



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

February 27, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-48

v.

Loch Arbour Village (Monmouth)
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 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:

1. The current Custodian complied with the Council’s December 19, 2017 Interim Order because she responded in the prescribed time frame providing the Complainant CAMA data she reasonably believed to be responsive and the photographs. The current Custodian also provided a detailed explanation of the Village’s attempts to rectify any alleged issue with the disclosed CAMA data. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the CAMA data and photographs responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to comply with the Council’s July 25, 2017 Interim Order. However, the current Custodian complied with the Council’s December 19, 2017 Interim Order by disclosing all responsive records. She also provided a detailed explanation of the Village’s attempts to rectify any alleges issues with the CAMA data, noting that the Complainant provided no explanation or assistance. Finally, upon receiving the Complainant’s clarification, the Village quickly provided the appropriate CAMA data to the Complainant’s satisfaction. Additionally, the evidence of record does not indicate that either of the Custodians’ violation of OPRA or the Council’s December 19, 2017 Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians’ 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.



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 27th Day of February, 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 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-48

v.

**Loch Arbour Village (Monmouth)²
Custodial Agency**

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

Custodian of Record: Daniel J. Mason³
Request Received by Custodian: Unknown
Response Made by Custodian: None
GRC Complaint Received: January 23, 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 the amended findings and recommendations. The Council, therefore, found that:

1. The current Custodian failed to comply with the Council’s July 25, 2017 Interim Order because she failed to provide all responsive records within the extended time frame, failed to provide certified confirmation of compliance to the Executive Director within that same time frame, and further failed to disclose the photograph DVD to the Complainant upon receipt.
2. The GRC finds that the Custodian unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6. However, based on the facts specific to the instant case, the GRC is providing the current Custodian one last opportunity to comply properly with the Council’s Order. Thus, the current Custodian shall:

¹ No legal representation listed on record.

² Represented by William H. Healey, Esq., of Luger, Healey, LLC (Tinton Falls, NJ).

³ The current Custodian of Record is Marilyn Simons.

- Disclose the CAMA data responsive to the Complainant's OPRA request in its entirety;
 - Include as part of her certified confirmation of compliance an explanation of how the parties have rectified the CAMA data issues to date; and
 - Provide the Complainant with a copy of the DVD by regular mail because said records only exist on DVD.
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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
 4. 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 current Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 20, 2017, the Council distributed its Interim Order to all parties. On December 21, 2017, the current Custodian e-mailed CAMA data to the Complainant. On the same day, the current Custodian responded to the Council's Interim Order, attaching a legal certification from Tax Assessor Erick Aguiar. Therein, the current Custodian recapitulated her prior attempt to comply with the Council's July 25, 2017 Interim Order. The current Custodian certified that Mr. Aguiar originally produced the CAMA data disclosed to the Complainant on July 31, 2017 by following the instructions included in the subject OPRA request. *See also Aguiar Cert.* at ¶ 4. The current Custodian affirmed that on the same day, the Complainant asserted the CAMA data was incomplete without further elaboration. The current Custodian certified that Mr. Aguiar immediately re-ran the commands, which generated the same files. *See also Aguiar Cert.* at ¶ 5. The current Custodian certified that Counsel subsequently reached out to the Complainant on August 11, 2017 asking him to advise if he still believed the Village's response was "incomplete." The current Custodian affirmed that at no point after the August 11, 2017 e-mail (or subsequent e-mails regarding the DVD) did the Complainant contact the Village explaining why he believed she failed to comply.

The current Custodian affirmed that the Village's efforts to rectify the alleged compliance issue involved re-running the CAMA data query based on the Complainant's instructions after he raised objection to the records provided. The current Custodian also certified that Custodian's Counsel attempted to contact the Complainant for an explanation as to why he believed the "Village's response [was] incomplete." The current Custodian asserted that her explanation proved

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.

the Village's good faith effort to address the alleged CAMA data issues, but that the Complainant provided no explanation or assistance to allow them to rectify them. The current Custodian affirmed that pursuant to the Council's most recent Order, she again provided CAMA data to the Complainant via e-mail. The current Custodian also certified that she sent a copy of the photograph DVD to the Complainant via certified mail.

