



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 25, 2016 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-01, 2014-10 and 2014-11

v.

Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. The Office of Administrative Law should make a reasonable determination as to whether the Complainant’s Co-Counsel should be awarded the full requested lodestar by: 1) determining whether both sought reasonable hourly rates; 2) determining whether the Certifications contain any duplicative billing; 3) determining whether the facts of this complaint allow for a contingency enhancement and if so, to what extent; and 4) determining whether Co-Counsel’s costs are reasonable.

Interim Order Rendered by the
Government Records Council
On The 25th Day of October, 2016

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: October 26, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
October 25, 2016 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

**GRC Complaint Nos. 2014-01,
2014-10 and 2014-11²**

v.

**Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation³
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for specifically identified municipalities in each respective County.

Custodians of Record: Matthew Clark (“Clark”), MaryLouise Hennighan (“Hennighan”), and Ralph T. Meloro, IV (“Meloro”)

Request Received by Custodian: December 18, 2013

Response Made by Custodian: December 19, 2013, and December 26, 2013

GRC Complaint Received: January 6, 2014, January 14, 2014

Background

July 26, 2016 Council Meeting:

At its July 26, 2016 public meeting, the Council considered the June 20, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Having reviewed the submissions of the parties, the Council should deny Custodian Counsel’s motion to remand the consolidated complaint back to the Office of Administrative Law for further proceedings.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). Also represented by Richard Gutman, Esq. (Montclair, NJ). Mr. Gutman previously withdrew his representation after the GRC transmitted this complaint to the Office of Administrative Law. Mr. Gutman began actively working on the matter again following Administrative Law Judge’s Initial Decision in November 2015.

² The GRC has consolidated the complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Deputy Attorney General Heather Anderson.

2. Because the GRC was divested of the opportunity to adopt, reject or modify the Administrative Law Judge’s Initial Decision, and therefore, the Administrative Law Judge’s Initial Decision has been deemed adopted by operation of law, the GRC is constrained to address only the remaining issue of determining the amount of the prevailing party attorney’s fees. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On July 27, 2016, the Council distributed its Interim Order to all parties.

On August 24, 2016, Complainant’s Counsel filed a certification of services for himself and the Co-Counsel. *See* Certification of Walter M. Luers, Esq., August 24, 2016; Certification of Richard M. Gutman, Esq., August 6, 2016 (“Certifications”) in support of their application for fees (“Application”). On September 8, 2016, the Custodian’s Counsel submitted objections to the Certifications. On September 13, 2016, the Custodian’s Counsel re-submitted objections with minor corrections and an additional attachment previously omitted in her original submission.

On September 16, 2016, the Complainant’s Counsel submitted a supplemental certification of services in support of additional fees for himself and Co-Counsel. *See* Supplemental Certification of Richard M. Gutman, Esq., September 16, 2016; Supplemental Certification of Walter M. Luers, Esq., September 15, 2016 (“Supplemental Certifications”). The Complainant’s Counsel also submitted a response brief addressing Custodian Counsel’s objections.

Analysis⁴

Compliance

At its July 26, 2016 meeting, the Council permitted the “Complainant, or his attorney . . . to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision.” N.J.A.C. 5:105-2.13(b). Further, the Council provided that the Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).

On August 24, 2016, the twentieth (20) business day after receipt of the Council’s Order, the Complainant’s Counsel filed an Application in compliance with the Interim Order. Neither the Custodian of Franklin Fire District No. 1 nor Custodian’s Counsel filed opposition to the

⁴ The GRC reiterates from its January 30, 2015 Interim Order that it must employ the Doctrine of Necessity in GRC Complaint No. 2014-11, based on recusal issues connected to Morris County.

Application. On September 8, 2016, the tenth (10) business day after receipt of the Application, the Custodian's Counsel filed objections to the Certifications.

Counsels' Application

Complainant's Co-Counsel included Walter M. Luers, Esq., and Richard M. Gutman, Esq. Each submitted a certification for fees, as well as a supplemental certification following Custodian Counsel's objections.

In Mr. Luers' Certification, he sought fees in the amount of \$29,631.83, based on the following:

- 73.3 hours of time at \$315.00 per hour.
- 35 hours of time at \$157.50 per hour for contingency enhancements.
- \$1,029.83 for expenses.

In Mr. Gutman's Certification, he sought fees in the amount of \$37,164.00, based on the following:

- 43.08 hours at \$400.00 per hour prior to November 17, 2015, with a 50% contingency enhancement.
- 28.29 hours at \$400.00 per hour after November 17, 2015, with no contingency enhancement.

Mr. Gutman also sought individual fees from the following:

- Monmouth County - \$300.00, comprised of 0.5 hours at \$400.00 per hour with a 50% contingency enhancement.
- Morris County - \$540.00, comprised of 0.9 hours at \$400.00 per hour with a 50% contingency enhancement.

Messrs. Luers and Gutman also submitted a single legal brief in support of their hourly rates, contingency requests, and expenses.

In her objections, the Custodian's Counsel argued that the proposed lodestar was unreasonable, that Complainant Co-Counsels engaged in duplicative billing subject to reduction, and that Complainant Co-Counsels' costs were excessive. The Custodian's Counsel requested that the GRC reduce the lodestar based on these objections.

Subsequent to the objections, the Complainant's Co-Counsels submitted a response to the objections. The Complainant's Co-Counsels also submitted Supplemental Certifications seeking additional fees for time spent responding to the objections. Therein, Mr. Gutman sought an additional \$9,560 for 23.9 hour at \$400.00 per hour. Mr. Luers sought an additional \$913.50 for 2.9 hours at \$315.00 per hour. Co-Counsel also submitted an hourly accounting of time spent addressing the Custodian Counsel's objections as part of their Supplemental Certifications.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t. of Corrections, (“NJDPM”) 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. *See generally* NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” *Id.* at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In this matter, it is undisputed that the Complainant prevailed in his action. Upon review of the Certifications, objections, and supplemental certifications, it is evident that the Office of Administrative Law (“OAL”) may be in the best position to review and determine the issues raised by all parties. Specifically, Complainant’s Co-Counselors are seeking a contingency enhancement, which the GRC has typically neither awarded nor allowed since 2011 at the earliest. *See* Livecchia v. Borough of Mt. Arlington (Morris), GRC Complaint No. 2008-80 (Interim Order dated November 29, 2011)(holding that no lodestar enhancement was appropriate). Further, the Council at this time has limited expertise in attorney’s fees, having previously relied extensively on the OAL to review and determine appropriate fee awards. For this reason, the GRC is satisfied that the OAL is in the best position to resolve the parties’ arguments and reach a reasonable prevailing party fee determination.

Thus, this complaint should be referred to the OAL to determine reasonable prevailing party attorney’s fees. The OAL should make a reasonable determination as to whether the Complainant’s Co-Counselors should be awarded the full requested lodestar by: 1) determining whether both sought reasonable hourly rates; 2) determining whether the Certifications contain any duplicative billing; 3) determining whether the facts of this complaint allow for a

contingency enhancement and if so, to what extent; and 4) determining whether Co-Counsel's costs are reasonable.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. The Office of Administrative Law should make a reasonable determination as to whether the Complainant's Co-Counsel should be awarded the full requested lodestar by: 1) determining whether both sought reasonable hourly rates; 2) determining whether the Certifications contain any duplicative billing; 3) determining whether the facts of this complaint allow for a contingency enhancement and if so, to what extent; and 4) determining whether Co-Counsel's costs are reasonable.

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

October 18, 2016



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Complainant

Complaint Nos. 2014-01, 2014-10 and 2014-11

v.

Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the June 20, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote and by Doctrine of Necessity, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Having reviewed the submissions of the parties, the Council should deny Custodian Counsel’s motion to remand the consolidated complaint back to the Office of Administrative Law for further proceedings.
2. Because the GRC was divested of the opportunity to adopt, reject or modify the Administrative Law Judge’s Initial Decision, and therefore, the Administrative Law Judge’s Initial Decision has been deemed adopted by operation of law, the GRC is constrained to address only the remaining issue of determining the amount of the prevailing party attorney’s fees. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**



Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

**GRC Complaint Nos. 2014-01,
2014-10 and 2014-11²**

v.

**Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation³
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for specifically identified municipalities in each respective County.

Custodians of Record: Matthew Clark (“Clark”), MaryLouise Hennighan (“Hennighan”), and Ralph T. Meloro, IV (“Meloro”)

Request Received by Custodian: December 18, 2013

Response Made by Custodian: December 19, 2013, and December 26, 2013

GRC Complaint Received: January 6, 2014, January 14, 2014

Background

January 30, 2015 Council Meeting:

At its January 30, 2015 public meeting, the Council considered the December 9, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of GRC Complaint No. 2014-11. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). Previously represented by Richard Gutman, Esq. (Montclair, NJ).

² The GRC has consolidated the complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Deputy Attorney General Heather Anderson.

themselves. *See Sokolinski v. Woodbridge Twp.*, 192 N.J. Super. 101, 106 (App. Div. 1983); *Cranberry Lake Quarry Co. v. Johnson*, 95 N.J. Super. 495, 521 (App. Div. 1967); *Gunthner v. Planning Bd. of the Borough of Bay Head*, 335 N.J. Super. 452 (Law Div. 2000); *Allen v. Toms River Reg'l Bd. of Educ.*, 233 N.J. Super. 642, 647 (Law Div. 1989).

2. Because of contested facts, conflicting certifications, and highly technological nature of the issues presented, the Council should refer these complaints to the OAL for a hearing to develop the record and resolve the following:
 - Whether the Counties are required to provide the CAMA data to which they have various levels of access or whether shared service agreement provisions, password protection, or limited to no accessibility relieve them of this obligation.
 - Whether the responsive CAMA data is exempt from disclosure as proprietary information due to its relationship to Microsystems' software. This issue should take into account whether prior disclosure can effectively moot a prohibition from disclosure under a licensing agreement, provided that disclosure of the CAMA data is similar to disclosing the software.
 - Whether any other exemptions, as raised by the Counties, apply to the responsive CAMA data.
3. This complaint should be referred to OAL to determine, if necessary, whether Clark, Rockwell and/or Meloro knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, this complaint should be referred to OAL to determine whether the Complainant is entitled to a prevailing party attorney's fee, if necessary.

Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties. On March 3, 2015, the complaint was transmitted to the Office of Administrative Law ("OAL"). On November 18, 2015, the Honorable Kimberly A. Moss, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter. The ALJ's November 16, 2015 Initial Decision, set forth as "Exhibit A," determined that:

I **CONCLUDE** 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.

[Exhibit A at 18.]

Additionally, the ALJ held that "no [custodian] of Monmouth, Sussex, or Morris knowingly and willfully violated OPRA under the totality of the circumstances" and that "[the Complainant] is the prevailing party and entitled to attorney's fees" Id. at 19, 21. Based on the foregoing, the ALJ ordered the following:

I hereby **ORDER** Monmouth, Sussex, and Morris [C]ounties' denial of the OPRA requests by [the Complainant] that are the subject of this matter . . . **REVERSED**. I further **ORDER** that [the Complainant] is the prevailing party and therefore entitled to attorney's fees.

[Id. at 21.]

