



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**

**May 21, 2019 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-43

v.

Borough of Shrewsbury (Monmouth)  
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply fully with the Council’s February 26, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing the Complainant the responsive CAMA data. However, in the absence of an extension request, the Custodian did not timely provide the responsive photographs. Further, the Custodian failed to submit certified confirmation of compliance to the Council Staff until nearly two (2) months after the expiration of the compliance time frame.
2. Mr. Walters unlawfully denied access to the Complainant’s OPRA request based on pending litigation. Additionally, the original Custodian and Mr. Walters unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian disclosed the responsive records to the Complainant, albeit without fully complying with the Council’s Interim Order. Additionally, the evidence of record does not indicate that either the original Custodian or Mr. Walters’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original Custodian or Mr. Walters’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the  
Government Records Council  
On The 21<sup>st</sup> Day of May 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 22, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
May 21, 2019 Council Meeting**

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

**GRC Complaint No. 2014-43**

v.

**Borough of Shrewsbury (Monmouth)<sup>2</sup>  
Custodial Agency**

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

**Custodian of Record:** Kathleen Krueger<sup>3</sup>  
**Request Received by Custodian:** January 8, 2014  
**Response Made by Custodian:** January 15, 2014  
**GRC Complaint Received:** January 21, 2014

**Background**

**February 26, 2019 Council Meeting:**

At its February 26, 2019 public meeting, the Council considered the February 19, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Mr. Walters unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Walters unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014).
2. The Custodian and Mr. Walters may have lawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Specifically, the evidence of record brings into question whether the Borough could have obtained and disclosed records based on a shared services agreement with the County of Monmouth. If such

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Bruce W. Padula, Esq. of Cleary, Giacobbe, Alfieri & Jacobs, LLC (Matawan, NJ). Previously represented by Martin M. Barger, Esq., of Barger & Gaines (Shrewsbury, NJ).

<sup>3</sup> The current Custodian of Record is Maureen L. Muttie.

an agreement existed, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Thus, the Custodian and/or Mr. Walters must disclose the CAMA data available at the time that the Complainant submitted his OPRA request. Should no shared services agreement exist, or should certain records not exist, the Custodian and/or Mr. Walters must certify to this fact.

3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,<sup>5</sup> to the Council Staff.<sup>6</sup>**
4. The Council defers analysis of whether the Custodian and/or Mr. Walters knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.

#### Procedural History:

On February 28, 2019, the Council distributed its Interim Order to all parties. On the same day, the previous Custodian's Counsel sent a letter to current Counsel advising of the Order. Previous Counsel noted that J. Stephen Walters and the original Custodian both left the Borough. Original Counsel averred that the matter "must be addressed immediately" by the new Tax Assessor and current Custodian at the Borough.

On April 25, 2019, the GRC e-mailed the parties advising that it had not received any correspondence from the Custodian, although the compliance deadline expired on March 7, 2019. The GRC noted that this complaint would be scheduled for a tentative adjudication at the Council's May 21, 2019 meeting and any further failure to comply with the Order would be noted in the record. On the same day, current Counsel e-mailed the GRC advising that he was away, but that he would mail the completed compliance package as soon as he returned.

On May 6, 2019, the current Custodian responded to the Council's Interim Order.<sup>7</sup> Therein, the current Custodian certified that on March 6, 2019, she e-mailed the Complainant the responsive CAMA data. The current Custodian certified that at that time, the Borough did not possess the

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>5</sup> "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."

<sup>6</sup> 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.

<sup>7</sup> The current Custodian's certification was dated April 15, 2019.

responsive photographs; thus, she needed to contact Realty Appraisal for them. The current Custodian certified that she received the responsive photographs on March 22, 2019. The current Custodian affirmed that she made two (2) attempts to contact the Complainant to obtain an updated address for mailing purposes. The current Custodian certified that on March 26, 2019, she obtained an updated address from an earlier e-mail sent by the GRC. The current Custodian certified that she then mailed the photographs to the Complainant on a compact disc (“CD”). The current Custodian noted that she also included a CD copy of the CAMA data.

## Analysis

### Compliance

At its February 26, 2019 meeting, the Council ordered the Custodian to disclose the responsive CAMA data available at the time of the Complainant’s OPRA request, predicated on a shared services agreement with the County. Further, the Council ordered the Custodian to disclose responsive property photographs or certify if none existed. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On February 28, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on March 7, 2019.

