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DEPARTMENT OF COMMUNITY AFFAIRS
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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-14

v.

Borough of Belmar (Monmouth)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, Mr. Mullane unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that Mr. Mullane was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). However, the GRC declines to order disclosure of the responsive records because the evidence supports that the Custodian disclosed the records to the Complainant (via e-mail) on January 31, 2014.
2. The Custodian and Mr. Mullane have borne their burden of proof that they lawfully denied access to the requested property photographs (through the Custodian) because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Mr. Mullane unlawfully denied access to the responsive CAMA reports. However, Mr. Mullane ultimately provided eight (8) reports to the Custodian for disclosure on January 31, 2014. Mr. Mullane also did not unlawfully deny access to the requested property photographs because none existed. Further, the evidence of record does not



indicate that Mr. Mullane's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Mullane's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of July, 2017

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 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-14

v.

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

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

Custodian of Record: April Claudio

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 2, 2014

GRC Complaint Received: January 14, 2014

Background³

Request and Response:

On December 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 24, 2013, the Custodian forwarded the subject OPRA request to Tax Assessor Edward Mullane for a response by January 3, 2014. On December 30, 2013, the Custodian e-mailed Custodian’s Counsel, stating that several other tax assessors received the subject OPRA request and are unsure whether the records are subject to disclosure. On the same day, Miriam McManus, Counsel’s Paralegal, e-mailed the Custodian, stating that Counsel believed the records were disclosable but that they were awaiting Mr. Mullane’s opinion on the issue. On January 2, 2014, the Custodian asked Counsel whether she needed additional time to respond to the OPRA request. On the same day, Counsel responded that he believed the requested records should be disclosed.

On January 2, 2014, the Custodian responded in writing, advising the Complainant that she would need additional time until January 7, 2014, because of the holidays and because Mr. Mullane was a part-time employee. The Complainant responded, acquiescing to the extension.

¹ No representation listed on record.

² Represented by Michael DuPont, Esq., of McKenna, DuPont, Higgins & Stone (Red Bank, NJ).

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

Thereafter, the Custodian e-mailed Mr. Mullane, requesting that he begin preparing the requested reports.

On January 6, 2014, the Custodian e-mailed Mr. Mullane, on which he copied Counsel, asking whether he responded to the Complainant's OPRA request. Mr. Mullane responded, stating that the Monmouth County Assessor's Association ("MCAA") believed that creating a specific report was "not public information." Mr. Mullane noted that all other towns, except one, that received the same OPRA request were denying access. Mr. Mullane noted that all of the information sought was on the Monmouth County website and that the OPRA request should be denied. Counsel e-mailed Mr. Mullane to inquire as to whether the MCAA provided a written opinion, which Mr. Mullane confirmed they did not. Mr. Mullane then forwarded an e-mail from Matthew Clark, Monmouth County, to multiple municipal tax assessors, providing guidance on a process for responding to the Complainant's OPRA request. The Custodian e-mailed Mr. Mullane to seek a written explanation for his denial; otherwise, he would be required to create the requested reports for disclosure.

On January 7, 2014, the Custodian e-mailed the Complainant, stating that she was waiting on Mr. Mullane to provide her a response. The Custodian stated that she attached a report created with information contained on Monmouth County's website, noting that it contained a lot of the information the Complainant sought in his OPRA request. Later in the day, the Custodian responded in writing to the Complainant, denying the OPRA request based on Ms. Mullane's included explanation. Therein, Mr. Mullane stated that Complainant sought "information, contained in a database" and that "[the Borough is] not required to create a record that does not exist. N.J.S.A. 47:1A-9; GRC exemption [No.] 23." Further, Mr. Mullane noted that no digital pictures of the property exist.

On January 7, 2014, the Complainant disputed the denial of access, noting that the cited exemption was irrelevant because it referred to personnel records. The Complainant stated that he only sought the CAMA data file and not creation of a database. The Complainant noted that he provided specific instructions on how to obtain the reports but that Mr. Clark also "agreed to provide" the information requested to any assessor giving written permission to Monmouth County. The Complainant finally stated that other municipalities have already complied with his request; Mr. Mullane could contact them for help or reach out to Microsystems-NJ.com, LLC., to obtain the responsive file.

On January 7, 2014, Counsel e-mailed the Custodian, on which he copied Mr. Mullane, suggesting that the Borough give authorization to Mr. Clark to disclose the reports to the Complainant. On January 9, 2014, the Custodian e-mailed Mr. Mullane, requesting that he confirm that he gave Mr. Clark permission to disclose the responsive records. Late in the day, Mr. Mullane forwarded to Counsel and the Custodian an e-mail chain from the MCAA regarding a coordinated response to the subject OPRA request. Mr. Mullane noted that he did not believe it fair for profit seekers to use OPRA as a vehicle for public officials to create reports for them. Mr. Mullane stated that he did not feel comfortable creating/copying computer files and sending them to the public because they could obtain confidential information or be used to sabotage the entire system. Mr. Mullane noted that all of his data was already available on the Monmouth

County website. Shortly thereafter, the Custodian e-mailed Mr. Mullane, asking him whether he would give Mr. Clark authorization to provide the records.