Custodian's Exceptions

On November 30, 2015, the Custodians' Counsel sought an extension of five (5) business days to submit exceptions. On December 8, 2015, the GRC granted an extension until December 11, 2015, applying to all parties. On December 11, 2015, the Custodians' Counsel requested a second (2nd) extension until December 16, 2015, which the GRC granted, noting that it would not allow any further extensions. On December 16, 2015, the Custodians' Counsel filed exceptions to the ALJ's Initial Decision.

Complainant's Objections

On December 17, 2015, the Complainant's Counsel requested an extension of time until December 28, 2015, to submit a reply to the Custodian Counsel's exceptions, which the GRC granted. On December 28, 2015, the Complainant's Counsel submitted a reply to the Custodian Counsel's exceptions.

Extensions of Time

On December 16, 2015, the GRC requested a forty-five (45) day extension of the statutory period, or until February 17, 2016, to accept, reject, or modify the ALJ's Initial Decision. That extension was requested to allow the parties time to submit their exceptions and objections. The OAL granted the GRC's request on December 18, 2015.

On February 16, 2016, with the unanimous consent of all parties in accordance with N.J.S.A. 52:14B-10(c), the GRC requested a second forty-five (45) day extension of the statutory period, or until April 3, 2016, to accept, reject, or modify the ALJ's Initial Decision. *See also* N.J.A.C. 1:1-18.8(e). The OAL granted this extension on February 17, 2016.

Following a recusal issue and lack of quorum at the Councils' February and March meeting respectively, on April 1, 2016, in accordance with N.J.S.A. 52:14B-10(c), the GRC sought from the parties' consent for a third (3rd) extension of time to accept, reject, or modify the ALJ's Initial Decision. The Counties, via Counsel, and Microsystems both consented. However, the Complainant, via Counsel, did not consent, stating that delays in disclosure of the responsive CAMA data were harming the Complainant's business venture. Notwithstanding the Complainant's refusal to grant the extension, the GRC requested from the OAL a third (3rd) extension until May 18, 2016 for good cause. Specifically, the GRC noted that it twice scheduled these complaints for adjudication at a monthly meeting; however, the Council could not adjudicate them due to a recusal issue and lack of quorum in February and March, respectively. On April 2, 2016, the Complainant's Counsel submitted an objection to the GRC's request for a

third (3rd) extension. Therein, he argued that N.J.S.A. 52:14B-10(c) required an agency to seek and obtain unanimous consent for any extensions beyond the initial one. *See Gulotta v. NJ Racing Comm'n*, Docket No. A-1774-12T3 (App. Div. 2014). The Complainant's Counsel argued that the GRC's request should be denied based on the plain language of the statute.

On April 4, 2016, the Honorable Laura Sanders, Acting Director and Chief ALJ, issued a formal order holding that "the motion for consideration of a third [(3rd)] forty-five [(45)] day extension lacking the consent of the parties is hereby **DENIED**." Thus, the ALJ's Initial Decision became final by operation of law at that time. N.J.S.A. 52:14B-10.

Motion for Remand

On April 18, 2016, the Custodian's Counsel submitted to the GRC a motion for remand to the OAL to ask the OAL to reconsider its order denying the GRC's request for a third (3rd) extension to accept, reject, or modify the Initial Decision. The Custodian's Counsel argued that N.J.S.A. 52:14B-10(c) did not bar the GRC's extension to review the Initial Decision. The Custodian's Counsel contended that the OAL should have granted the extension in the interest of justice and because the Counties would be highly prejudiced by its denial, resulting in the GRC's inability to consider timely filed exceptions.

First, the Custodian's Counsel contended that the Initial Decision was not a final decision within the meaning of N.J.S.A. 52:14B-10(c), because it did not address the amount of fees due to Complainant's Counsel. Counsel asserted that an "initial decision shall be in final form and fully dispositive of all issues in the case." N.J.A.C. 1:1-18.1. The Custodian's Counsel contended that the ALJ found that the Complainant was a prevailing party but did not calculate a fee award. The Custodian's Counsel thus contended that the decision did not constitute an "Initial Decision" that is subject to consent requirements set forth in N.J.S.A. 52:14B-10(c). The Custodian's Counsel asserted that the Counties are suspended between two tribunals without the ability to pursue an appeal because a final decision cannot be issued until the fee award issue is settled.

Next, the Custodian's Counsel argued that the OAL should have extended the time frame in the interest of justice. N.J.A.C. 1:1-1.3(a); Matturri v. Bd. of Treasurers of the Judicial Ret. Sys., 173 N.J. 368, 379 (2002). The Custodian's Counsel further argued that the OAL had the ability to relax or dispense the time limitation if same resulted in an injustice, even "if a statute imposing the time limitation does not include a similar provision . . ." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 152 (2001); Newark Morning Ledger, Co. v. NJ Sports & Exposition Auth., 423 N.J. Super. 140, 159 (App. Div. 2011); Gallo v. Twp. Comm. Of Weehawkin, 181 N.J. Super. 385, 392 (1981). The Custodian's Counsel contended that the OAL prejudiced the Counties by denying the GRC's extension within hours of the Complainant's objection to same without allowing the Counties to submit a response. Counsel further contended that the GRC showed good cause not within the Counties' control (lack of quorum).

The Custodian's Counsel also argued that further injustice was committed when the OAL narrowly applied N.J.S.A. 52:14B-10(c). The Custodian's Counsel contended that quorum issues could effectively provide one party with the ability to control the outcome of an entire case by

withholding consent. Counsel contended that it is unlikely that the Legislature intended this result when enacting the revised statute. The Custodian's Counsel contended that the Counties are the only affected parties here. Specifically, the GRC was unable to address the Counties' exceptions regarding disclosure of sensitive information and their status as the actual custodian of record for the responsive CAMA data. However, the Complainant was not harmed because the business for which he intended to use the responsive records is running and open to the public. The Custodian's Counsel further asserted that the Complainant received the responsive records from the individual municipalities.

On April 27, 2016, the Complainant's Counsel submitted an opposition brief to the Custodian Counsel's motion for remand. The Complainant's Counsel argued that the motion for remand was disingenuous because Custodian's Counsel consented to three (3) extensions instead of immediately requesting remand due to the "newly discovered position." Notwithstanding, the Complainant's Counsel argued that the motion should be denied on its merits.

Regarding Custodian Counsel's "Initial Decision" claim, the Complainant's Counsel contended that the GRC's Interim Order only directed the OAL to determine whether the Complainant was a prevailing party and not the fee amount. The Complainant's Counsel further contended that he could not make a meaningful fee application without first knowing the degree to which the Complainant prevailed; thus, any fee application would not have been properly before the OAL. The Complainant's Counsel further noted that, contrary to past practices, the GRC has recently considered prevailing party attorney's fees internally. Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-228 (March 25, 2014); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (August 2013), Nevin v. NJ Dep't of Health & Senior Serv., GRC Complaint No. 2013-18 (February 2014). The Complainant's Counsel asserted that, were the GRC to remand this consolidated matter to the OAL, it would likely result in piecemeal fee applications.

Regarding the OAL's denial of a third (3rd) extension, Complainant's Counsel asserted that the ALJ properly ruled based on the plain reading of N.J.S.A. 52:14B-10(c). The Complainant's Counsel averred that the statute was amended to eliminate unlimited extensions of time. Counsel further argued that the amendment did not provide one party unilateral control on the outcome of the matter. The Complainant's Counsel argued that the statute allows for one (1) extension without consent. Further, the Complainant's Counsel noted that the Complainant consented to two (2) additional extensions prior to objecting to the last one.

Analysis⁴

Motion for Remand

The Council must first address whether to grant or deny Custodian Counsel's motion for remand back to the OAL. The GRC rejects Custodian Counsel's argument that the ALJ's Initial Decision did not dispose of all issues. The ALJ's Initial Decision disposed of all issues transmitted to the OAL. The GRC did not direct the OAL to determine the fee; thus, the ALJ

⁴ The GRC reiterates from its January 30, 2015 Interim Order that it must employ the Doctrine of Necessity in GRC Complaint No. 2014-11, based on recusal issues connected to Morris County.

appropriately did not address the issue. The GRC must also dismiss Custodian Counsel's argument that the Counties were highly prejudiced by the OAL's denial of an extension, resulting in the GRC's inability to consider their exceptions.

The GRC is disappointed that one party did not consent to the extension and that the OAL rejected the GRC's request for an extension. This is the first time in the GRC's fourteen-year history that the GRC has been unable to accept, reject, or modify an ALJ's Initial Decision within the allotted or extended time frame. The GRC sought extensions based on several "good cause" factors, which included extending the time frame for the parties to submit exceptions and objections, recusal issues, and a lack of quorum that forced the cancellation of the Council's March 29, 2016 Council meeting. The GRC fully intended to accept, reject, or modify the decision as soon as possible but was unable to do so for the reasons explained above. Moreover, the Complainant did not consent to a third extension of time, thereby preventing the GRC from taking action. That notwithstanding, the OAL's denial of the GRC's third request for extension of time to adopt, modify or reject the ALJ's Initial Decision is not a basis upon which the GRC can remand the matter to the OAL. As stated above, the ALJ decided all issues that were transmitted to the OAL for resolution.

Based on the foregoing, the Council should deny Custodian Counsel's motion to remand the consolidated complaint back to the OAL for further proceedings.

Prevailing Party Attorney's Fees

Because the GRC was divested of the opportunity to adopt, reject or modify the ALJ's Initial Decision, and therefore, the ALJ's Initial Decision has been deemed adopted by operation of law, the GRC is constrained to address only the remaining issue of determining the amount of the prevailing party attorney's fees. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Having reviewed the submissions of the parties, the Council should deny Custodian Counsel's motion to remand the consolidated complaint back to the Office of Administrative Law for further proceedings.
2. Because the GRC was divested of the opportunity to adopt, reject or modify the Administrative Law Judge's Initial Decision, and therefore, the Administrative Law Judge's Initial Decision has been deemed adopted by operation of law, the GRC is constrained to address only the remaining issue of determining the amount of the prevailing party attorney's fees. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees**

within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

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

June 20, 2016⁵

⁵ This complaint was prepared for adjudication at the Council's June 28, 2016 meeting, but could not be adjudicated due to lack of quorum.



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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint Nos. 2014-01, 2014-10
and 2014-11

v.

Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of GRC Complaint No. 2014-11. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse themselves. *See Sokolinski v. Woodbridge Twp.*, 192 N.J. Super. 101, 106 (App. Div. 1983); *Cranberry Lake Quarry Co. v. Johnson*, 95 N.J. Super. 495, 521 (App. Div. 1967); *Gunthner v. Planning Bd. of the Borough of Bay Head*, 335 N.J. Super. 452 (Law Div. 2000); *Allen v. Toms River Reg’l Bd. of Educ.*, 233 N.J. Super. 642, 647 (Law Div. 1989).
2. Because of contested facts, conflicting certifications and highly technological nature of the issues presented, the Council should refer these complaints to the OAL for a hearing to develop the record and resolve the following:
 - Whether the Counties’ are required to provide the CAMA data to which they have various levels of access or whether shared service agreement provisions, password protection or limited to no accessibility relieve them of this obligation.
 - Whether the responsive CAMA data is exempt from disclosure as proprietary information due to its relationship to Microsystems’ software. This issue should take into account whether prior disclosure can effectively moot a prohibition from



disclosure under a licensing agreement, provided that disclosure of the CAMA data is similar to disclosing the software.

