



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 30, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-21

v.

Colts Neck Township (Monmouth)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of January, 2018

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 2, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-21

v.

**Colts Neck Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Robert Bowden³

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 21, 2014

GRC Complaint Received: January 16, 2014

Background

December 19, 2017 Council Meeting:

At its December 19, 2017 public meeting, the Council considered the December 12, 2017 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. The current Custodian did not fully comply with the Council’s October 31, 2017 Interim Order. Specifically, although she timely provided the responsive CAMA data to the Complainant, she did not timely provide simultaneous certified confirmation of compliance to the Executive Director.
2. The original Custodian failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, although the original Custodian unlawfully denied access to the responsive CAMA data, he did not unlawfully deny access to photographs because none existed. Further, the current Custodian did not fully

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

² Represented by David A. Clark, Esq. of Gluck, Walrath, LLP (Trenton, NJ). Previously represented by Christopher D. Ackerman, Esq., of Dilworth, Paxson, LLP (Red Bank, NJ) and, most recently, Joseph A. Clark, Esq. of Gluck, Walrath, LLP (Red Bank, NJ).

³ The current Custodian of Record is Beth Kara.

comply with the Council's Interim Order. Additionally, the evidence of record does not indicate that either Custodians' violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, neither Custodians' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, current Custodian disclosed responsive CAMA data to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On December 20, 2017, the Council distributed its Interim Order to all parties. On January 11, 2018, Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved. Shortly thereafter, Custodian's Counsel also confirmed the parties' resolution via e-mail.

Analysis

Prevailing Party Attorney's Fees

At its December 19, 2017 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On December 20, 2017, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on January 22, 2018. On January 11, 2018, Complainant's Counsel e-mailed the Government Records Council ("GRC") advising that the

parties resolved the fee issue and that this complaint may be dismissed. Shortly thereafter, Custodian's Counsel e-mailed the GRC confirming resolution of the fee issue.

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

Conclusions and Recommendations

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

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

January 23, 2018



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

December 19, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-21

v.

Colts Neck Township (Monmouth)
Custodian of Record

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian did not fully comply with the Council’s October 31, 2017 Interim Order. Specifically, although she timely provided the responsive CAMA data to the Complainant, she did not timely provide simultaneous certified confirmation of compliance to the Executive Director.
2. The original Custodian failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, although the original Custodian unlawfully denied access to the responsive CAMA data, he did not unlawfully deny access to photographs because none existed. Further, the current Custodian did not fully comply with the Council’s Interim Order. Additionally, the evidence of record does not indicate that either Custodians’ violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, neither Custodians’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s October 31, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, current Custodian disclosed responsive CAMA data to the Complainant in accordance with the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J.



Super. 432, and Mason, 196 N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 19th Day of December, 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: December 20, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 19, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-21

v.

**Colts Neck Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Robert Bowden³

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 21, 2014

GRC Complaint Received: January 16, 2014

Background

October 31, 2017 Council Meeting:

At its October 31, 2017 public meeting, the Council considered the October 24, 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, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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

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

² Represented by Joseph A. Clark, Esq. of Gluck, Walrath, LLP (Red Bank, NJ). Previously represented by Christopher D. Ackerman, Esq., of Dilworth, Paxson, LLP (Red Bank, NJ).

³ The current Custodian of Record is Beth Kara.

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, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.

3. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the responsive data does not fall within the ACD exemption. *See* Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian must disclose the responsive CAMA data.
4. The Custodian might have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
5. **The Custodian shall comply with conclusion Nos. 3 and 4 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On November 1, 2017, the Council distributed its Interim Order to all parties. On November 6, 2017, the Custodian’s Counsel e-mailed the Government Records Council (“GRC”), advising that the Township produced all records to the Complainant the prior week.

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

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

On November 21, 2017, the Custodian's Counsel e-mailed the current Custodian's certified confirmation of compliance to the GRC. Counsel also noted that the current Custodian originally signed the certification on November 6, 2017, and he was not sure whether he forwarded it to the GRC. Counsel noted that any failure to submit the certification timely was solely his oversight.

In the certification, the current Custodian certified that on November 2, 2017, she provided to the Complainant's Counsel six (6) CAMA files via e-mail. The current Custodian certified that the Tax Assessor from Monmouth County provided the files to the Township. The current Custodian also certified that no photographs responsive to the subject OPRA request existed.

Analysis

Compliance

At its October 31, 2017 meeting, the Council ordered the Custodian to disclose to the Complainant responsive CAMA data. Further, the Council ordered the Custodian to provide either responsive photographs or a certification that none existed. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 1, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 9, 2017.