On January 10, 2014, the Custodian responded in writing to the Complainant, stating that Mr. Mullane advised her of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* The Custodian stated that Mr. Mullane took the position that he would like more time to permit the Government Records Council (“Council” or “GRC”) to review the subject OPRA request and determine whether records are disclosable. The Custodian offered the Complainant Mr. Mullane’s contact information in case he wished to speak with him. Also, the Custodian noted that Mr. Mullane had stated that all of his records were on the Monmouth County website, which also included the report she previously e-mailed to the Complainant. Following her response, the Custodian e-mailed Mr. Mullane, advising him of her response.

Denial of Access Complaint:

On January 14, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant stated that he previously requested CAMA data from the County on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality. The Complainant disputed the Borough’s denial of access.

The Complainant argued that the requested CAMA data has been stored in a database that has been paid for and maintained by the County since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the Borough unlawfully denied access to the requested data because:

- Six municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C., as their MODIV/CAMA vendor.
- The County funds, maintains, and operates the software program under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires⁵ all municipalities within the County to utilize the MODIV/CAMA program and there is a retention schedule for property record cards (“PRC”).
- Revaluation contracts require firms to deliver PRCs to the municipality, which utilizes 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.

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

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

Supplemental Response:

On January 31, 2014, Mr. Mullane e-mailed the Custodian a copy of the responsive files, advising that he spoke to the Complainant by phone earlier in the week. Mr. Mullane noted that the Complainant agreed to withdraw the instant complaint if he received the responsive records by the end of the day. On the same day, the Custodian responded to the Complainant, disclosing eight (8) CAMA data files.

Statement of Information:

On April 2, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 24, 2013. The Custodian further certified that her search included engaging in multiple e-mail conversations with Mr. Mullane and Custodian’s Counsel. The Custodian also certified that she initially responded to the Complainant in writing on January 2, 2014, advising that she needed an extension until January 7, 2014. The Custodian affirmed that she continued to urge Mr. Mullane to disclose the responsive records, as both her and Counsel believed that disclosure was required, absent a lawful basis for denial. The Custodian noted that Tax Collector Robbin Kirk also assisted her by running a report from Monmouth County’s website, which she provided to the Complainant on January 7, 2014. However, the Custodian certified that Mr. Mullane did not agree with disclosure because he believed disclosure required him to create a record. The Custodian affirmed that Mr. Mullane provided a written explanation of his denial to her that she forwarded to the Complainant on January 7, 2014. The Custodian certified that Mr. Mullane also noted that no photographs existed as part of his explanation.

The Custodian certified that the Complainant immediately objected to the response. The Custodian affirmed that she e-mailed the Complainant on January 10, 2014, to clarify exactly what he was seeking and noting that he could speak directly to Mr. Mullane to resolve any issues. The Custodian certified that Mr. Mullane provided to her eight (8) CAMA reports on January 31, 2014, for disclosure with the understanding that the Complainant would withdraw the complaint upon disclosure. The Custodian certified that she sent the Complainant those reports on the same day.

Analysis

Unlawful Denial of Access

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

CAMA Data

Initially, the evidence of record shows that Mr. Mullane’s resistance to disclose the

requested CAMA data, based on a “creation of a record” argument and the pending action in Hopkins, GRC 2014-01 *et seq.*, directly precipitated the Custodian’s varied responses to the Complainant. The GRC will address both the “creation of a record” argument and reliance on the pending adjudication of Hopkins, below.

Most recently, in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017), the Supreme Court determined that an agency’s electronically stored information is a “government record” under OPRA, unless otherwise exempt. The Court accepted plaintiff’s appeal from the Appellate Division’s decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court had reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

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

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division’s statement that “OPRA only allows requests for records, not requests for information.” Paff, 444 N.J. Super. at 503, (*quoting* [Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA’s plain language or its objectives in dealing with electronically stored information.

Id. at 24, 28.

Regarding the “creation of a record” argument, in Fang v. Dep’t of Transp., GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records might contain. The custodian certified that no records existed that contained a compilation of the information specified by the complainant in the request. The Council, relying upon the Court’s decision in [MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005)], held that “[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. *See* [MAG].” Id. at 11.

Conversely, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian’s argument that she was not

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

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

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

Id. at 12 (emphasis added).

The GRC notes that the evidence of record here supports that CAMA data exists within a database system provided to the Borough as part of a shared services agreement with Monmouth County. For that reason, the GRC finds that the requested CAMA data falls under the definition of a "government record" as "information stored or maintained electronically" in a database.

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

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), an agency or judge may take official notice of judicially noticeable facts (as explained in the New Jersey Rules of Evidence at N.J.R.E. 201), and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. *See* Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974). The Council's decision here must take into account the Final Decision of Administrative

Law Judge (“ALJ”) Kimberly A. Moss in Hopkins, GRC 2014-01, *et seq.* (Interim Order dated July 26, 2016), because the ALJ held that CAMA data is a “government record” that is subject to access under OPRA.⁶ Further, the ALJ held that “CAMA data . . . are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter.” Id. at 18.