On January 21, 2018, the Complainant e-mailed the GRC ("Government Records Council") contending that the current Custodian failed to comply with both of the Council's Orders. The Complainant argued that they only provided two (2) of the five (5) files requested, and that one of those files was "incomplete." The Complainant thus requested that the GRC find that the current Custodian knowingly and willfully violated OPRA by failing to comply with the Council's Orders and submitting false certifications. On January 23, 2018, Custodian's Counsel e-mailed the GRC requesting that Mr. Aguiar have a chance to address the Complainant's clarification, which the Village has actively sought for months. Counsel also argued that the compliance certifications were not false: the Village has always understood that it fully complied with the Council's Orders.

On the same day, the GRC advised that it would allow until January 30, 2018 for the Village to address the Complainant's clarification. Later on January 23, 2018, Custodian's Counsel sent an e-mail to all parties attaching six (6) CAMA data files and a letter to the GRC. In the letter, Counsel stated that Mr. Aguiar contacted Microsystems-NJ.com, L.L.C. due to the fact that the commands from the OPRA request produced the CAMA data twice provided to the Complainant. Counsel stated that Mr. Aguiar used the Complainant's January 21, 2018 letter to obtain the correct commands from Microsystems. Counsel stated that Mr. Aguiar entered the new commands and produced the attached CAMA data, which represented those sought by the Complainant. Counsel averred that the Complainant provided insufficient commands, which is understandable given the complex nature of Microsystems' software. Counsel expressed concern that the Complainant waited an extended period of time to provide the clarification necessary to resolve this complaint. Counsel requested that, based on the foregoing, the GRC dismiss this complaint.

On February 13, 2018, the Complainant confirmed receipt of the responsive records and renewed his request that the GRC find a knowing and willful violation based on false certifications. The Complainant contended that it was obvious that the photographs were available prior to the December 19, 2017 Order but that the Custodian failed to provide them. Additionally, the Complainant contended that it was clear that the CAMA data was not right when provided. The Complainant argued that, contrary to Custodian Counsel's assertions about the instructions, OPRA is not "about being able to follow instructions." The Complainant asserted that the records provided for each of the last two (2) Orders were clearly wrong. The Complainant next averred that, as the GRC was aware from Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016), the original instructions provided worked at the time he submitted the subject OPRA request. The Complainant noted that the facts of that case also showed that the program was changed in 2014 and that assessors could reach out to Monmouth County ("County") to receive assistance in producing the responsive data. The Complainant expressed confusion as to why the Custodian would contact Monmouth County

for photographs but not CAMA data assistance. The Complainant stated that the forgoing formed the basis for his knowing and willful request.⁶

Analysis

Compliance

At its December 19, 2017 meeting, the Council ordered the current Custodian to provide responsive CAMA data to the Complainant in its entirety, provide an explanation on how the Village attempted to rectify any CAMA data issues to date, and send the Complainant a copy of the photograph DVD by regular mail. The Council also ordered the current Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 20, 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 current Custodian's response was due by close of business on December 28, 2017.

On December 21, 2017, the first (1st) business day after receipt of the Council's Order, the current Custodian disclosed CAMA data she believed to be responsive to the Complainant via e-mail, as well as the photograph DVD via certified mail. The current Custodian also provided certified confirmation of compliance to the Executive Director. Therein, the current Custodian included a detailed explanation of the Village's attempts to rectify any issues regarding the disclosed CAMA data. A month later, on January 21, 2018, the Complainant provided clarification as to why he believed that the current Custodian's response was incomplete. On January 23, 2018, the Village provided CAMA data that satisfied the Complainant's OPRA request.

In determining whether the current Custodian complied with the Council's Order, the GRC must look to the specific wording of that Order. The Council ordered the current Custodian to provide responsive CAMA data and photographs to the Complainant. The Council also ordered the current Custodian to provide a detailed explanation of how she attempted to rectify the alleged CAMA data issue.

Based on the current Custodian's disclosures and certified confirmation of compliance, the GRC is satisfied that she fully complied with the Council's Order. The current Custodian completed each task as required by the Order with the information available to her at that time. Specifically, she provided to the Complainant CAMA data believed to be responsive to the subject OPRA request at that time. Further, the current Custodian detailed the Village's attempts to rectify the alleged issue with the CAMA data, to which the Complainant did not respond. To supplement this certification, she submitted Mr. Aguiar's legal certification detailing how he produced the records provided. The Complainant did not provide clarification on the disclosure issue until more than five (5) months after his initial allegation and one (1) month after receipt of the current Custodian's response to this Order. Within two (2) days of receiving clarification, the Village contacted Microsystems and produced the appropriate CAMA data to the Complainant.