On November 6, 2017, the Custodian's Counsel advised the GRC that all responsive records were sent to the Complainant. However, the GRC did not receive the current Custodian's certified confirmation of compliance until November 21, 2017, seven (7) business days after the expiration of the compliance time frame. Therein, the current Custodian certified that the Township disclosed CAMA data on November 2, 2017. Further, the current Custodian certified that no photographs existed.

Notwithstanding that the current Custodian executed the certification on November 6, 2017, the Council's Order required that she provide it prior to the expiration of the compliance deadline. Regardless of whether Counsel admittedly did not timely forward the certification, compliance was not timely met.

Therefore, the current Custodian did not fully comply with the Council's October 31, 2017 Interim Order. Specifically, although she timely provided the responsive CAMA data to the Complainant, she did not timely provide simultaneous certified confirmation of compliance to the Executive Director.

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)).

Initially, the original Custodian failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, although the original Custodian unlawfully denied access to the responsive CAMA data, he did not unlawfully deny access to photographs because none existed. Further, the current Custodian did not fully comply with the Council’s Interim Order. Additionally, the evidence of record does not indicate that either Custodians’ violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, neither Custodians’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The Complainant filed the instant complaint to request that the GRC order disclosure of the requested CAMA data and photographs. The original Custodian argued in the Statement of Information that the Complainant's OPRA request was invalid. In its October 31, 2017 Interim Order, the Council disagreed and ordered the original Custodian to disclose to the Complainant the responsive CAMA data and photographs, if they existed. On November 2, 2017, in partial compliance with the Interim Order, the current Custodian provided the responsive CAMA data to the Complainant via e-mail. However, the GRC should note that the current Custodian later certified that no photographs existed. Thus, the evidence of record supports that, regarding the CAMA data, the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, current Custodian disclosed responsive CAMA data to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council's October 31, 2017 Interim Order. Specifically, although she timely provided the responsive CAMA data to the Complainant, she did not timely provide simultaneous certified confirmation of compliance to the Executive Director.
2. The original Custodian failed to respond timely to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Also, although the original Custodian unlawfully denied access to the responsive CAMA data, he did not unlawfully deny access to photographs because none existed. Further, the current Custodian did not fully comply with the Council's Interim Order. Additionally, the evidence of record does not indicate that either Custodians' violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, neither Custodians' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App.

Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, current Custodian disclosed responsive CAMA data to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

December 12, 2017



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 31, 2017 Government Records Council Meeting

Shawn Hopkins
Complainant

Complaint No. 2014-21

v.

Colts Neck Township (Monmouth)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.
3. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the responsive data does not fall within the ACD exemption. *See* Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian must disclose the responsive CAMA data.



4. The Custodian might have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
5. **The Custodian shall comply with conclusion Nos. 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 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: November 1, 2017

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-21

v.

**Colts Neck Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Robert Bowden
Request Received by Custodian: December 24, 2013
Response Made by Custodian: January 21, 2014
GRC Complaint Received: January 16, 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.

Denial of Access Complaint:

On January 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested CAMA data from the Monmouth County (“County”) Tax Board 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 Township’s denial of access.

The Complainant argued that the requested CAMA data has been stored in a database that the County has paid for and maintained since 1996. The Complainant asserted that the software

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

² Represented by Christopher D. Ackerman, Esq., of Dilworth, Paxson, LLP (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.

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

program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the County unlawfully denied access to the requested data because:

- Six (6) municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C., 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, who utilize them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

Supplemental Response:

On January 21, 2014, approximately eighteen (18) business days⁶ after receipt of the OPRA request, the Custodian’s Counsel responded on behalf of the Custodian in writing, denying access to the Complainant’s OPRA request. Custodian’s Counsel stated that the request failed to identify with reasonable clarity the records (including photographs) sought. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). Custodian’s Counsel sought clarification of the Complainant’s request, advising that “any and all” tax assessment data is invalid. Custodian’s Counsel noted that the Complainant’s failure to provide clarification would result in the closure of the subject OPRA request.

Statement of Information:

On January 30, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 24, 2013, upon her return to the office. The Custodian certified that Custodian’s Counsel responded in writing on his behalf on January 21, 2014, denying the OPRA request as invalid. Bent, 381 N.J. Super. at 37.

The Custodian argued that the Complainant’s request seeking CAMA data did not identify a particular record; rather, it sought information and required the Township to create a new record that it did not keep in the ordinary course of official business. Bent, 381 N.J. Super.

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.

⁶ The GRC calculated this time frame, taking into account non-business days for Christmas Day, New Year’s Day, and Martin Luther King, Jr., Day.

30, 37. The Custodian asserted that the portion of the Complainant's OPRA requests seeking property photographs similarly failed to identify a specific record sought.