On May 6, 2019, nearly two (2) months after receipt of the Council’s Order, the current Custodian submitted her compliance package to the GRC. Therein, the current Custodian certified that she provided responsive CAMA data to the Complainant on March 6, 2019 via e-mail. The current Custodian certified that she obtained responsive photographs and sent same via U.S. mail on a CD on or around March 26, 2019. The current Custodian also noted that she included a CD copy of the CAMA data in that mailing.

Although the current Custodian ultimately provided the appropriate responsive records to the Complainant, she did not fully comply with the Council’s Order. Initially, the current Custodian did disclose the responsive CAMA data in a timely manner. However, the current Custodian, without a proper extension request, disclosed responsive photographs on March 26, 2019, or thirteen (13) business days after the expiration of the compliance time frame. Further, the current Custodian did not provide certification of compliance until May 6, 2017, or forty-one (41) business days after the expiration of the compliance time frame.

Therefore, the Custodian failed to comply fully with the Council’s February 26, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing the Complainant the responsive CAMA data. However, in the absence of an extension request, the Custodian did not timely provide the responsive photographs. Further, the Custodian failed to submit certified confirmation of compliance to the Council Staff until nearly two (2) months after the expiration of the compliance time frame.

## **Knowing & Willful**

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, Mr. Walters unlawfully denied access to the Complainant’s OPRA request based on pending litigation. Additionally, the original Custodian and Mr. Walters unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian disclosed the responsive records to the Complainant, albeit without fully complying with the Council’s Interim Order. Additionally, the evidence of record does not indicate that either the original Custodian or Mr. Walters’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original Custodian or Mr. Walters’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council’s February 26, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing the Complainant the responsive CAMA data. However, in the absence of an extension request, the Custodian did not timely provide the responsive photographs. Further, the Custodian failed to submit certified confirmation of compliance to the Council Staff until nearly two (2) months after the expiration of the compliance time frame.

2. Mr. Walters unlawfully denied access to the Complainant's OPRA request based on pending litigation. Additionally, the original Custodian and Mr. Walters unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian disclosed the responsive records to the Complainant, albeit without fully complying with the Council's Interim Order. Additionally, the evidence of record does not indicate that either the original Custodian or Mr. Walters' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original Custodian or Mr. Walters' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Acting Executive Director

May 14, 2019



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 26, 2019 Government Records Council Meeting**

Shawn G. Hopkins  
Complainant

Complaint No. 2014-43

v.

Borough of Shrewsbury (Monmouth)  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Mr. Walters unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Walters unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014).
2. The Custodian and Mr. Walters may have lawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Specifically, the evidence of record brings into question whether the Borough could have obtained, and disclosed records based on a shared services agreement with the County of Monmouth. If such an agreement existed, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. Burnett v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Thus, the Custodian and/or Mr. Walters must disclose the CAMA data available at the time that the Complainant submitted his OPRA request. Should no shared services agreement exist, or should certain records not exist, the Custodian and/or Mr. Walters must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</sup>**

4. The Council defers analysis of whether the Custodian and/or Mr. Walters knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 28, 2019**

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<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>2</sup> "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."

<sup>3</sup> 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 Council Staff  
February 26, 2019 Council Meeting**

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

**GRC Complaint No. 2014-43**

v.

**Borough of Shrewsbury (Monmouth)<sup>2</sup>  
Custodial Agency**

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

**Custodian of Record:** Kathleen Krueger  
**Request Received by Custodian:** January 8, 2014  
**Response Made by Custodian:** January 15, 2014  
**GRC Complaint Received:** January 21, 2014

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

**Request and Response:**

On January 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian acknowledged receipt of the Complainant’s OPRA request.

On January 15, 2014, the Custodian responded in writing forwarding Tax Assessor J. Stephen Walters’ response to the Complainant’s OPRA request. Therein, Mr. Walters stated that, in response to previous requests, he advised the Complainant that he did not possess any responsive records. Mr. Walters also acknowledged that the Complainant filed a Denial of Access Complaint<sup>4</sup> regarding the County of Monmouth (“County”) Tax Board’s denial of a similar OPRA request. Mr. Walters stated that the Borough was not denying access to any records but sought sufficient time to allow the Government Records Council (“GRC”) to adjudicate the pending complaint before disclosing any records.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Martin M. Barger, Esq. (Shrewsbury, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

<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.* (June 2018).

### Denial of Access Complaint:

On January 21, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant stated that he previously requested CAMA data from the County on December 18, 2013.<sup>5</sup> The Complainant stated that the County advised him to request the data individually from each municipality.