Further, the Complainant expounded on how the current Custodian could have obtained the responsive CAMA data in confirming receipt of the correct records on February 13, 2018. His

⁶ The parties submitted additional correspondence that repeated arguments already included herein.

explanation first insinuated that the current Custodian should have known the details of Hopkins, GRC 2014-01 and used them to comply. Further, his explanation insinuated that the GRC should have rectified any compliance issues with the CAMA data because it was aware of the facts of Hopkins. Notwithstanding, each insinuation does not take away from the fact that the Complainant did not respond to the Village's several written attempts to rectify the alleged noncompliance prior to January 21, 2018. Further, the current Custodian has always maintained that she believed she had complied absent any indication as to why the Complainant was not satisfied with her initial disclosure.

Therefore, the current Custodian complied with the Council's December 19, 2017 Interim Order because she responded in the prescribed time frame providing the Complainant CAMA data she reasonably believed to be responsive and the photographs. The current Custodian also provided a detailed explanation of the Village's attempts to rectify any alleged issue with the disclosed CAMA data. Finally, the current Custodian simultaneously provided 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)).

In the matter before the Council, the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the CAMA data and photographs responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to comply with the Council's July 25, 2017 Interim Order. However, the current Custodian complied with the Council's December 19, 2017 Interim Order. She also

provided a detailed explanation of the Village's attempts to rectify any alleged issues with the CAMA data, noting that the Complainant provided no explanation or assistance. Finally, upon receiving the Complainant's clarification, the Village quickly provided the appropriate CAMA data to the Complainant's satisfaction. Additionally, the evidence of record does not indicate that either of the Custodians' violation of OPRA or the Council's December 19, 2017 Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians' 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian complied with the Council's December 19, 2017 Interim Order because she responded in the prescribed time frame providing the Complainant CAMA data she reasonably believed to be responsive and the photographs. The current Custodian also provided a detailed explanation of the Village's attempts to rectify any alleged issue with the disclosed CAMA data. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the CAMA data and photographs responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to comply with the Council's July 25, 2017 Interim Order. However, the current Custodian complied with the Council's December 19, 2017 Interim Order by disclosing all responsive records. She also provided a detailed explanation of the Village's attempts to rectify any alleged issues with the CAMA data, noting that the Complainant provided no explanation or assistance. Finally, upon receiving the Complainant's clarification, the Village quickly provided the appropriate CAMA data to the Complainant's satisfaction. Additionally, the evidence of record does not indicate that either of the Custodians' violation of OPRA or the Council's December 19, 2017 Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians' 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.

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

February 20, 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. 2017-48

v.

Loch Arbour Village (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 failed to comply with the Council’s July 25, 2017 Interim Order because she failed to provide all responsive records within the extended time frame, failed to provide certified confirmation of compliance to the Executive Director within that same time frame, and further failed to disclose the photograph DVD to the Complainant upon receipt.
2. The GRC finds that the Custodian unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6. However, based on the facts specific to the instant case, the GRC is providing the current Custodian one last opportunity to comply properly with the Council’s Order. Thus, the current Custodian shall:
 - Disclose the CAMA data responsive to the Complainant’s OPRA request in its entirety;
 - Include as part of her certified confirmation of compliance an explanation of how the parties have rectified the CAMA data issues to date; and
 - Provide the Complainant with a copy of the DVD by regular mail because said records only exist on DVD.
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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

4. 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 current Custodian's compliance with the Council's Interim Order.

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

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**

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

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-48

v.

**Loch Arbour Village (Monmouth)²
Custodial Agency**

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

Custodian of Record: Daniel J. Mason³
Request Received by Custodian: Unknown
Response Made by Custodian: None
GRC Complaint Received: January 23, 2014

Background

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, 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 might have unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. See also Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26,

¹ No legal representation listed on record.

² Represented by William H. Healey, Esq., of Luger, Healey, LLC (Tinton Falls, NJ).

³ The current Custodian of Record is Marilyn Simons.

2016). The Custodian must therefore disclose all responsive records. If the Custodian believes that certain records do not exist, the Custodian 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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. 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.

