



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**

**April 24, 2018 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-28

v.

Hazlet Township (Monmouth)  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 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 the 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 24<sup>th</sup> Day of April, 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: April 26, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
April 24, 2018 Council Meeting**

**Shawn G. Hopkins<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-28**

v.

**Hazlet Township (Monmouth)<sup>2</sup>  
Custodial Agency**

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

**Custodian of Record:** Evelyn Grandi

**Request Received by Custodian:** December 26, 2013

**Response Made by Custodian:** January 6, 2014

**GRC Complaint Received:** January 16, 2014

**Background**

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request. 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. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014); 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. However, the GRC declines to order disclosure of any records because the Custodian provided the

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<sup>1</sup> Represented by Richard Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by James H. Gorman, Esq. (Shrewsbury, NJ). Previously represented by Brian Hak, Esq., of Weiner, Lesniak, LLP (Parsippany, NJ).

responsive CAMA data and photographs to the Complainant between July 14, and August 19, 2016.

2. The Custodian unlawfully denied access to the responsive CAMA data and photographs. However, the Custodian disclosed the responsive CAMA data (through the Tax Assessor) and photographs to the Complainant in the period between July 14, and August 25, 2016. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, Custodian disclosed responsive CAMA data and photographs to the Complainant during the pendency of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On March 28, 2018, the Council distributed its Interim Order to all parties. On April 9, 2018, Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was settled. On the same day, Custodian's Counsel also confirmed that the fee issue was settled.

#### Analysis

##### Prevailing Party Attorney's Fees

At its March 27, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel

would be required to “submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.”

On March 28, 2018, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by close of business on April 26, 2018. On April 9, 2018, both parties e-mailed the Government Records Council advising that the fee issue was settled.

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

### **Conclusions and Recommendations**

The Council Staff respectfully recommends that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the 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

April 17, 2018



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**March 27, 2018 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-28

v.

Hazlet Township (Monmouth)  
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request. 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. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014); 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. However, the GRC declines to order disclosure of any records because the Custodian provided the responsive CAMA data and photographs to the Complainant between July 14, and August 19, 2016.
2. The Custodian unlawfully denied access to the responsive CAMA data and photographs. However, the Custodian disclosed the responsive CAMA data (through the Tax Assessor) and photographs to the Complainant in the period between July 14, and August 25, 2016. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, Custodian disclosed responsive CAMA data and photographs to the Complainant during the pendency of this complaint. 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 27<sup>th</sup> Day of March, 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: March 28, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
March 27, 2018 Council Meeting**

**Shawn G. Hopkins<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-28**

v.

**Hazlet Township (Monmouth)<sup>2</sup>  
Custodial Agency**

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

**Custodian of Record:** Evelyn Grandi

**Request Received by Custodian:** December 26, 2013

**Response Made by Custodian:** January 6, 2014

**GRC Complaint Received:** January 16, 2014

**Background<sup>3</sup>**

**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 January 6, 2014, the Custodian responded in writing denying the Complainant access to CAMA data on the basis that same is not a “government record” under OPRA. Specifically, the Custodian stated that the Complainant’s request sought information requiring the Township to compile data and create a record that does not exist: the Custodian was under no obligation to perform such a task. The Custodian allowed the Complainant to provide clarification of his request to identify specific records that exist. Additionally, the Custodian requested that the Complainant provide specific properties of which he sought photographs and the Township would review same accordingly.

**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

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<sup>1</sup> Represented by Richard Gutman, Esq. (Montclair, NJ).

<sup>2</sup> Represented by James H. Gorman, Esq. (Shrewsbury, NJ). Previously represented by Brian Hak, Esq., of Weiner, Lesniak, LLP (Parsippany, NJ).

<sup>3</sup> 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.

CAMA data from Monmouth County (“County”) on December 18, 2013.<sup>4</sup> 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 program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the Township unlawfully denied access to the requested data because:

- Six (6) municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C., 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,” requires<sup>5</sup> 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.