- Whether any other exemptions, as raised by the Counties, apply to the responsive CAMA data.
3. This complaint should be referred to OAL to determine if necessary, whether Clark, Ms. Rockwell and/or Meloro knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, this complaint should be referred to OAL to determine whether the Complainant is entitled to a prevailing party attorney's fee, if necessary.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

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 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

**GRC Complaint Nos. 2014-01,
2014-10 and 2014-11²**

v.

**Monmouth County Board of Taxation,
Sussex County Board of Taxation, and
Morris County Board of Taxation³
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for specifically identified municipalities in each respective County.

Custodians of Record: Matthew Clark (“Clark”), MaryLouise Hennighan (“Hennighan”) and Ralph T. Meloro, IV (“Meloro”)

Request Received by Custodian: December 18, 2013

Response Made by Custodian: December 19, 2013 and December 26, 2013

GRC Complaint Received: January 6, 2014, January 14, 2014

Background⁴

Request and Response:

GRC Complaint No. 2014-01 (Monmouth)

On December 18, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to Clark seeking the above-mentioned records. The Complainant noted that CAMA data could be “. . . obtained by using command 21 (utilities) command 16 (file upload/download) Command (sic) csv.” Further, the Complainant noted that the compressed file should include “. . . land.csv, res.csv, mod4.csv, codes.csv [and] sales.csv.” The Complainant also sought any pictures of properties within the municipalities associated with assessments.

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

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Deputy Attorney General Heather Anderson.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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On December 19, 2013, Clark responded in writing stating that although the physical data was maintained on hardware owned and operated by the County of Monmouth Board of Taxation (“Monmouth”), it is only maintained per a county-to-municipal shared services agreement for MODIV processing services. For these reasons, Clark contended that Monmouth was not the custodian of record for the requested files and could not provide access to the responsive records without authorization from each municipality. Clark stated that he would provide records only after the Complainant sought out and received authorization from each municipality. Finally, Clark noted that Monmouth is the custodian of record for the MODIV tax list and SRA1 files, which are readily available online.

On December 20, 2013, the Complainant questioned whether the CAMA data is utilized by Monmouth in appeals. Clark responded stating that some data is gathered from public files, but overall Monmouth does not utilize CAMA data in appeals. On the same day, the Complainant disputed that Monmouth did not have access to the requested CAMA data since the system was hosted by Monmouth as part of a shared services agreement. Clark responded providing language from the shared services agreement stating that the requested data belongs to the municipalities and that Monmouth would not make information public without consent from the municipalities. Clark further noted that he authored the shared services agreement and the intent was to maintain the data through providing the service. Clark noted that the current agreement was silent as to Monmouth’s ability to use the data, but that historically, Monmouth never disclosed it unless authorized by the municipalities because it is Monmouth’s position that the data belonged to same.

On December 22, 2013, the Complainant sent Clark the GRC’s decision in Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013) and advised that according to the GRC, parties to a shared services agreement are both responsible for providing records requested under OPRA. The Complainant urged Clark to contact the GRC regarding this decision and further noted that he would file a Denial of Access Complaint if Clark did not provide access to the requested records by December 27, 2013. On December 23, 2013, Clark stated that he contacted the GRC but that the holidays might not allow this issue to be concluded by December 27, 2013. Clark further stated that he believed the GRC’s decision in Michalak, supported Monmouth’s position that the municipalities must decide whether access to the CAMA data should be provided. Finally, Clark noted that he has not denied access to the records; rather, it is Monmouth’s position that the information is not theirs to disclose.

GRC Complaint No. 2014-10 (Sussex)

On December 18, 2013, the Complainant submitted an OPRA request to Hennighan seeking the above-mentioned records. The Complainant noted that CAMA data could be “. . . obtained by using command 21 (utilities) command 16 (file upload/download) Command (sic) csv.” Further, the Complainant noted that the compressed file should include “. . . land.csv, res.csv, mod4.csv, codes.csv [and] sales.csv.” On December 26, 2013, Melissa Rockwell, Tax Administrator, responded in writing on behalf of Hennighan advising that the Sussex County Board of Taxation (“Sussex”) was in receipt of the Complainant’s OPRA request and that same should be directed to each individual municipality because Sussex was not the custodian of record for CAMA data.

GRC Complaint No. 2014-11 (Morris)

On December 18, 2013, the Complainant submitted an OPRA request to Meloro seeking the above-mentioned records. The Complainant noted that CAMA data could be “. . . obtained by using command 21 (utilities) command 16 (file upload/download) Command (sic) csv.” Further, the Complainant noted that the compressed file should include “. . . land.csv, res.csv, mod4.csv, codes.csv [and] sales.csv.” On December 19, 2013, Meloro responded verbally during a meeting denying access to the request stating that Morris was not the custodian of record for the requested data.

Denial of Access Complaint:

GRC Complaint No. 2014-01 (Monmouth)

On January 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the requested CAMA data has been stored in a database paid for and maintained by Monmouth since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that Monmouth unlawfully denied access to the requested data because:

- The software program is funded, maintained and operated by Monmouth under the 1996 shared services agreement.
- Monmouth accesses various information from the database.
- S-2234 entitled “Monmouth Assessment Demonstration Program” requires all municipalities with Monmouth 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, whom 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.

GRC Complaint No. 2014-10 (Sussex)

On January 14, 2014, the Complainant filed a Denial of Access Complaint with the GRC reiterating his argument from GRC 2014-01 (Monmouth) in contending that Sussex unlawfully denied access to the responsive records. The Complainant added that the MODIV software module was integrated with the CAMA program; both are provided by Microsystems-NJ.com, L.L.C. (“Microsystems”). The Complainant further noted that all assessors are required to use MODIV for filing and maintaining tax lists. The Complainant asserted his belief that Sussex unlawfully denied access to the requested data for the reasons asserted in GRC 2014-01, but included that:

- Asbury Park and Marlboro Township (all in Monmouth County), Hopatcong Borough (Sussex County), Roxbury Township, Mt. Arlington Borough, Mt. Olive Township (all in

Morris County), and all municipals in Gloucester County have provided the requested information, with Microsystems as their MODIV/CAMA software providers.

GRC Complaint No. 2014-11 (Morris)

On January 14, 2014, the Complainant filed a Denial of Access Complaint with the GRC reiterating his argument from both GRC 2014-01 (Monmouth) and GRC 2014-10 (Sussex) in contending that Morris County Board of Taxation (“Morris”) unlawfully denied him access to the responsive records.

Request to Intervene

On July 25, 2014, Mr. William K. Raska, President of Microsystems, requested to intervene in these complaints because Microsystems’ software is used by all three (3) counties. Mr. Raska stated that the software features a CSV export function that enables users to analyze their data with other programs such as Microsoft Excel®.

Mr. Raska contended that the file layout he designed for the CSV function is proprietary, as are the codes data and sketch vector data. Further, Mr. Raska stated that, typically, a computer system will have multiple files open to accomplish a search of same. Mr. Raska alleged that he designed a code file accomplishing the task of creatively merging multiple tables into one file to allow for a more efficient search. Mr. Raska also asserted that the layout and codes he designed to enter and store the building sketch are user-friendly and utilize a minimum of computer storage space. Mr. Raska contended that the “vector logic” used to enter and draw the building sketch are proprietary.

Mr. Raska noted that each user is granted a license to use Microsystems’ software that does not permit the distribution of intellectual property to others.

On August 5, 2014, the GRC granted Mr. Raska’s request to intervene in this complaint.

Statement of Information:

On August 6, 2014, Monmouth, Sussex and Morris (collectively, the “Counties”) filed a Statement of Information (“SOF”) for each complaint.

GRC Complaint No. 2014-01 (Monmouth)

Clark certified that he received the Complainant’s OPRA request on December 18, 2013 and responded denying access to same on December 19, 2013. Clark further noted that although the Complainant received most records through duplicate requests to individual municipalities, Monmouth provided no records.

Clark certified that MOD-IV is a uniform system of maintaining and reporting tax information as to real estate throughout the State by municipalities and counties, and is owned by the New Jersey Division of Taxation (“Taxation”). Also, Clark noted that Monmouth public

records are available on the internet.⁵ Clark certified that under N.J.A.C. 18:12-4.8(a)(15), Taxation recommended that municipalities obtain CAMA programs for purposes of revaluation maintenance. Clark affirmed that Monmouth determined that purchasing the CAMA program and sharing the cost with its individual municipalities was the most cost-effective plan. Further, Monmouth concluded that the CAMA program could assist their own assessors to make accurate assessments of value. Clark certified that, in 1996, Monmouth purchased a CAMA program from Microsystems to be used by local assessors as a tool to develop assessed valuations for each parcel within individual municipalities. Clark certified that, to this end, Monmouth entered into a Shared Services Agreement (“Agreement”)⁶ with each municipality; these agreements were recently renewed in 2011. Clark certified that, as part of the Agreement, Monmouth agreed to maintain the CAMA program and its server in exchange for annual payments for use of the program. Clark affirmed that, as of the date of the OPRA request, all municipalities within Monmouth participating in the Agreement as per their requirement in N.J.S.A. 54:1-104.

Clark certified that the field data to include images, metadata and database information compiled by each municipal tax assessor to create assessment valuation records is owned by that municipality under the Open Public Records System – Records Information Management Module (“OPRS-RIM”) Shared Services agreement. Further, Clark certified that each municipality is responsible for inputting its own information into the CAMA program. Clark affirmed that, although he and the MOD-IV coordinator have administrative rights to access CAMA data, local assessors are responsible for all changes. Thus, in order to access the data for its use, Monmouth is required to gain approval from each individual municipality. Specifically, Clark certified that the OPRS-RIM contract requires Monmouth to obtain written consent from the individual municipality if it is going to make public any information contained in the repository.

Clark argued that the Superior Court has previously upheld a grant of confidentiality in shared services contracts. Commc’n Workers of America v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010)(holding that confidentiality provisions in a partnership agreement between a State agency and private investment companies was a valid OPRA exemption). Clark contended that here, Monmouth has a similar Agreement clause in place. Further, Clark argued that, because Monmouth has no ability to input or alter CAMA program information, same does not fall within the definition of a government record. Accordingly, Clark argued that Monmouth was not the custodian of the requested information.

Additionally, Clark certified that the CAMA program uses information provided by municipal tax assessors to calculate and/or project an estimated value for land and improvements. Inherently, these estimates may, and often do, change regularly through the year as information is obtained and added or amended in the CAMA program. Clark affirmed that this data is then used to create valuations published in the MOD-IV. Clark certified that the Agreement requires local assessors to check and correct CAMA data when necessary to ensure correct MOD-IV valuations. Also, Clark certified that certain limited CAMA data is used to verify preliminary tax lists that Monmouth receives in November of a pre-tax year. Clark contended that CAMA data essentially remains in draft form and is not required to match the

⁵ <http://oprs.co.monmouth.nj.us/Oprs/External.aspx?iId=1> (accessed November 3, 2014).