Additional Submissions:

On July 25, 2014, Complainant's Counsel submitted a letter brief, first arguing that the Custodian did not timely respond to the subject OPRA request. Complainant's Counsel asserted that the Custodian's own SOI statements prove that he violated N.J.S.A. 47:1A-5(i).

Complainant's Counsel next disputed the Township's position that the Complainant's request was invalid. Counsel contended that in Burnett v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010), the Appellate Division held that OPRA does not require a custodian to perform research or compile information and create a new record, but OPRA does require a custodian to search for existing records. Complainant's Counsel argued that this is exactly what the Complainant's OPRA request required the Custodian to do. Specifically, Complainant's Counsel argued that the Complainant identified an existing data folder and even provided detailed instructions on how to extract it. Complainant's Counsel contended that the Township would not be required to create a new file. Further, Counsel noted that the definition of a "government record" under OPRA includes "data processed" documents and "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. Counsel argued that copy of a database folder or file amounts to searching for and not creating records.

Complainant's Counsel also contended that the Township maintains CAMA data through the Monmouth Assessment Demonstration program, based on a shared services agreement with the County. Counsel contended that, when applying Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012), the Custodian was obligated to obtain and disclose the responsive information. *See also* Burnett, 415 N.J. Super. at 511-512.

Finally, Complainant's Counsel contended that the Township unlawfully denied access to the pictures on basis that this portion of the request was similarly invalid. Complainant's Counsel argued that the Burnett Court determined an OPRA request seeking "any and all settlement agreements" for a certain time period was valid. Complainant's Counsel asserted that the Complainant's OPRA request seeking property photographs was similar to the request at issue in Burnett and that he was not required to identify a specific property. Complainant's Counsel also argued that the Complainant's OPRA request only required a search, not research. *See also* Burke v. Brandes, 429 N.J. Super. 169, 176-177 (App. Div. 2012).

On August 6, 2014, Custodian's Counsel submitted a letter brief. Therein, Custodian's Counsel reiterated that the Township did not maintain the type of CAMA reports requested in the ordinary course of official business. Custodian's Counsel thus argued that, as held in Bent, the Township was not required to create a record from the data maintained by the County. Custodian's Counsel noted that the Complainant recognized the Township's need to "create" a file in his OPRA request.

Custodian's Counsel confirmed that the County and the Township were parties to a shared services agreement that allows the local assessors to submit "hard" data to the County. Custodian's Counsel asserted that the assessors use the "hard" data to formulate an assessment; the data changes from "hard" form to formulated opinions and then a finalized valuation on October 1, of the subject tax year. Custodian Counsel contended that, in addition to the overly broad nature of the request, the requested data was deliberative. Custodian's Counsel also alleged that it "may" contain notes, citations, or formulaic observations used by the assessors to determine the final valuation. Custodian's Counsel argued that the requested data thus met the two-prong test to be considered "inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)]" material. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274, 284 (2009).

Finally, Custodian's Counsel contended that the rationale in denying blanket requests for records also applied to the portion of the OPRA request seeking photographs. Custodian's Counsel asserted that assessors commonly comment on the photographs and that their analysis was often reflected in the market data. Custodian's Counsel also argued that some photographs may also contain information that would compromise building security. N.J.S.A. 47:1A-1.1. Custodian's Counsel contended that the photographs could show security systems (or the absence thereof), various entry points, and the type of locks used to secure the home.

On July 8, 2016, Complainant's Counsel sent an e-mail to the GRC, advising that in Hopkins, GRC 2014-01, Microsystems had waived its claim to confidentiality and agreed to make CAMA data available for disclosure. Complainant's Counsel requested that the GRC proceed with adjudicating this complaint in light of Microsystems' privilege waiver.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on December 24, 2013. The Custodian further certified that he responded (through Custodian's Counsel) on January 21, 2014, or approximately eighteen (18) business days after

⁷ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

receipt of the request. Thus, the evidence of record proves a “deemed” denial. N.J.S.A. 47:1A-5(i).

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

Validity of Request

The New Jersey Appellate Division has held that:

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

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division’s records custodian to manually search through all of the agency’s files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;⁸ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

⁸ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

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

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

....

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

Id. at 24, 28.

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

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

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

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

Id. at 12 (emphasis added).

In the instant matter, the Custodian, through Counsel, initially denied the Complainant’s OPRA request on the basis that the Township was not required to create a record. In response to the Complainant’s Denial of Access Complaint, the Custodian argued that it properly denied the request because same was invalid. The Custodian contended that the Township was not required to compile information and create a new record. Bent, 381 N.J. Super. at 37; Fang, GRC 2006-93. In his July 25, 2014 letter brief, Complainant’s Counsel refuted the Township’s position, stating that the Custodian was merely required to retrieve a file or folder from a database.