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

- Six (6) municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C. (“Microsystems”) as their MODIV/CAMA vendor.
- The software program is funded, maintained, and operated by the County under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires<sup>6</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 utilize them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

### Statement of Information:

On February 24, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 8, 2014. The Custodian certified that her search included providing the Complainant’s request to Mr. Walters for review. The Custodian certified that Mr. Walters prepared a response, which the Custodian forwarded to the Complainant on January 15, 2014.

The Custodian contended that the Borough properly denied access to the responsive records because it does not possess them. The Custodian argued that the Borough did not deny access to the responsive records in their entirety. The Custodian asserted that she requested additional time to allow the GRC to adjudicate Hopkins, GRC 2014-01, *et seq.*

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<sup>5</sup> Ibid.

<sup>6</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.

## Analysis

### Unlawful Denial of Access

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

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

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

Hopkins, GRC 2014-01, *et seq.*, as a deemed adopted decision of the Council, applies here because there, the Administrative Law Judge 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 . . .” Id. at 18.

Initially, Mr. Walters responded through the Custodian seeking additional time to await the Council’s holding in Hopkins before responding to the subject OPRA request. As part of the SOI submitted in this matter, the Custodian contended that Mr. Walters did not deny access to responsive records; rather, he sought an opportunity for the GRC to adjudicate Hopkins, GRC 2014-01, *et seq.* However, Mr. Walters’ attempt to delay a response until after Hopkins violated OPRA. See Paff, GRC 2013-195.

Therefore, Mr. Walters unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Walters unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195.

Moreover, the Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a

complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In the instance that another agency or third party creates or maintains records on behalf of the agency in receipt of an OPRA request, the Court's decision in Burnett v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010) controls. There, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The Court's decision largely fell on the fact that there was no question that the broker was working on behalf of defendants to execute settlement agreements. The Court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, "they nonetheless bind the county as principal, and the agreements are made on its behalf." Id. at 513. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the Court noted that the facts there differed from those in Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) (holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency). The Council later applied the Court's holding to a complaint involving disclosure of records held by another public agency as part of a shared services agreement. See Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012) (holding that an agency had an obligation to obtain records from another agency maintaining same in accordance with a shared services agreement).

In the matter currently before the Council, Mr. Walters, through the Custodian, denied the Complainant access to the responsive CAMA data and property photographs on the basis that responsive records were not in his possession. Mr. Walters also directed the Complainant to the County's open public records website to review "data which has already been made public."

However, the GRC has knowledge from adjudicating numerous complaints wherein Complainant requested CAMA data from a public agency that multiple municipalities entered into a shared services agreement with the County to use Microsystems' software for storing CAMA data. See *e.g.* Hopkins v. Borough of Fair Haven (Monmouth), GRC Complaint No. 2014-24 (Interim Order dated July 25, 2017) (holding that the custodian had an obligation to obtain responsive records from the County pursuant to a shared services agreement). It is not clear here whether the Borough similarly entered into such an agreement. However, the Borough's likely access to Microsystems' software to manage CAMA data casts doubt on the assertion that they are not in possession of the responsive records.

Accordingly, the Custodian and Mr. Walters may have lawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Specifically, the evidence of record brings into question whether the Borough could have obtained and disclosed records based on a shared services agreement with the County. If such an agreement existed, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. Burnett, 381 N.J. Super. 506; Michalak, GRC 2010-220. Thus, the Custodian and/or Mr. Walters must disclose the CAMA data available at the time that the Complainant submitted his OPRA request. Should no shared services

agreement exist, or should certain records not exist, the Custodian and/or Mr. Walters must certify to this fact.

Finally, the Supreme Court's recent decision in Paff v. Twp. of Galloway, 229 N.J. 340 (2017) is binding on requests for electronic data. There, 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 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 GRC notes that Paff effectively negates any argument that disclosure of CAMA data would require the Custodian to create a record (although the Custodian here did not make such an argument).

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. Mr. Walters unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Walters unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014).
2. The Custodian and Mr. Walters may have lawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. Specifically, the evidence of record brings into question whether the Borough could have obtained and disclosed records based on a shared services agreement with the County of Monmouth. If such an agreement existed, the Custodian had an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. Burnett v. Cnty. of Gloucester 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Thus, the Custodian and/or Mr. Walters must disclose the CAMA data available at the time that the Complainant submitted his OPRA request. Should no shared services agreement exist, or should certain records not exist, the Custodian and/or Mr. Walters must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,<sup>8</sup> to the Council Staff.<sup>9</sup>**

4. The Council defers analysis of whether the Custodian and/or Mr. Walters knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Acting Executive Director

February 19, 2019

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<sup>7</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>8</sup> "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."

<sup>9</sup> 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.