⁶ At that time, such agreements were referred to as “Interlocal Services Agreements.”

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final valuations as they appear in the MOD-IV. Further, Clark argued that while tax lists get certified up until May 25 of a current tax year, CAMA data is never certified or considered final.

Moreover, Clark argued that the requested CAMA data is “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Ciesla v. NJ Dep’t of Health & Senior Serv., 429 N.J. Super. 127, 140 (App. Div. 2012). Clark asserted that the CAMA data reflects the deliberative process by which a municipal tax assessor develops a preliminary tax assessment that Monmouth will eventually consider for final certification. Clark contended that the data is always in draft form; therefore, it fits the definition of ACD material.

Also, Clark noted that sensitive information concerning a property (alarms, panic rooms, *etc.*) may be contained within the requested data. Clark affirmed that this information could be entered throughout different fields within the CAMA program because there is no standard for the placement of such information. Thus, Clark argued that manually reviewing millions of data fields for such information would be a substantial disruption of Monmouth’s operations. Clark also asserted that disclosure of this information would violate a citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-1; Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005)(holding that non-disclosure of fire and burglar alarm permits outweighed disclosure based security concerns). To this end, Clark asserted that even if Monmouth conducted a manual review to redact sensitive information, there would be no guarantee that all sensitive information would be located and redacted.

GRC Complaint No. 2014-10 (Sussex)

Hennighan certified that she received the Complainant’s OPRA request on December 19, 2013. Ms. Rockwell submitted a legal certification, in which she first certified that she responded on Hennighan’s behalf on December 26, 2013 denying the Complainant’s OPRA request.

Ms. Rockwell certified that all municipalities in Sussex independently purchased their own CAMA program from a vendor of their choice; therefore, Sussex has no programs or licenses. Ms. Rockwell affirmed that no CAMA data is stored on any server owned, operated or maintained by Sussex. Ms. Rockwell certified that Sussex has an agreement with Microsystems for the MOD-IV, SRA1 and Appeals programs only. Further, Ms. Rockwell certified that Sussex has access to CAMA data for:

- Andover Township
- Byram Township
- Frankford Township
- Fredon Township
- Green Township
- Lafayette Township
- Montague Township
- Ogdensburg Borough
- Sandyston Township
- Sparta Township
- Stanhope Township
- Stillwater Township
- Sussex Borough
- Vernon Township

Ms. Rockwell certified that, to the best of her knowledge, no members of Sussex have input or altered CAMA data; rather, the individual municipalities are responsible for these actions.

Ms. Rockwell affirmed that no CAMA data is available to Sussex for:

- Andover Borough
- Branchville Borough
- Franklin Borough
- Hardyston Township
- Newtown Township
- Walpack Township
- Wantage Township

Accordingly, Ms. Rockwell affirmed that Sussex has no viewing capability for these municipalities. Further, Ms. Rockwell certified that Franklin Borough, Hardyston Township and Newtown Township have password-protected programs to which Sussex has not access. Also, Ms. Rockwell certified that Branchville Borough and Wantage Township do not utilize Microsystems for their CAMA programs.

Hennighan certified that Sussex does not license the CAMA program, does not maintain a server containing the data, and further had no knowledge of their ability to even view the data prior to this complaint. Hennighan contended that, for these reasons, Sussex is not the custodian of the responsive CAMA data.

Hennighan also advanced ACD and privacy arguments similar to those found in the SOI for GRC Complaint No. 2014-01 (Monmouth).

GRC Complaint No. 2014-11 (Morris)

Meloro certified that he received the Complainant's OPRA request on December 18, 2013 and responded denying access to same on December 19, 2013. Meloro certified that all municipalities in Morris independently purchased their own CAMA program from Microsystems; therefore, Morris has no programs or licenses. Meloro certified that Morris has an agreement with Microsystems for the MOD-IV only.

However, Meloro certified that under agreements with the municipalities and Microsystems, municipalities have the ability to back up their files on Morris' server solely in case of malfunction or operation failure. Meloro affirmed that he was not sure how often backups occur, but that same is done in set intervals. Meloro certified that the following municipalities utilize backup system:

- Boonton Town
- Boonton Township
- Chatham Borough
- Chatham Township
- Chester Borough
- Chester Township
- Florham Park Borough
- Hanover Township
- Harding Township
- Kinnelon Borough
- Lincoln Park Borough
- Madison Borough
- Mendham Borough
- Mendham Township
- Mine Hill Township
- Montville Township
- Mountain Lakes Borough
- Netcong Borough
- Parsippany-Troy Hills Township
- Pequannock Township

- Randolph Township
- Rockaway Borough
- Victory Gardens Borough

Meloro averred that, to the extent that Morris can view these municipalities' CAMA data, it has no ability to alter any information. Further, Meloro certified that he has never accessed or viewed the backed-up CAMA data.

Meloro certified that the following municipalities back up their data in-house or have password-protected their data:

- Denville Township
- Dover Township
- East Hanover Township
- Long Hill Township
- Morris Township
- Morris Plains Borough
- Morristown Town
- Rockaway Township
- Washington Township

Meloro certified that Morris has no ability to access or ability to view CAMA data for these municipalities.

Meloro also advanced ACD and privacy arguments similar to those found in the SOI for GRC Complaint No. 2014-01 and GRC Complaint No. 2014-10.

Finally, the Counties argued that they did not knowingly and willfully violate OPRA. Specifically, the Counties timely responded to the Complainant's requests denying access to same. Further, the Counties argued that the facts of these complaints and their proper responses does not warrant a knowing and willful violation. O'Shea v. Twp. of West Milford, GRC Complaint No. 2004-87 (September 2005).

Additional Submissions:

On August 26, 2014, the GRC requested additional information from Mr. Raska. Specifically, the GRC requested that he submit a certification answering the following:

1. Does the licensing agreement for Microsystems' software purchased by participating public agencies, whether county or municipal, contain a clause prohibiting its disclosure? If so, please provide a copy of the licensing agreement entered into with Monmouth to indicate such clause.
2. Would disclosure of the files requested by the Complainant allow him to effectively reverse-engineer the CSV file, codes data and sketch vector data and/or other information which is proprietary?

On the same day, Mr. Raska responded to the GRC's request for additional information as follows:

1. The licensing agreement for Microsystems' software purchase contains a clause prohibiting its disclosure.

2. The disclosure of the files requested by the Complainant will allow him to effectively reverse-engineer proprietary codes data and sketch vector.

On August 27, 2014, the Complainant submitted a legal certification refuting Mr. Raska's August 26, 2014 submissions. The Complainant certified that he has served as a municipal tax assessor for twenty-five (25) years. The Complainant certified that he currently served in that position for Jefferson Township, Butler Borough and Riverdale Borough and is familiar with the CAMA database.

First, the Complainant certified that he was not seeking any of the three (3) portions of the database that Mr. Raska asserted to be proprietary. The Complainant noted that certain columns could be redacted in order to protect that information.

Second, the Complainant certified that the record is not proprietary in nature based on its wide dissemination to the public. Newark Morning Star Ledger, Co. v. NJ Sports & Exposition Auth., 423 N.J. Super. 140, 167-71 (App. Div. 2011). The Complainant certified that, here, he has been granted access to similar CAMA data from no less than fifty (50) municipalities in response to OPRA requests. Further, the Complainant affirmed the disclosures began on January 6, 2014 and occurred as recently as on August 26, 2014. Also, the Complainant certified that on May 8, 2014, Mr. Raska restored the csv.zip file layout at the request of Mendham so that they could comply with his OPRA request for same.

Finally, the Complainant disputed Mr. Raska's assertion that someone could reverse engineer his software code by having possession of the CAMA data. The Complainant averred that there is no correlation between the data and the ability to duplicate Mr. Raska's work product.

On August 28, 2014, the Complainant's Counsel submitted a rebuttal to the SOI. First, Counsel argued that the Counties' assertions that they are not the custodian for property tax databases because the data they maintain belongs to individual municipalities conflicts with the assertions of some of those municipalities. Specifically, Counsel noted that in ten (10) complaints filed by the Complainant and currently awaiting adjudication by the GRC, the public agencies asserted that the Counties created and controlled the requested records. Counsel asserted that, contrary to either of these arguments, the database is a government record of both the Counties and local municipalities. Counsel argued that this is because the municipalities transmit their files to the Counties, who process the data into their MOD-IV database systems and make same available for use by the municipalities.

Further, Counsel contended that the threshold issue here is not whether a public agency is an "actual custodian," but rather whether the requested records are government records as defined under OPRA. Counsel argued that because the Counties do not use or own the responsive records does not exempt from them from the definition. As an example, Counsel noted that public agencies frequently maintain many records not in use because they are in storage; yet, this does not diminish the fact that they are still subject to access under OPRA. Also, Counsel noted that agencies also possess copies of records from other entities that are no less disclosable simply because that agency did not create same.

GRC Complaint No. 2014-01 (Monmouth)

Complainant's Counsel stated that Clark admitted to maintaining the CAMA program and server pursuant to a shared services agreement. Counsel argued that this fact alone establishes that the data is a government record of Monmouth. Counsel further argued that the OPRS-RIM agreement prohibits publishing municipal records on the OPRA website without consent; however, no such provision exists under the current Agreement between Monmouth and the municipalities. Also, Counsel argued that even if the Agreement contained such a provision, it is not a lawful basis for denying access. Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 9 (App. Div. 2009). Counsel contended that Monmouth misapplied CWA, 417 N.J. Super. 341, because that case involved a private equity fund agreement and not a shared services agreement.

GRC Complaint No. 2014-10 (Sussex)

Complainant's Counsel questioned Ms. Rockwell's legal certification, arguing that Sussex leases the server from Microsystems and the municipalities store the responsive data on same. Counsel also noted that Sussex uses the same server for its MOD-IV, SRA1 and Appeals Program. Further, Counsel argued that Ms. Rockwell's denial failed to note that the "server supplied by the CAMA vendor" is leased by Sussex. Counsel asserted that a public agency does not relieve its obligation to provide records pursuant to an OPRA request by placing same on leased property. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-512 (App. Div. 2010).

Counsel noted that Ms. Rockwell admitted to having access to CAMA data for fourteen (14) municipalities and that three (3) additional municipalities have password-protected data. Counsel asserted that the GRC should require Sussex to obtain the passwords and grant the Complainant access to same.

GRC Complaint No. 2014-11 (Morris)

Complainant's Counsel noted that Meloro certified that twenty-three (23) municipalities utilize Morris' server to back-up their CAMA data and five (5) additional municipalities have password-protected data. Counsel contended that this establishes that the requested CAMA data is a government record of Morris. Counsel noted that Meloro asserted that he did not have the ability to download or print CAMA data. Counsel argued that this is no different than a situation where a public agency has paper copies of a responsive record but no copying machine. Counsel thus asserted that the GRC should require Morris to request Microsystems to provide the Complainant with the responsive records.

Additional Arguments of the Counties

Complainant's Counsel addressed the remaining arguments against disclosure presented by the Counties. First, Counsel contended that the requested data does not meet the definition of ACD material. Counsel argued that the Complainant sought the requested data after the October 10 preliminary tax list filing. Further, Counsel noted that the Complainant did not seek the preliminary tax list or the data as it existed at the time that the tax list was submitted. Also,

Counsel asserted that raw data cannot be considered ACD material because such factual information is not deliberative. In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000).