In the instant matter, the Custodian initially denied the Complainant’s OPRA request on the basis that Mr. Mullane would not provide her with the requested reports on his belief that he would have to create a record and that creating a record is not required under OPRA. Subsequent to her initial response, which the Complainant disputed, she denied access because Mr. Mullane wanted more time to allow the GRC to adjudicate Hopkins. In each instance, the Custodian’s response was driven by Mr. Mullane’s resistance to provide her with responsive records for disclosure. In the SOI, the Custodian provided extensive e-mail chains, which evidence that her denials came directly from Mr. Mullane and which is contrary to both Custodian Counsel’s and her urging to disclose responsive records. Ultimately, Mr. Mullane acquiesced to providing responsive records on January 31, 2014 by providing eight (8) CAMA reports to the Custodian for disclosure. Thus, the evidence here shows that any unlawful denial of access rests with Mr. Mullane as he was clearly the point of denial in this matter.

In determining whether the Complainant’s request seeking CAMA data required Mr. Mullane to create a record, the Council distinguishes the instant complaint from Fang. Specifically, the requests at issue there sought general records inclusive of certain personnel information. However, the complaint here more closely fits on the square with Zahler, GRC 2013-266, notwithstanding that it was decided during the pendency of the instant complaint. The Court’s decision in Paff, 2017 N.J. LEXIS 680, although decided after the pendency of this complaint, is binding here. Specifically, the Complainant here identified a specific type of record, CAMA data, which was accessible from a database by utilizing a few simple commands. The GRC notes that the Complainant included instructions that Mr. Mullane could utilize to extract the responsive compressed file from the database. As was the case in Zahler, Mr. Mullane was not required to create a record; rather, he was required to extract the CAMA data from a database. A similar type of compilation was also contemplated in Paff. *See also* McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

Further, Mr. Mullane violated OPRA when he chose to not provide responsive records based on the Council’s pending adjudication of Hopkins. Additionally, the ALJ’s decision in Hopkins supports the above finding that the responsive CAMA data was disclosable under OPRA. Specifically, the ALJ considered the responsive CAMA data a “government record” not otherwise exempt under OPRA. Regarding the requested property photographs, the Custodian did not address those in the SOI. The GRC finds that the Custodian might have unlawfully denied access to those records, absent any arguments as to their existence or applicable exemptions.

Accordingly, Mr. Mullane unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new

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

record. Zahler, GRC 2013-266. See also Paff, 2017 N.J. LEXIS 680; McBride, GRC 2014-54. Further, Mr. Mullane unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195. Additionally, the ALJ's Final Decision supports that Mr. Mullane was required to disclose the responsive CAMA data. Hopkins, GRC 2014-01, *et seq.* However, the GRC declines to order disclosure of the responsive records because the evidence supports that the Custodian disclosed the records to the Complainant (via e-mail) on January 31, 2014.

Property photographs

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian initially responded to the Complainant, advising that no photographs existed based on Mr. Mullane's guidance. The Custodian subsequently certified to that fact in the SOI. Additionally, there is no evidence in the record to rebut the Custodian's certification.

Therefore, the Custodian and Mr. Mullane have borne their burden of proof that they lawfully denied access to the requested property photographs (through the Custodian) because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Knowing & Willful

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

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

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the GRC first notes that the knowing and willful question effectively shifts to Mr. Mullane as the “public officer, official [or] employee” that denied access to the responsive CAMA data per N.J.S.A. 47:1A-11. Specifically, the evidence of record supports that Mr. Mullane resisted the Custodian and Counsel’s calls for disclosure due to his belief that he would have to “create a record” and based on the GRC’s pending adjudication in Hopkins, GRC 2014-1, *et seq.*

The GRC finds that Mr. Mullane unlawfully denied access to the responsive CAMA reports. However, Mr. Mullane ultimately provided eight (8) reports to the Custodian for disclosure on January 31, 2014. Mr. Mullane also did not unlawfully deny access to the requested property photographs because none existed. Further, the evidence of record does not indicate that Mr. Mullane’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Mullane’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Further, Mr. Mullane unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that Mr. Mullane was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). However, the GRC declines to order disclosure of the responsive records because the evidence supports that the Custodian disclosed the records to the Complainant (via e-mail) on January 31, 2014.
2. The Custodian and Mr. Mullane have borne their burden of proof that they lawfully denied access to the requested property photographs (through the Custodian) because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

3. Mr. Mullane unlawfully denied access to the responsive CAMA reports. However, Mr. Mullane ultimately provided eight (8) reports to the Custodian for disclosure on January 31, 2014. Mr. Mullane also did not unlawfully deny access to the requested property photographs because none existed. Further, the evidence of record does not indicate that Mr. Mullane's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Mullane's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

July 18, 2017