11, 2019, the final day of the extended time frame to comply, the Custodian provided certified confirmation of compliance to the Council Staff.

In reviewing the evidence of record here, the GRC is satisfied that the Custodian complied with the Council's Order. Specifically, she successfully disclosed responsive CAMA data to the Complainant. Additionally, the Custodian obtained an extension to try and recover responsive photographs from a CD. Upon recovery of those photographs that could be retrieved, the Custodian provided the Complainant access via Google® Drive. The Custodian then provided certified confirmation of compliance on the final day of the extended time frame to comply. The Custodian made every attempt to comply with the Order and was able to do so rather successfully given the technological obstacles she faced.

Therefore, the Custodian complied with the Council's March 26, 2019 Interim Order. First, the Custodian disclosed the responsive CAMA data to the Complainant within the prescribed time frame to do so. Second, the Custodian disclosed those photographs that were recoverable from a corrupted CD to the Complainant within the extended time frame to comply. Finally, the Custodian provided certified confirmation of compliance to the Council Staff, also within the extended time frame.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate,

with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter currently before the Council, the Custodian and Mr. Elias unlawfully denied access to the subject OPRA request on the basis that same was invalid. Further, Mr. Elias unlawfully denied to the request due to pending litigation. Also, both the Custodian and Mr. Elias unlawfully denied access to both the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's March 26, 2019 Interim Order, notwithstanding the technological issues in doing so. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Elias' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Elias' actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (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. The Custodian argued in the Statement of Information that the request was invalid because it failed to identify a specific record. In its March 26, 2019 Interim Order, the Council disagreed and ordered disclosure of the requested CAMA data and property photographs (if in existence). Between April 3, and April 9, 2019, the Custodian disclosed responsive CAMA data and property photographs 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 March 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 CAMA data and photographs 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 March 26, 2019 Interim Order. First, the Custodian disclosed the responsive CAMA data to the Complainant within the prescribed time frame to do so. Second, the Custodian disclosed those photographs that were recoverable from a corrupted compact disc to the Complainant within the extended time frame to comply. Finally, the Custodian provided certified confirmation of compliance to the Council Staff, also within the extended time frame.
2. The Custodian and Mr. Elias unlawfully denied access to the subject OPRA request on the basis that same was invalid. Further, Mr. Elias unlawfully denied to the request due to pending litigation. Also, both the Custodian and Mr. Elias unlawfully denied access to both the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's March 26, 2019 Interim Order, notwithstanding the technological issues in doing so. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Elias' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mr. Elias' actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's March 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 CAMA data and photographs 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

April 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

March 26, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-46

v.

Borough of Red Bank (Monmouth)
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 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 and Mr. Elias unlawfully denied access to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). For that reason, the Complainant’s OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Borough’s files.
2. Mr. Elias unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Elias 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 Mr. Elias was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian and/or Mr. Elias must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.
3. The Custodian and/or Mr. Elias may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Elias must either disclose the responsive photographs to the Complainant (identifying if any

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-46

v.

**Borough of Red Bank (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 Red Bank (“Borough”) including property photographs.

Custodian of Record: Pamela Borghi

Request Received by Custodian: January 8, 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 stating that she was not familiar with the process the Complainant outlined in his OPRA request. The Custodian noted that she would forward the request to Tax Assessor Mitchell Elias for guidance. Additionally, the Custodian denied the portion of the request referring to photographs as overly broad. The Custodian offered to fulfill this portion of the request if the Complainant provided specific properties or subject matter.

On the same day, the Complainant clarified his portion of the request for photographs to seek any in Mr. Elias’ possession that were taken of the front side of buildings on properties during the Borough’s revaluation. On the same day, the Custodian e-mailed the Complainant advising that she would speak with Mr. Elias, but believed that the request would require him to go through every file to locate responsive photographs. The Custodian averred that the Complainant must identify the property by address or block/lot and subject matter.

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

² Represented by Daniel O’Hern, Esq., of Byrnes, O’Hern, & Heugle, LLC (Red Bank, 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.

On January 10, 2014, the Custodian responded in writing to the Complainant forwarding Mr. Elias' response to his OPRA request noting that she would check with him in two (2) weeks for any additional information. Therein, Mr. Elias acknowledged that he knew that the Complainant submitted the same OPRA request to Monmouth County ("County") Tax Board. Further, Mr. Elias acknowledged that the Complainant filed a Denial of Access Complaint⁴ regarding the County's denial of one of the OPRA requests. Mr. Elias 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 Denial of Access Complaint before disclosing any records.

On January 22, 2014, Mr. Elias sent a memorandum to the Custodian stating that he did not believe the responsive records were subject to disclosure at that time for the following reasons:

- The Borough was not required to create a record where one does not exist.
- The created document culls information from various locations within the work-in-progress portion of the software, known as CAMA, which is often updated daily. This information is the basis for the finalized MODIV records, which are public and readily available from many sources.
- The County supplied, financed, and is maintaining the software in which CAMA data exists.

Mr. Elias stated that it was his understanding that the GRC is reviewing Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* and the Borough should seek sufficient time to await their decision before determining how to proceed. Mr. Elias averred that it may be problematic to disclose records that the GRC could later rule are exempt from disclosure.

Denial of Access Complaint:

On January 23, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted The Complainant stated that he previously requested CAMA data from 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

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).

⁵ Ibid.

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.