Second, Counsel argued that records already in the public domain cannot be deemed confidential. Counsel asserted that CAMA data is the electronic version of paper property cards, which are available to the public. *See Spalding v. Hudson Cnty. Register*, GRC Complaint No. 2006-157 (Interim Order dated July 25, 2007). Counsel also noted that no less than eighty-three (83) municipalities have already granted access to the CAMA data.

Third, Counsel contended that disclosure would not be a substantial disruption of agency operations for the Counties because the Complainant is not seeking “assessor’s note.” Counsel argued that the Complainant is not seeking any information on assessor’s notes, comments or sketches. Counsel thus asserted that any records provided to the Complainant can be easily redacted by field name without much effort. Counsel noted that eighty-three (83) municipalities transmitted the records with notes and no one that redacted same argued that it was burdensome.

Finally, Counsel argued that, although the Complainant is not seeking sanctions against the Counties, he disagrees that their actions were not knowing and willful. Counsel reiterated that the records sought are nothing more than property tax records already available to the public in paper form. Further, Counsel asserted that the records were specifically identified and are easy to retrieve in less than ten (10) minutes.

On August 28, 2014, the Complainant submitted a second (2nd) legal certification. Therein, he certified that on May 15, 2014, the attorney for Parsippany-Troy Hills confirmed that Microsystems advised it would object to the disclosure of any CAMA data to the Complainant. However, West Long Branch Borough disclosed responsive data to the Complainant on August 27, 2014 after Microsystems restored access to certain files.

On September 13, 2014, the Complainant submitted a third (3rd) legal certification. Therein, the Complainant certified that in February 2014, municipal tax assessors were able to provide the responsive data on their own. However, in late March, 2014, Microsystems altered the download function to remove certain fields; thus, requiring municipalities to contact Microsystems whenever they needed to download the responsive data. The Complainant certified that on August 22, 2014, he submitted an OPRA request to Washington Township. On this date, they provided the Complainant with the responsive record noting that “Microsystems reconstructed info requested.”

Analysis

Doctrine of Necessity

OPRA provides in pertinent part 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 which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to . . . [N.J.S.A.].47:1A-7.

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner.

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

The Ethics Law states, in turn, that:

[no] local government officer or employee shall act in his official capacity in any matter where he, a member of his family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence in judgment[.]

N.J.S.A. 40A:9-22.5(d).

Further, Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993) describes the common law conflict of interest rule as follows:

[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body. Id. at 523 (citing Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App.Div.1991)).

According to Wyzykowski, the Ethics Law further “refined the definition of a conflict of interest.” Id. at 529.

The determination of whether a particular interest is sufficient to disqualify a board member is necessarily factual in nature and depends upon the circumstances in each case. Id. (citing Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958)). Overall, “[t]he question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Id. It is not necessary to demonstrate actual proof of dishonesty because only the potential for conflict is necessary. Id. at 524 (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App.Div.1956)). In general, “[a] conflicting interest arises when a public official has an interest not shared in common with the other members of the public.” Id. (citing Griggs v. Borough of Princeton, 33 N.J. 207, 220-21, (1960)). However, “[t]here cannot be a conflict of interest where there does not

exist, realistically, contradictory desires tugging the official in opposite directions.” Id. (citing LaRue v. Twp. of East Brunswick, 68 N.J. Super. 435, 448 (App.Div.1961)).

When it is impossible to constitute a quorum, for example, disqualified members may, of necessity, have to vote, but this departure from the disqualification rule should be narrowly circumscribed and only invoked if there is some compelling reason justifying its use. *See* Wyzykowski, 132 N.J. at 528; Griggs, 33 N.J. at 221. Generally speaking, the doctrine of necessity is utilized when a pressing public need exists, and it would be detrimental to the public's well-being to bar the disqualified members from participating in a vote. Sokolinski v. Woodbridge Twp., 192 N.J. Super. 101, 106 (App. Div. 1983); Cranberry Lake Quarry Co. v. Johnson, 95 N.J. Super. 495, 521 (App. Div. 1967).

In Allen v. Toms River Reg'l Bd. of Educ., 233 N.J. Super. 642, 647 (Law Div. 1989), the plaintiff township and boroughs were the constituent members of a council which advised the defendant regional Board of Education. Id. at 644-45. Due to a vote against the defendant's budget, the council was to consider the matter. Id. at 644. However, four members of the council had conflicts of interest regarding their involvement with the Board of Education, which affected the ability of the membership to reach a quorum. Id.

The court examined the history of the doctrine of necessity in New Jersey and held that the doctrine:

[W]ill be invoked in those circumstances in which there is a pressing public need for action (that is, the matter cannot be laid aside until another date), there is no alternative forum which can grant the same relief and the body is unable to act without the members in conflict taking part.

Id. at 651.

The court noted that “[t]he public clamor with respect to the proposed budget is documented in the record[.]” as was “[t]he public insistence that there be a review by the governmental authorities[.]” Id. The court also noted that the budget was large and would have a significant impact on all of the taxpayers in the constituent municipalities. Id. Moreover, although the applicable statute provided for a review of the budget before the Commissioner of Education, the court determined that such review did not “allow for the public input which would be received by each of the governing bodies so that direct public involvement [would] be denied.” Id. Finally, the court determined that because the council “could not achieve a quorum with four of its seven members in conflict, it was only by authorizing those four members to act that the council could fulfill its statutory obligation to review and certify the amount necessary to be appropriated and address an issue of substantial importance in which the citizenry has a right to participate.” Id.

In Gunthner v. Planning Bd. of the Borough of Bay Head, 335 N.J. Super. 452 (Law Div. 2000), the plaintiff sought to develop property contiguous to a yacht club. He filed a development application with the defendant planning board, but filed an order to show cause seeking to disqualify seven of the Board’s members from voting on said application, stating that

they had a conflict of interest because they were members of the yacht club. Id. at 458-59. However, the Law Division held that the doctrine of necessity permitted the challenged Board members to rule on the application because there was a pressing public need and it would have been detrimental to the public's well-being to bar the disqualified members, because to do so would have resulted in an automatic acceptance of the application. Id. at 464.

In the present matter, the Complainant filed three (3) Denial of Access Complaints, one of which was against Morris County, for adjudication before the Council. The choice of this forum, as opposed to Superior Court, is the Complainant's prerogative under N.J.S.A. 47:1A-6. The Council, in turn, has the power to determine if a complaint is outside of its jurisdiction. *See* N.J.S.A. 47:1A-7(e).

Here, the Council notes that two (2) of the four (4) current members are recused from the GRC Complaint No. 2014-11. However, the Council has unique expertise and experience which cannot be duplicated at any other forum. If these two (2) members were required to recuse themselves from the adjudication of complaints filed against the GRC due to potential conflicts of interest issues, the Council would lack the quorum necessary to fulfill its obligation, both under statute and to citizens of this State, to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." N.J.S.A. 47:1A-7(b).

Therefore, the Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of GRC Complaint No. 2014-11. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse themselves. *See* Sokolinski, 192 N.J. Super. at 106; Cranberry Lake Quarry Co., 95 N.J. Super. at 521; Gunthner, 335 N.J. Super. at 452; Allen, 233 N.J. Super. at 647.

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.

OPRA defines a "government record" as "any . . . information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business . . ." N.J.S.A. 47:1A-1.1. Additionally, OPRA exempts access to "trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, *trade secrets*

shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.” N.J.S.A. 47:1A-1.1 (emphasis added).

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See Hyman v. City of Jersey City (Hudson)*, GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); *Mayer v. Borough of Tinton Falls (Monmouth)*, GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); *Latz v. Twp. of Barnegat (Ocean)*, GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

Further, in instances where an issue raised which is a matter of first impression, contested facts exist regarding the disclosability of the requested records and/or the issue is highly technological in nature thus warranting a fact-finding hearing, the Council has opted to refer such a complaint to the OAL. *See Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer)*, GRC Complaint No. 2012-91 (January 2013); *Owoh (on behalf of Delores Nicole Simmons) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer)*, GRC Complaint No. 2012-130 (January 2013).

In this matter, the issue of the CAMA data is one of first impression. Specifically, the Council has not previously been tasked with determining the disclosability of same from either a county standpoint or an individual municipal standpoint. Although the Complainant noted that the Council has previously decided on the disclosability of records made, maintained, received or kept on file pursuant to a shared services agreement, the Counties here have certainly raised questions as to their level of access to same. This is especially true of Sussex and Morris, who may have varying levels of access.

The base question of access is further complicated by the relationship of the CAMA data to the trade secret and proprietary exemption. To this point, Mr. Raska and the Complainant have submitted conflicting legal certifications regarding the status of the CAMA data as proprietary information. Specifically, Mr. Raska certified that the requested data was proprietary in nature; however, the Complainant has provided multiple certifications evidencing that Mr. Raska either worked to disclose records or at least had knowledge that same were being disclosed in response to individual municipal OPRA requests. Further, Mr. Raska certified that disclosure of the CAMA data would allow the Complainant to reverse-engineer his software. The Complainant counter-certified that reverse engineering was not possible because there is no correlation between the data and the software.

However, it is unclear how these certifications impact the second part of the proprietary exemption, which provides that data processing software obtained by a public agency under a licensing agreement that prohibits disclosure. Also, the question of one’s ability to reverse engineer Mr. Raska’s software based on disclosure of the CAMA data highlight the intense technological nature of this issue. It is clear that both Mr. Raska, Microsystems’ president; and the Complainant, a twenty-five (25) year municipal tax assessor, are familiar with the software;

the GRC is not. Further, there is extensive concern that requesting additional details on the software and implications of reverse engineering same could prove injurious for Microsystems.

The issues described above are just a sampling of issues that include a question of whether the requested CAMA data is ACD material, whether disclosure with redactions for privacy information would prove to be disruptive to the Counties' operations and whether agencies have a legal obligation to obtain the passwords to provide access to password-protected records, if they maintain such a record.

Accordingly, because of contested facts, conflicting certifications, and highly technological nature of the issues presented, the Council should refer these complaints to the OAL for a hearing to develop the record and resolve the following:

- Whether the Counties' are required to provide the CAMA data to which they have various levels of access or whether shared service agreement provisions, password protection, or limited to no accessibility relieve them of this obligation.
- Whether the responsive CAMA data is exempt from disclosure as proprietary information due to its relationship to Microsystems' software. This issue should take into account whether prior disclosure can effectively moot a prohibition from disclosure under a licensing agreement, provided that disclosure of the CAMA data is similar to disclosing the software.
- Whether any other exemptions, as raised by the Counties, apply to the responsive CAMA data.

Additionally, this complaint should be referred to OAL to determine, if necessary, whether Clark, Ms. Rockwell and/or Meloro knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, this complaint should be referred to OAL to determine whether the Complainant is entitled to a prevailing party attorney's fee, if necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of GRC Complaint No. 2014-11. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse themselves. *See Sokolinski v. Woodbridge Twp.*, 192 N.J. Super. 101, 106 (App. Div. 1983); *Cranberry Lake Quarry Co. v. Johnson*, 95 N.J. Super. 495, 521 (App. Div. 1967); *Gunthner v. Planning Bd. of the Borough of Bay Head*, 335 N.J. Super. 452

(Law Div. 2000); Allen v. Toms River Reg'l Bd. of Educ., 233 N.J. Super. 642, 647 (Law Div. 1989).