Initially, the GRC notes that the evidence of record supports that CAMA data exists within a database system provided to the Township as part of a shared services agreement with the County. For this reason, the GRC is satisfied that the requested CAMA data falls under the definition of a “government record” as “information stored or maintained electronically” in a database. Paff, 2017 N.J. LEXIS 680. Thus, the threshold issue before the Council is whether the Complainant’s request (including any responsive photographs that may exist) was invalid because it failed to identify a specific record and would have required the Township to create a new record.

In determining whether the Complainant’s request seeking CAMA data was invalid, the Council distinguishes the instant complaint from Fang. Specifically, the requests at issue there sought general records inclusive of certain personnel information. However, the complaint here more closely fits 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 also instructive here. Specifically, the Complainant identified a specific type of record, CAMA data, which was accessible from a database by utilizing a few simple commands. The GRC notes that the Complainant included instructions that the Custodian could utilize to extract the responsive compressed file from the database. As was the case in Zahler, the Custodian was not required to create a record; rather, she was required to extract the CAMA data from a database. A similar type of compilation was also

contemplated in Paff. See also McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

Regarding the portion of the request seeking photographs, Custodian argued in the SOI that it was similarly invalid as a blanket request. Custodian's Counsel reiterated these arguments in his August 6, 2014 letter brief.

The GRC is not persuaded by the Township's position: the request identifies a type of record (photographs) associated with the CAMA data sought. Thus, it is not unreasonable to believe that those photographs submitted to correspond with the data at that time, if any, were responsive to request. The GRC does not find that the portion of the request seeking photographs would require an "open-ended" search of every agency record. The GRC should note that this position is supported by Custodian Counsel's arguments regarding the potential content of the photographs.

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive CAMA data: such an action does not amount to creating a new record. Zahler, GRC 2013-266. See also Paff, 2017 N.J. LEXIS 680; McBride, GRC 2014-54. Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.

Unlawful Denial of Access

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

Having determined that the Complainant's OPRA request was valid, the GRC now turns to whether the Custodian was obligated to provide the responsive records.

CAMA Data

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974). The Council's decision here must take into account Administrative Law Judge ("ALJ") Kimberly A. Moss' Final Decision in Hopkins, GRC 2014-01, *et seq.*, because the ALJ held on whether CAMA data is a "government record" subject to access under OPRA.⁹ Therein, the ALJ found that "CAMA data are government records that are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter." Id. at 18.

⁹ The ALJ's Initial Decision became final by operation of law on April 4, 2016.

In Hopkins, GRC 2014-01, the Counties similarly argued that the ACD exemption applied to the responsive CAMA data because it is never finalized and some of the data ultimately made up the MOD-IV program. In reaching the conclusion that no exemptions applied, the ALJ noted that:

There was no testimony that CAMA data was used in the formulation of policy. CAMA data is facts about properties. The CAMA documents do not contain opinions, recommendations, or advice about agency policy as expressed in [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]. There was no testimony that the CAMA data contained opinions, recommendations, or [advice]. The CAMA data contains facts. . . . Some of the CAMA data, the Mod-4, and SR1A data, is on the [I]nternet.

Id. at 16.

Subsequent to the SOI in this matter, Custodian's Counsel contended that the responsive data constituted ACD material because it was not finalized until October 1 of the tax year. Counsel contended that the responsive data was constantly changing until that time and that it squarely fell within the two prongs of the ACD test. Educ. Law Ctr., 198 N.J. at 284.

However, the GRC finds the ALJ's reasoning in Hopkins, as instructive here. Specifically, the Custodian believed that the CAMA data was exempt as ACD material. Similar to the ACD argument in Hopkins, the Custodian asserted that the data was a "work-in-progress" and not finalized. Further, the Custodian asserted that the data included thoughts, ideas, and notes that would take time to review and redact. As was the case in Hopkins, the GRC does not find this argument compelling for the reasons contemplated by the ALJ.

Therefore, the Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the responsive data does not fall within the ACD exemption. *See* Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian must disclose the responsive CAMA data.

Property Photographs

Regarding the property photographs, the Custodian did not clearly identify whether any records exist either in his initial response or in the SOI. Based on this, it is currently unclear whether any responsive records exist. Thus, it is possible that the Custodian unlawfully denied access to copies of any responsive photographs.

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

Knowing & Willful

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

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all Township files.
3. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the responsive data does not fall within the ACD exemption. *See* Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian must disclose the responsive CAMA data.
4. The Custodian might have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.

5. **The Custodian shall comply with conclusion Nos. 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

October 24, 2017

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.