Statement of Information:

On March 5, 2014, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on January 8, 2014. The Custodian certified that his/her search included contacting Mr. Elias for advice. The Custodian certified that Mr. Elias expressed several concerns with disclosing the responsive CAMA data. The Custodian certified that she responded in writing on January 10, 2014 providing to the Complainant Mr. Elias’ response via e-mail.

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 asserted that the Borough did not want to disclose any data to which the County objected disclosure.

Notwithstanding the foregoing, the Custodian argued that the Complainant’s request was invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian contended that the Complainant failed to identify with reasonable clarity the records sought; rather, the Complainant sought general information. Further, the Custodian contended that, although the Complainant provided clarification of the photograph portion of the request, it did not cure the deficiencies. The Custodian argued that responding to such a request would have placed a significant burden on Mr. Elias’ office. The Custodian noted that, to the extent that the GRC determines the Borough is not entitled to an extension, it reserved the right to raise substantive objections to the subject request.

Additional Submissions:

On July 24, 2014, the Complainant’s Counsel submitted a letter brief disputing the

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.

Borough's position. First, the Complainant's Counsel contended that the Borough's response was both untimely and insufficient. Specifically, the Complainant's Counsel asserted that the Borough's request to delay a response until after the conclusion of Hopkins was unreasonable and thus unlawful.

The Complainant's Counsel next stated that in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010), the Appellate Division held that a custodian was not required to perform research, compile information or create a new file. Counsel argued that the facts here were similar to Burnett because the Complainant specifically identified the data file sought. Counsel noted that the Complainant provided the Custodian with specific instructions to locate the compressed data folder. Further, Counsel noted that the 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.

Moreover, the Complainant's Counsel argued that the Complainant's request for photographs was specific and valid. The Complainant's Counsel argued that Burnett supported that the Complainant did not need to seek photographs for specific properties; he clearly sought all photographs for every property in the Borough. Further, the Complainant's Counsel argued that the Custodian could easily locate photographs with a reasonable amount of effort. See Burke v. Brandes, 429 N.J. Super. 169, 176-77 (App. Div. 2012).

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

Validity of Request

The New Jersey Appellate Division has held that:

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

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

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor*

any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;⁷ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Most recently, the Supreme Court addressed a custodian's obligation to coalesce information stored electronically into a single record. In Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

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

. . . .

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

[Id. at 353, 356.]

⁷ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

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

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

The Council first noted that the definition of a "government record" included "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

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

[Id. at 12 (emphasis added).]

In this matter, Mr. Elias denied the request on January 22, 2014 because, among other reasons, it would require creation of a record. The Custodian subsequently argued in the SOI that the Complainant's OPRA request seeking CAMA data and property photographs failed to identify the records sought. The Custodian contended that she properly denied the request because same was invalid: the Borough was not required to compile information and create a new record. Bent, 381 N.J. Super. at 37. The Custodian also argued that the portion of the request seeking photographs was equally invalid because the Complainant failed to identify specific properties.

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

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

Regarding the portion of the request seeking photographs, Custodian argued in the SOI that it was similarly invalid. The Custodian argued that that portion of the request failed to identify specific properties of which responsive photographs were taken. The GRC is not persuaded by the Borough's position: the request identifies a type of record (photographs) associated with the CAMA data sought. Thus, it is not unreasonable to believe that those photographs submitted to correspond with the data at that time, if any, were responsive to request. The GRC does not find that the portion of the request seeking photographs would require an "open-ended" search of every agency record.

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

Unlawful Denial of Access

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

CAMA Data

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Regarding the existence of parallel litigation in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016), in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014), the custodian denied access to the subject OPRA request, arguing that it was the subject of Paff v. City of Union City (Union), GRC Complaint No. 2012-262 (August 2013). The Council initially noted that pending litigation was not a lawful basis to deny access to a record (citing Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011)). The Council then took judicial notice of the facts in Paff, GRC 2012-262, and determined that the custodian unlawfully denied access to the responsive record. Paff, GRC 2013-195 at 3-4.

In the instant matter, the Council's decision 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.⁸ 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.

Initially, Mr. Elias responded through the Custodian seeking additional time to await the Council's holding in Hopkins, before responding to the subject OPRA request. As part of the SOI submitted in this matter, the Custodian contended that Mr. Elias did not deny access to responsive records; rather, he sought an opportunity for the Borough to respond based on Hopkins, GRC 2014-01, *et seq.* The Custodian noted that the Borough would provide records in a reasonable amount of time should the GRC determine that same was disclosable. However, Mr. Elias' attempt to delay a response until after Hopkins violated OPRA. See Paff, GRC 2013-195.

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

Accordingly, Mr. Elias unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Elias unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195. Additionally, the ALJ's Final Decision supports that Mr. Elias was required to disclose the responsive CAMA data. Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian and/or Mr. Elias must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.

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

Property Photographs

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

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

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Mr. Elias knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their 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 and Mr. Elias unlawfully denied access to the Complainant's OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). For that reason, the Complainant's OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Borough's files.
2. Mr. Elias unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Elias 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 Mr. Elias was required to disclose the responsive

CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian and/or Mr. Elias must disclose the CAMA data available at the time that the Complainant submitted his OPRA request.

3. The Custodian and/or Mr. Elias may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian and/or Mr. Elias 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.
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**
5. The Council defers analysis of whether the Custodian and/or Mr. Elias knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Acting Executive Director

March 19, 2019

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.

were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.

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

Interim Order Rendered by the
Government Records Council
On The 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

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.