2. Because of contested facts, conflicting certifications and highly technological nature of the issues presented, the Council should refer these complaints to the OAL for a hearing to develop the record and resolve the following:
 - Whether the Counties' are required to provide the CAMA data to which they have various levels of access or whether shared service agreement provisions, password protection or limited to no accessibility relieve them of this obligation.
 - Whether the responsive CAMA data is exempt from disclosure as proprietary information due to its relationship to Microsystems' software. This issue should take into account whether prior disclosure can effectively moot a prohibition from disclosure under a licensing agreement, provided that disclosure of the CAMA data is similar to disclosing the software.
 - Whether any other exemptions, as raised by the Counties, apply to the responsive CAMA data.
3. This complaint should be referred to OAL to determine if necessary, whether Clark, Ms. Rockwell and/or Meloro knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, this complaint should be referred to OAL to determine whether the Complainant is entitled to a prevailing party attorney's fee, if necessary.

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

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

December 9, 2014⁷

⁷ This complaint was prepared for adjudication at the Council's December 16, 2014 meeting, but could not be adjudicated due to lack of quorum.

Shawn G. Hopkins v. Monmouth County Board of Taxation, Sussex County Board of Taxation, and Morris County Board of Taxation, 2014-01, 2014-10 and 2014-11 – Findings and Recommendations of the Executive Director



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 03129-15
AGENCY DKT. NOS. 2014-01,
2014-10 and 2014-11

SHAWN G. HOPKINS,

Petitioner,

v.

**MONMOUTH COUNTY BOARD
OF TAXATION, SUSSEX COUNTY BOARD
OF TAXATION, AND MORRIS COUNTY
BOARD OF TAXATION,**

Respondents.

Walter M. Luers, Esq., for petitioner

Heather Lynn Anderson, Deputy Attorney General for respondents (John J. Hoffman, Attorney General of New Jersey, attorney)

Record Closed: October 14, 2015

Decided: November 16, 2015

BEFORE **KIMBERLY A. MOSS,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Shawn Hopkins (Hopkins), filed three Government Records Counsel (GRC) complaints in connection with alleged violations by Monmouth, Sussex, and Morris counties of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. These were denominated as GRC 2014-01, GRC 2014-10, and 2014-11. Hopkins requested electronic copies of the computer assisted mass appraisal (CAMA) data for specifically identified municipalities in each respective county. Monmouth, Sussex, and Morris denied his request. GRC allowed Microsystems Computer Company (Microsystems) to intervene in this matter. GRC referred the matter to the Office of Administrative Law (OAL). The matter was filed at OAL on March 3, 2015. The hearing was held on July 17, 2015. At that time Microsystems reached a settlement with Hopkins whereby it would withdraw its objection to the information being proprietary and if the data is requested of Microsystems from the counties, it will provide the data. Closing briefs were submitted on October 14, 2015. I closed the record at that time.

In these three cases, the GRC has directed that the Office of Administrative Law determine the following:

1. Whether Monmouth County Board of Taxation (Monmouth), Sussex County Board of Taxation (Sussex), and Morris County Board of Taxation (Morris) are required to provide CAMA data to which they have various levels of access or whether shared-service agreement provisions, password protection, or limited to no accessibility relieve them of the obligation.
2. Whether the responsive CAMA data is exempt from disclosure as proprietary information due to its relationship with Microsystems software. This issue should take into account whether prior disclosure can effectively moot a prohibition from disclosure under a licensing agreement, provided that disclosure of the CAMA data is similar to disclosing the software.
3. Whether any other exemptions, as raised by the counties, apply to the responsive CAMA data.

4. Whether any employee of the counties whether currently or previously employed knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
5. Whether complainant is a prevailing party entitled to counsel fees.

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

Shawn Hopkins

Hopkins is a tax assessor for Jefferson Township, the Borough of Butler, and the Borough of Riverdale. He has never been employed by Monmouth, Sussex, or Morris. He requested CAMA data for municipalities in Monmouth, Sussex, and Morris.

CAMA data lists attributes of each property in a county including owners name, address, assessments, land size, size of bedrooms, and any data an assessor would collect for an assessment. It is a database. The assessor or re-evaluation contractor places data in the database fields. Hopkins requested 664 fields of data for each property. CAMA has over 800 fields of data for each property. Most fields are restricted in database files containing a number or letter. There are limits as to what can be put into a CAMA field. There are five CAMA notes fields that can include text. In the counties where he is a tax assessor, he inputs half of the CAMA data, but he is responsible for all of the CAMA data.

Most towns in Monmouth, Sussex and Morris counties use the Microsystems CAMA software. Hopkins has worked with the CAMA program since approximately 2002-2003. In his OPRA request to Sussex, Hopkins requested CAMA data for nineteen of the twenty-four municipalities in Sussex. Some municipalities in Sussex do not use the Microsystems CAMA database. He requested CAMA data for most of the municipalities in Morris and all of the municipalities in Monmouth. Monmouth maintains

the Microsystems CAMA data on its server. The software program and the data are on Monmouth's server in its data center.

Monmouth, Sussex, and Morris would not provide the data to Hopkins stating that it was not the custodian of the records.

The State regulations provide a format for appraising property, which is a cost approach. Improvements to the property are considered as well as estimated market value and a model is created for all similar property. Each tax assessor is required to use CAMA. The tax assessor loads its CAMA data onto the county server. Mod-4 is a software program that all tax assessors must use to maintain records and assessments regarding changes in tax information. All municipalities use Mod-4 software. Monmouth and Belmar have a shared-service agreement. Their shared-service agreement states that the information is owned by the municipality and the county cannot release it without the consent of the municipality. OPRS-RM is an agreement as to how the data will be administered. In an intra-local service agreement for Mod-4 services the municipality must make data available to the county. Mod-4 does not contain all of the CAMA data; it contains a subset of CAMA data. Mod-4 is certified by the county once a year. Mod-4 has ownership, sale, and exemption records. Mod-4 information is available to the public.

Hopkins is familiar with the Microsystem software; therefore he requested CAMA data from municipalities that use the Microsystem software. Eleven municipalities gave him the data he requested in Monmouth. He also requested CAMA data from the municipalities in Sussex and Morris. Some of the municipalities provided data redacting the notes field.

CAMA software in Morris is maintained on Morris's server and maintained by Microsystems. CAMA has one program with information from multiple municipalities. In Sussex the Microsystems CAMA software is on a server maintained by Sussex. Sussex contracts with Microsystems for CAMA data to be housed on the Microsystem server. Morris and Monmouth have access to all CAMA data. Sussex has access to view CAMA data and has access to Mod-4 and sales data. Hopkins did not go to

Monmouth, Sussex, or Morris and personally access the Microsystem software through Monmouth, Sussex, or Morris's computers. Morris and Sussex can view CAMA data. CAMA contains much more data than Mod-4.

The denials that Hopkins received from Monmouth, Sussex, and Morris did not state that reason for the denial was because the data would reveal panic rooms, fire alarms, or burglar alarms.

There is a website where a tax appeal can be filed. Once a tax appeal is filed the person filing the appeal can access a property card. The property card contains certified Mod-4 information and sales information. All CAMA data cannot be accessed from the website. The CAMA data on the website is not in the spreadsheet format that Hopkins requested.

Hopkins in his duties as a tax assessor has received CAMA data from eighty-eight municipalities. He has reviewed the individual CAMA fields. He has never seen any inappropriate, unbecoming, or defamatory information in a CAMA field.

William Raska

William Raska (Raska) is the owner of Microsystems, which provides software for county, municipal, and private clients. The property record program (PRC-5) is provided to tax assessors. A similar program with different menus called County Tax Board System is provided to the counties. It is the same software but different customers see different menus. The agreement provides the customers with leases to use the PRC-5 program. CAMA data is in PRC-5. When an assessor is using the PRC-5 program, the assessor is accessing CAMA data. PRC-5 has a Mod-4 module and a SR1A module. CAMA fields overlap with Mod-4 SR1A.

Microsystems provide software maintenance of the PRC-5 software to Monmouth. It also provides upgrades and training. The PRC-5 program could have provided Hopkins with the data he requested in 2013. The system changed in 2014, after Hopkins's request. He cannot say with certainty that the data could be provided in

the format requested. The system changed because he spoke to tax assessors, who told him the system was difficult to use, which was the consensus of their peers. The change did not appear in the county's programs only in the assessors program.

Raska does not recall if he was contacted by Monmouth regarding this matter. If his company received a request from its client for the data, it could format the data for the customer. If he received a request from a county for CAMA data, he would have required requests from the individual municipal assessors.

Microsystem provides Morris with software updates and prints its tax list. Morris is not a certified Mod-4 vendor. Microsystem is a Certified Mod-4 vendor. The majority of municipalities in Morris County have their CAMA data on the Morris server. Approximately five to ten municipalities in Morris County hold their CAMA data and PRC-5 program on an in house server. The municipalities that have their CAMA data stored on the Morris server each have a license agreement with Microsystems for maintenance of CAMA.

Microsystem has an agreement with Morris. Although the agreement has expired, they still work together. Morris has access to Mod-4, SR1A, tax appeals, and equalization CAMA data. The tax appeal program allows Morris to input ownership and information from tax appeal forms and the software will print notices and judgments. Equalization is used to summarize total assessments from each municipality. Microsystem has access to the CAMA data. Microsystem could produce the files in the format that Hopkins requested. It never received a request for the data from Morris.

Microsystem provides Sussex with use of the software. It prints tax lists. Sussex assessors pay individually for the CAMA part of the program. There are municipalities in Sussex County that do not use the Microsystem program. The majority of municipalities in Sussex County use the PRC-5 and CAMA from the Sussex server. Microsystem stores CAMA data for municipalities in Sussex that do not store the data themselves or do not use another provider. The municipalities contract with Microsystem for the CAMA part of the program. Microsystems provide Sussex with Mod-4, SR1A, equalization, tax appeals, and notebooks for the hearing rooms. The

notebooks are similar to laptop computers. Through the notebooks there is a web-based application that can access CAMA data. It cannot access all of the CAMA fields. It can access property record card (PRC) information. If Sussex cannot produce a document, Microsystem can try to produce the document. All of the PRC's for microsystems are online. In Monmouth County they are available to the public. There are differences between what the information that Sussex can see on the property records and the information that the public can see on the PRC's for Monmouth. Morris cannot review CAMA data. The municipalities are the custodians of the CAMA data.

Hopkins requested that an old program be restored in Jefferson after it had been updated. The program was restored.

Most of the request for reports that Microsystems receives are for Mod-4 and tax appeal information. Those requests do not require municipal permission. The municipalities and the counties are customers of Microsystems but only the municipalities are CAMA customers.

Microsystems can provide Mod-4 software without a CAMA program.