Statement of Information:

On January 29, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 26, 2013. The Custodian affirmed that her search for the responsive records included providing the request to the Tax Assessor for review. The Custodian certified that she responded in writing on January 6, 2014, denying the Complainant’s OPRA request because the requested information was not considered a “government record” under OPRA.

The Custodian affirmed that the request sought CAMA data, a program that assessors use to perform their daily work. The Custodian noted that this data is updated frequently. The Custodian contended that data is not disclosable because it is not a government record.

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

<sup>5</sup> 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.



Additional Submissions:

On July 24, 2014, the Complainant's Counsel submitted a letter brief disputing the Township's position. Counsel stated that in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010), the Appellate Division held that a custodian was required to seek existing records, but was not required to perform research, compile information or create a new file. Counsel argued that here, the Complainant identified an existing data folder that did not require the Township to perform any of the above actions. Counsel noted that the Complainant provided the Custodian with specific instructions to locate the compressed data folder. Further, Counsel stated 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.

Additionally, Counsel argued that the Complainant's request for photographs was specific and valid. Counsel argued that Burnett supported that the Complainant did not need to seek photographs for specific properties; he clearly sought all photographs for every property in the Township. Further, Counsel argued that the Custodian could easily locate photographs with a reasonable amount of effort. See Burke v. Brandes, 429 N.J. Super. 169, 176-77 (App. Div. 2012). Counsel also noted that numerous other municipalities have already complied with an identical request, which further supports that the request is valid.

On July 8, 2016, the Complainant's Counsel requested that the GRC proceed with the adjudication of this complaint because, in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.*, Microsystems waived its claim of confidentiality. Further, Counsel noted that Microsystems agreed to provide responsive CAMA data for all municipalities in the County.

On July 14, 2016, the Custodian e-mailed the Complainant disclosing CAMA data. Further, the Custodian stated that she could not e-mail the photographs because the file was too big; thus, she charged the Complainant \$5.00 to disclose them on a compact disc. On the same day, the Complainant e-mailed the Custodian advising that the CAMA data provided was not responsive to his OPRA request. The Complainant requested that the Custodian contact the Microsystems to obtain the proper files.

On July 15, 2016, the Custodian's Counsel sent a letter to the GRC. Therein, Counsel stated that the Custodian e-mailed the responsive data to the Complainant on July 14, 2016. Counsel stated that the Complainant responded rejecting the data and asking the Custodian to contact Microsystems. Counsel contended that not only did the Township not have a contractual relationship with Microsystems, but also it has no control over that company, which contracts directly with the County. Counsel also directed the GRC's attention to Paff v. Twp. of Galloway, 44 N.J. Super. 495, 404-405 (App. Div. 2016)<sup>6</sup> providing that a custodian is not required to create a new record from information stored electronically. Counsel asserted that even though

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<sup>6</sup> The GRC notes that the Supreme Court reversed this decision; thus, requiring agencies to produce electronic information in the form of reports even if the agency was not regularly producing such a report in the regular course of official business. Paff v. Galloway Twp., 229 N.J. 340 (2017).

Paff, applies to the CAMA data issue, the Township exceeded its statutory obligation by attempting to create a responsive record.

On July 28, 2016, the Complainant's Counsel sent a letter to Custodian's Counsel providing updated instructions to download the records directly from the County. Further, Complainant's Counsel refuted that Paff, 444 N.J. Super. 495 applied here because the responsive CAMA data files existed (unlike the e-mail logs at issue in Paff). The Complainant's Counsel thus requested that the Custodian e-mail the responsive CAMA data to him by August 4, 2016.

On August 10, 2016, the Custodian's Counsel sent a letter to the Complainant's Counsel. Therein, Custodian's Counsel argued that the CAMA data files did not exist at the time of the request and had to be created, which is on point with Paff, 444 N.J. Super. 495. Counsel further asserted that regardless of whether the Township was legally required to provide records, the Tax Assessor followed the Complainant's instructions, produced the requested data, and sent it to the Complainant on July 14, 2016. Counsel noted that Complainant Counsel's most recent letter contained different instructions than those originally provided. Counsel stated that, in an effort to avoid any further argument, the Tax Assessor would again attempt to create and provide the responsive CAMA data.