George Lockwood

George Lockwood (Lockwood) is an employee of Microsystems. He has experience in technical support, customer service, and training. He had an interaction with Hopkins in 2014 where Hopkins asked him to restore a menu item's functionality to Jefferson's PRC-5 program. He made the change which took a few hours. A change to the Morris server on the utility menu would affect all of the municipalities' data.

Melissa Rockwell

Melissa Rockwell (Rockwell) is a tax administrator for Sussex County. Her duties are primarily equalization, supervision of the assessors, supervise tax appeals, and report to the county Board of Taxation. Microsystems provide the software program for the daily function of the Sussex County Tax Collectors office. Requests have been

made from her office to Microsystems for abstract ratables. Abstract ratables cannot be created in-house.

Rockwell reviewed Hopkins OPRA request dated December 18, 2013. Access to the records was denied. When Hopkins request was received, she sought counsel and informed Sussex. Hopkins requested CAMA data, not Mod-4 data. She did not contact Microsystems. Hopkins request was denied because Sussex was not the custodian of the records and does not maintain utilize or create the records. Hopkins was not given the information on the PRC or Mod-4 data. Mod-4 data is online.

Hopkins OPRA request included Mod-4 data in CSV format, which was not provided to him. He was not given sales data, which he asked for with a command from the utility menu.

There are twenty-four municipalities in Sussex County. All but two use the microsystem program. Three of the municipalities that use the microsystem program have password protection for their CAMA data. She does not know those passwords. She can see CAMA data. She has not gone into the CAMA data in Sussex. She does not input data into the CAMA program. She has never changed CAMA data. Assessments are done yearly.

Rockwell has discussed passwords with municipalities. She encouraged password protection.

Rockwell has personal knowledge regarding CAMA programs from when she was a tax accessor. CAMA has fields where text or code can be entered. She has seen information in CAMA fields regarding burglar alarms, fire alarms, panic rooms, and security systems when she was a tax accessor. CAMA data can change daily. She does not know how many notes fields there are in CAMA. It is fixed and final when it is transferred to Mod-4 and the assessments are certified; however, the CAMA data itself is not certified. She does not know if there is a CAMA program that can redact data. Mod-4 data is public information.

Notebooks are available to the commissioners. The notebooks have Mod-4 and PRC information in them. A snapshot of the PRC is on the notebooks. PRC's contain a sketch of the property, physical attributes of the property, zoning, and value control sector. The PRC shows a subset of CAMA. PRC are used in tax appeals.

Kim Roggenkamp

Kim Roggenkamp (Roggenkamp) is the assistant county tax administrator for Morris County. The Morris County tax administrator is Ralph Meloro (Meloro). She received an OPRA request from Hopkins for CAMA data for thirty-nine municipalities in Morris County. She gave the request to Meloro, who denied it stating that Hopkins had to get consent from the municipalities.

Roggenkamp understands the agreement with Morris and Microsystem to be for Mod-4, SR1A, tax appeals, and equalization programs. Five to ten municipalities use their own server. There are municipalities using Microsystem that are password protected. She does not know the passwords.

Roggenkamp does not input CAMA data. She believes that it is possible to have Mod-4 data, PRC, and appeals without a CAMA program. Morris owns a server that is located in its data center. Morris does not pay for the CAMA program. She does not know how the CAMA program works. The commissioners do not use Mod-4, the staff does. She had access to Mod-4 data, but does not update or change it. She uses SR1A data and has made changes and updates to that data. The SR1A data is updated on a rolling basis. Hopkins was not provided SR1A data.

Morris does not use PRC. The data for the majority of municipalities in Morris County is stored on the CAMA program on the Morris server. She does not use CAMA to do her job. She has not reviewed the information in CAMA to determine if it is confidential. Morris has an arrangement with Microsystems to provide software for Mod-4, SR1A, tax appeals, equalization, and abstracted ratables.

Matthew Clark

Matthew Clark (Clark) is the Monmouth County tax administrator. He has never been a tax assessor. He has knowledge of CAMA files. He has limited experience inputting data into CAMA programs. His job entails overseeing the tax assessors by providing support, guidance, and assistance. He can correct an assessor's mistake. He has not input CAMA data since 1992. There are many CAMA fields where text can be inserted. There are sixty-seven fields in each CAMA file. In order to redact information from CAMA every field has to be visually inspected.

He is the OPRA custodian for Monmouth. He received Hopkins's request for CAMA data. Hopkins's request was denied because the CAMA data was not Monmouth's but the municipalities' and the proprietary nature of the software. Mod-4 and SR1A data is available online. He believes that he partially complied with Hopkins's request by informing him that the Mod-4 and SR1A data can be accessed anytime at a specific web site in CSV format. The land CSV and the res CSV files are not available through the internet. He also informed Hopkins that if Hopkins received consent of the municipalities to get the CAMA data, that Clark would assemble the data from the assessors. Clark does not presently have viewing rights to CAMA data. He does not daily view the CAMA data of the assessors.

Monmouth has a shared-service agreement with the municipalities regarding the CAMA data. The OPRA rim is a shared-service agreement for Monmouth's internal imaging system. Twenty-three municipalities use this. This is distinct from Mod-4 shared-service agreement. Monmouth has a license with Microsystems for Microsystems to be its Mod-4 vender. The data is the property of the municipalities. All of the Monmouth County municipalities use the CAMA program from Microsystems. CAMA uniformity is important.

Property is revalued each year in Monmouth County. The tax assessors are inputting CAMA data on a daily basis. The Mod-4 data is certified yearly. It cannot be changed once it is certified.

Clark does not have a problem with the vast majority of information that Hopkins requested. He does have a concern with providing data that would later be presented as the official record, when in fact it is a draft. He also has a concern that there may be an error in the CAMA data. It is impossible for Monmouth to review every CAMA field. It can be done with Mod-4 data because it is a smaller subset of CAMA data.

There are fifteen million line items of CAMA data for Monmouth. He has never had to forensically pull apart fifteen million fields of data. A search could be done for example using the words "burglary alarm" might not result in all properties with burglary alarms because the assessors could have used abbreviations. It is possible for a tax assessor to put text information into many of the CAMA fields. There are no guidelines for where to write notes in the CAMA program.

CAMA data is never finalized. When a Mod-4 is done it is a snapshot in time. The Mod-4 does not contain all of the CAMA text fields. Once the Mod-4 data is submitted, if changes need to be made they have to be submitted to Microsystem to make the correction.

Clark does not know if the PRC is a public form. The Mod-4 information and a PDF sketch are on the website. The sketch is based on the sketch vector, which is a field in CAMA. The website also includes the block and lot qualifier, owner's name and address, and room count information. All of which are fields in CAMA. Mod-4 information and SR1A information are available on the Monmouth website. The Mod-4 and SR1A information on the website changes over time. The Mod-4 information is updated annually. The SR1A information is updated weekly. The PRC on the website is updated annually. He no longer has access to the municipalities CAMA data. He could access the CAMA data when he received Hopkins's request.

Monmouth County municipalities are required to store their CAMA data on the Monmouth server. The municipalities are required to use Monmouth as their Mod-4 vendor. If a municipality consented to the release of its CAMA data, Clark would not provide the data without the approval of the Attorney General.

Mod-4 and SR1A are public records, neither of which were turned over to Hopkins. Clark last worked in the field collecting data in 1992. That was also the last time he input CAMA data. He oversees fifty-three tax assessors. It is important that information in CAMA fields is consistent within the county. Much of the information in CAMA could be released to the public without much harm. It was decided that the information requested by Hopkins in the format that he requested would not be produced.

The CAMA data is on Monmouth's server. The data on the server is operated by Microsystems. The server can be housed anywhere. There are multiple connected servers owned by Monmouth.

He has not evaluated CAMA data to determine if it is confidential. CAMA does not have a specific field for burglar alarms or security systems. Sensitive information can be anywhere in CAMA, although there are five fields for notes, notes can be placed anywhere. He does not know if assessors use the notes area for sensitive information. Redacting the notes area from CAMA would take one hour.

Having heard the testimony and evidence I make the following **FINDINGS** of **FACTS**:

Hopkins filed an OPRA request with Monmouth, Sussex, and Morris requesting CAMA reports for municipalities in the counties. He specifically requested information from 664 CAMA fields for each property. CAMA is a database that lists attributes of each property in a county including owners name, address, assessments, land size, size of bedrooms, and any data an assessor would collect for an assessment. The assessor or re-evaluation contractor places data in the database fields. There are over 800 CAMA fields for each property. There are five CAMA fields for text to be written. Text can be written in other fields. Information regarding burglar alarms, panic rooms and security systems can be included in CAMA data. There was no testimony that the specific CAMA data that Hopkins requested contained burglar alarms, panic rooms, or security system information.

The Microsystems PRC-5 CAMA program is used by Monmouth, Sussex, and Morris. The PRC-5 has a Mod-4 and SR1A module as well as other modules. Mod-4 is a software program that all tax assessors must use to maintain records and assessments regarding changes in tax information. Mod-4 contains ownership, sale, and exemption records. It is certified by the county once a year. The Mod-4 does not contain all of the CAMA data. Mod-4 information is available to the public. SR1A are sales records. SR1A records are available to the public.

Microsystem is a certified Mod-4 vendor. All of the municipalities in Monmouth store their CAMA data on Monmouth's server. Microsystem provides Monmouth with software maintenance, training, and updates.

The municipalities in Morris County that use the PRC-5 program, CAMA data is housed on the Morris server. These municipalities each have a separate licensing agreement with Microsystem. Four municipalities in Morris do not store their CAMA data on the Morris server. Microsystem provides Morris with software maintenance and prints its tax lists. Morris also has access to Mod-4, SR1A, tax appeals, and equalization CAMA data from Microsystems.

Twenty-two of the twenty-four municipalities in Sussex County use the Microsystem program. Microsystem stores the CAMA data for municipalities in Sussex County that do not store the data themselves or do not use another provider. The Sussex County municipalities Microsystem pay individually for the CAMA part of the program. Sussex contracts with and pays Microsystem for the CAMA data of the twenty-two municipalities that use the Microsystem program to be housed on Microsystems server. Three municipalities in Sussex County password protect their CAMA data. Microsystems provide Sussex with the use of its software and prints its tax lists. In addition, Sussex is provided with Mod-4, SR1A, equalization, tax appeals and notebooks for the hearing rooms. The notebooks have a web-based application that can access some of the CAMA fields.

A shared-service agreement between Monmouth and the Borough of Belmar regarding software products, services, and websites (OPRS-RIM) was submitted into

evidence (P-7). This agreement allows Belmar to use the OPRS-Rim through Monmouth's web-based system. In this agreement all of the images, associated metadata, and database information remained the property of the sub-licensee (Belmar). Monmouth cannot make any information available to the public without Belmar's consent. An Interlocal Service agreement between Monmouth and municipalities located in Monmouth County was submitted into evidence (P-8). It states that the municipality must make data available to the county and provide the county with transaction files reflecting changes in property data which will be processed by the county. The county will process the change data and cause the record changes to be incorporated into the municipalities' master file.

Hopkins's OPRA requests were denied by Monmouth, Sussex, and Morris. He was not provided with any data, although he was directed to a website where he could download some of the data he requested in the form he requested by Monmouth. Hopkins made OPRA request for the same information with various municipalities. He received the data requested from eighty-three municipalities. Some of the municipalities redacted text information.

Rockwell, the tax administrator for Sussex, received Hopkins's OPRA request. She sought counsel with regard to the request. She denied Hopkins's request because she maintained that Sussex was not the custodian of records and did not maintain create or utilize the records. Hopkins was not given Mod-4 or SR1A data.

Roggenkamp, the assistant county tax administrator for Morris, received Hopkins's OPRA request, which she gave to Ralph Melora, the Morris County tax administrator. Melora denied the request stating that Hopkins needed to get consent from the municipalities. Hopkins was not provided with SR1A data.

Clark is the Monmouth County tax administrator. He received Hopkins's OPRA request. He denied Hopkins request because he maintained that the data was the municipalities and the proprietary nature of the software. However, he wrote to Hopkins stating that if Hopkins received consent of the municipalities he would assemble the

data. Clark informed Hopkins that Mod-4 and SR1A data can be accessed anytime from a specific website in CSV format.

Microsystems reached a settlement with Hopkins whereby it would withdraw its objection to the information being proprietary—and if the CAMA data is requested of Microsystem from the counties—Microsystem would provide the data.

LEGAL ANALYSIS AND CONCLUSION

OPRA is contained in N.J.S.A. 47:1A-1 to -18. As the Legislature declares in the first section of the act, public policy in this State is that government records shall be readily accessible for inspection, copying, or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. Or as the New Jersey Supreme Court succinctly stated in Mason v. Hoboken, 196 N.J. 51, 65 (2008), “OPRA calls for the prompt disclosure of government records.”

Toward this end, custodians of government records must grant access to them or deny a request for them as soon as possible but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i).

Microsystems withdrew its objection that its information was proprietary as a result of a settlement with Hopkins prior to the hearing. Therefore that issue is moot.

The next issue is whether Monmouth, Sussex, and Morris and are required to provide the CAMA data. N.J.S.A. 47:1A-1.1 defines government record as:

“Government record” or “record” means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any

such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J.S.A. 47:1A-1.1 lists a broad criterion for government records. It also lists exemptions from government records. CAMA is data, images, and processed documents that are stored and maintained by Monmouth, Sussex, and Morris. CAMA data is used to determine taxes to be assessed. Monmouth, Sussex, and Morris received these records in the in the course of its official business. CAMA data is tax data that is housed on the Monmouth and Morris servers and on a server owned by Microsystems paid for by Sussex. Government records include records held by a third party. See e.g. Gannett Satellite Info. Network v. Borough of Raritan, A-3525-09T3 (App. Div. February 10, 2011), <http://njlaw.rutgers.edu/collections/courts/>.

Respondents argue that CAMA data is deliberative, advisory, or consultative and therefore not government records. They state that CAMA data is never finalized although some CAMA data is certified yearly in the Mod-4 program. There is an exemption to government's records requirements if the documents are deliberative, advisory, or consultative. The court has stated:

As articulated in case law prior to the enactment of OPRA in 2001, the deliberative process privilege has allowed the government to "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The privilege "is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached[.]" Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009). The privilege bars the "disclosure of proposed policies before they have been fully vetted and adopted by a government agency," thereby ensuring that an agency is not judged by a policy that was merely considered. Ibid. It also avoids the confusion that could result from the release of information concerning matters that do not bear on an agency's chosen course. Ibid.

In order to invoke the deliberative process privilege, an agency must initially prove that a document is "pre-

decisional,” i.e., “generated before the adoption of an agency’s policy or decision,” and also “deliberative,” in that it “contain[s] opinions, recommendations or advice about agency policies.” Integrity, supra, 165 N.J. at 84-85. “[T]he key to identifying deliberative material must be how closely the material . . . relates to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.” McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010) (quoting Educ. Law Ctr., supra, 198 N.J. at 295). Purely factual material that does not reflect deliberative processes in any way is not protected by the privilege. Integrity, supra, 165 N.J. at 85.

[Ciesla v. New Jersey Dep’t of Health and Senior Serv., 429 N.J. Super. 127, 137-38 (App. Div. 2012).]

There was no testimony that CAMA data was used in the formulation of policy. CAMA data is facts about properties. The CAMA documents do not contain opinions, recommendations, or advice about agency policy as expressed in Liquidation of Integrity Ins. Co, supra, 165 N.J. at 84-85. There was no testimony that the CAMA data contained opinions, recommendations, or advise. The CAMA data contains facts. In addition there are municipalities that have turned its CAMA data over to Hopkins. Some of the CAMA data, the Mod-4, and SR1A data, is on the internet. The Mod-4 is updated yearly and the SR1A is updated weekly, both of which are available to the public.

Respondents argue that they have limited access to the CAMA data and in some instances the CAMA data is password protected. The CAMA data is a government record that is stored by Monmouth, Sussex, and Morris. The fact that respondents may have to get consent of the municipalities does not lessen the fact that the CAMA data is a government record. Microsystems can access all of the CAMA data at the request of respondents. The Court in Burnett v. County of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010), in a similar case regarding settlement agreements stated:

The settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

Respondents cite the case of Verry v. Borough South Bound Brook, Complaint no. 2011-385, for the proposition that since some of the municipalities CAMA was password protected, and respondents do not have the passwords and are not required to obtain the passwords. In this matter Hopkins is not asking for passwords. Microsystem has access to the data and can produce the data at the request of respondent. Microsystem prior to the hearing agreed that at the request of respondents for the CAMA data Microsystems will provide the data.

Respondents also argue that providing the CAMA data to Hopkins would violate the privacy of the residents in the municipalities because the CAMA data contains information that is sensitive or private. In this case no representative from Monmouth, Sussex, or Morris reviewed the CAMA data that Hopkins requested. Although CAMA data can include information regarding burglar alarms, security systems, and panic rooms, there was not testimony that the CAMA data that Hopkins requested contained this information. None of the witness reviewed the CAMA data that Hopkins requested. Hopkins stated that in his career as a tax accessor he has not seen burglar alarms, security systems, or panic rooms in CAMA data. Although Rockwell testified that when she was a tax assessor she saw burglar alarms, security systems, and panic rooms in the CAMA fields, this was prior to her becoming tax administrator for Sussex and prior to Hopkins's request for CAMA data.

I **CONCLUDE** 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.

The next issue is whether any employee of the counties knowingly or willfully violated OPRA and unreasonably denied access under the totality of the circumstances. N.J.S.A. 47:1A-11 provides:

- a. A public official, officer, employee or custodian who knowingly and willfully violates P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs

within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999,” P.L. 1999, c. 274 (C. 2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

A knowing and willful violation, however, requires actual knowledge that the actions were wrongful and a positive element of conscious wrongdoing. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stinak, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)). In this matter the counties had an agreement with the municipalities that the counties could not disclose the CAMA data without the consent of the municipalities. In Sussex, Rockwell consulted with counsel before denying the OPRA request. The denial was based on Sussex position that it was not the custodian of records. In Morris, Roggenkamp gave the request to Meloro who denied the request stating the Hopkins had to get the consent of the municipalities. In Monmouth, Clark informed Hopkins that Hopkins would have to get consent of the municipalities, then Clark would assemble the data. It is clear in Monmouth, Sussex, and Morris that the administrators believed that they could not turn the CAMA data over to Hopkins without the consent of the municipalities. There is no indication that Meloro, Rockwell, or Clark had actual knowledge that their actions were wrongful. There was no indication that there was an element of conscious wrongdoing by Meloro, Rockwell, or Clark.

I **CONCLUDE** that no employee of Monmouth, Sussex, or Morris knowingly and willfully violated OPRA under the totality of the circumstances.

These matters arise under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., which provides that a “prevailing party” may be awarded reasonable attorney’s fees. “A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee”

N.J.A.C. 5:105-2.13 provides

(a) Reasonable attorney's fees shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.

(b) The complainant, or his or her attorney, shall submit an application to the Council for an award of attorney's fees within 20 business days following the effective date of a decision by the Council or a voluntary settlement agreement.

Attorney fees are permitted so as "to attract competent counsel in cases involving statutory rights . . . and to ensure justice for all citizens." Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). The specific concern in OPRA cases that supports the need to provide for fee shifting is to "even the fight" where the citizen needs to "battle against a public entity vested with almost inexhaustible resources." NJDPM v. DOC, 185 N.J. 137, 153 (2005) (quoting Courier News v. Hunterdon County Prosecutor's Office, 378 N.J. Super. 538, 546 (App. Div. 2005)).

New Jersey case law has defined a "prevailing party". There must be shown to be a "factual nexus" between the litigation brought by the plaintiff and "the relief ultimately achieved." Singer v. State, 95 N.J. 487, 495 (1984). It is not necessary that the relief achieved be the result of a formal order or judgment; it is enough if the litigation effects a change in the behavior of the defendant. In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court considered whether attorney's fees were properly awarded where, after the filing of a lawsuit, the defendant voluntarily disclosed the records sought. The Court concluded that in OPRA matters public policy favored the adoption of the "catalyst theory." To prevail on a fee application,

requestors 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, supra, 95 N.J. at 494. Consistent with our case law, litigants seeking fees are required to make that showing.

[Mason, supra, 196 N.J. at 76.]

In this matter Hopkins is the prevailing party. Monmouth, Sussex, and Morris should have complied with his OPRA request. By being successful in bringing this action, Monmouth, Sussex, and Morris will be required to provide Hopkins with the CAMA records. There is a factual nexus with Hopkins bringing this action and Monmouth, Sussex, and Morris being required to honor his OPRA request.

I **CONCLUDE** that Hopkins is the prevailing party and entitled to attorney’s fees.

ORDER

I hereby **ORDER** Monmouth, Sussex, and Morris counties’ denial of the OPRA requests by Hopkins that are the subject of this matter is **REVERSED**. I further **ORDER** that Hopkins is the prevailing party and therefore entitled to attorney’s fees.

I hereby **FILE** my Initial Decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 16, 2015



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

November 16, 2015

Date Mailed to Parties:

ljb

WITNESS LIST

For Petitioner:

William Raska
George Lockwood
Melissa Rockwell

For Respondent:

Kim Roggenkamp
Matthew Clark

EXHIBITS

For Petitioner:

- P-1 Not in Evidence
- P-2 Not in Evidence
- P-3 Monmouth's Denial of Access Complaint and Exhibits
- P-4 Sussex 2014-10 filed Denial of Access Complaint
- P-5 Morris 2014-11 filed Denial of Access Complaint
- P-6 Not in Evidence
- P-7 Belmar-Monmouth County Shared Service Agreement
- P-8 Belmar Inter-local Services Agreement
- P-9 Not in Evidence
- P-10 Certification with Lists of Towns Providing CAMA Date to Hopkins
- P-11 Not in Evidence
- P-12 Hopkins August 22, 2014, Washington Request and September 12, 2014, Response
- P-13 Raska emails and list of Monmouth, Sussex, and Morris towns

P-14 NJ Appeal Page

P-15 Open Public Records Search

P-16 Assessment Records

P-17 Page of Morris County Tax Board Information System

P-18 March 3, 2015, GRC letter transmitting complaints to OAL