On August 19, 2016, the Complainant's Counsel e-mailed the Custodian's Counsel the updated instructions. On August 25, 2016, the Tax Assessor e-mailed the responsive CAMA data to the Complainant's Counsel.

On August 29, 2016, the Custodian's Counsel sent a letter to the Complainant's Counsel reacting to Complainant Counsel's alleged request that the Township pay attorney's fees. Custodian's Counsel stated that he believed the Township's denial of access was appropriate, but that "it seemed easier to create a new [record] . . . rather than to fight about it." Custodian's Counsel argued that Complainant Counsel's request for fees was frivolous because the Township was under no obligation to provide records by using keystrokes to create them. However, Custodian's Counsel stated that the Township cooperated and far exceeded its requirements under OPRA. Custodian's Counsel thus requested that the Complainant's Counsel withdraw his demand for attorney's fees within twenty-eight (28) days under threat of an application for sanctions. N.J. Court Rules R. 1:4-8.<sup>7</sup>

### **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

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<sup>7</sup> On September 9, 2016, the Complainant's Counsel submitted a prevailing party fee application with the GRC. However, such filing was premature because 1) the Council has yet to rule on the fee issue, and 2) the Council has not requested said application by formal decision.

“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.

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

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

....

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

[Id. at 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).]

Here, the Custodian maintained that she was not required to compile CAMA data into the requested reports and that no records existed. The Custodian also argued that the Complainant would have to provide specific addresses to receive photographs. In the SOI, the Custodian expounded on this denial, stating that the request did not seek a “government record.” The Custodian offered no additional arguments regarding the photographs. Notwithstanding, the Custodian disclosed the responsive CAMA data and photographs to the Complainant between July 14, and August 19, 2016.

The Council relies on Paff, 229 N.J. 340, decided during the pendency of this complaint. 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).

Further, the GRC is also not persuaded by the Township’s arguments concerning the validity of the “photographs” portion of the OPRA request. Specifically, the request identified 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, were responsive to request. The GRC does not find that the portion of the request seeking photographs would require an “open-ended” search of every agency record.

Accordingly, the Custodian 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. See also Paff, 229 N.J. 340; Zahler, GRC 2013-266; 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. However, the GRC declines to order disclosure of any records because the Custodian provided the responsive CAMA data and photographs to the Complainant between July 14, and August 19, 2016.

### **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 Custodian unlawfully denied access to the responsive CAMA data and photographs. However, the Custodian disclosed the responsive CAMA data (through the Tax Assessor) and photographs to the Complainant in the period between July 14, and August 25, 2016. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> 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 requesting that the GRC order disclosure of the requested CAMA data and photographs. The Custodian argued in the Statement of Information that the responsive records were not considered “government records.” Thereafter, between July 14, and August 19, 2016, the Custodian disclosed the responsive CAMA data and photographs to the Complainant. On August 29, 2016, Custodian’s Counsel sent a letter to the Complainant’s Counsel disputing that the Complainant was a prevailing party. In arguing against a fee award, Counsel argued that the Township disclosed records because “it seemed easier to create a new [record] . . . rather than to fight about it.” Notwithstanding that the Township believed they were making a concession on disclosure despite their position, same represented a voluntary change in the custodian’s conduct. Further, a factual causal nexus with a basis in law existed here: the GRC has determined that the Custodian was required to disclose the responsive records, which she did so during the pendency of this complaint. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, 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, Custodian disclosed responsive CAMA data and photographs to the Complainant during the pendency of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See

N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian 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. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017); Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014); 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. However, the GRC declines to order disclosure of any records because the Custodian provided the responsive CAMA data and photographs to the Complainant between July 14, and August 19, 2016.
2. The Custodian unlawfully denied access to the responsive CAMA data and photographs. However, the Custodian disclosed the responsive CAMA data (through the Tax Assessor) and photographs to the Complainant in the period between July 14, and August 25, 2016. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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, Custodian disclosed responsive CAMA data and photographs to the Complainant during the pendency of this complaint. 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.**

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