Procedural History:

On July 27, 2017, the Council distributed its Interim Order to all parties. On July 28, 2017, the current Custodian e-mailed the Government Records Council ("GRC"), requesting a copy of the Complainant's OPRA request because she did not have an original. On the same day, as a courtesy, the GRC e-mailed the current Custodian a complete copy of the Denial of Access Complaint.

On July 31, 2017, the current Custodian e-mailed all parties, advising that she was attaching copies of the responsive CAMA data retrieved by the Village Tax Assessor. The current Custodian also noted that the Village did not possess photographs and that instead Monmouth County ("County") maintained the photographs on their servers. On the same day, the Complainant e-mailed the current Custodian, advising that the data files were incomplete because they did not include all information originally sought. Specifically, the Complainant stated that the requested information was not responsive to the OPRA request and that the "res.csv" file was incomplete. The Complainant also noted that the Village was required to disclose the photographs, regardless of where they were stored.

On August 2, 2017, the Custodian's Counsel sent the Complainant a letter, reiterating that the photographs were held by the County. Counsel requested that the Complainant contact the Village if he believed it did not "understand [his] position as to the completeness" of the response. On the same day, the Complainant responded, referring Counsel to Hopkins v. Borough of Freehold (Monmouth), GRC Complaint No. 2014-26 (Interim Order dated July 25, 2017). The Complainant noted that the Council in that matter held that a custodian had an obligation to obtain records regardless of location. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010). The Complainant noted that, per Hopkins, this premise also applied to situations where an agency's records were held by another agency as part of a shared services agreement (*citing*

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.

Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012).

On August 3, 2017, Counsel responded to the Complainant via e-mail, advising that the “completeness” issue was still unclear. Counsel again reiterated that the County possessed responsive photographs, adding that the Village never possessed them. Counsel also again asked the Complainant to clarify exactly what was sought. Counsel stated that, notwithstanding its position on the photographs, Counsel stated that the Village would attempt to obtain them. Counsel sought additional time to comply with the Council’s Order. On the same day, the GRC granted an extension until August 11, 2017.

On August 6, 2017, the Complainant e-mailed the GRC, advising that the Village failed to comply with the Council’s Order. On August 11, 2017, Counsel e-mailed the parties again, asserting that the Village fully complied and that the Complainant failed to identify any specific reasons to the contrary. Counsel also noted that the County would provide a DVD containing photographs within the next week and that the Complainant should contact the current Custodian to arrange its disclosure.

On October 11, 2017, the GRC e-mailed Counsel, recapitulating the Council’s Order and advising that the Village had failed to comply within the extended time frame. The GRC noted that the extended time frame directly resulted from a conflict over both the disclosed CAMA data and disclosure of a DVD containing responsive photographs. The GRC also noted that the last communication received from Counsel was dated August 11, 2017. The GRC stated that the Village failed to comply fully with the Council’s Order based on timeliness. The GRC requested a compliance update and stated that, although the current Custodian was well beyond the compliance time frame, the GRC would accept a supplemental certification regarding the CAMA data and photographs.

On October 16, 2017, Counsel e-mailed the GRC to advise that the Complainant did not respond to the August 11, 2017 e-mail and thus has not received the DVD containing the photographs. Counsel noted that Complainant could still obtain the DVD if he wished. Counsel finally assured that a legal certification would be forthcoming.

On November 19, 2017, the Complainant sent a letter to the GRC, averring that as of that date, he had not received any of the records responsive to his original OPRA request. The Complainant requested that the GRC determine that the Custodian⁶ knowingly and willfully violated OPRA. The Complainant asserted that such a conclusion is reasonable because: 1) the Custodian did not respond to the OPRA request; 2) the Custodian did not submit a Statement of Information (“SOI”); and 3) the Custodian failed to comply with the Council’s July 25, 2017 Interim Order.

On November 20, 2017, the Custodian responded to the Council’s Interim Order. Therein, the current Custodian certified that she provided CAMA data to the Complainant via e-mail on July 31, 2017. The current Custodian certified that she also advised that no photographs existed.

⁶ The Complainant does not specify whether he believed the original or current Custodian (or both) knowingly and willfully violated OPRA.

The current Custodian affirmed that, as the GRC is aware, there was a conflict between the parties regarding the CAMA data and the Village's obligation to obtain photographs from the County. The current Custodian certified that, notwithstanding the disagreement over the Village's obligation to obtain and disclose photographs, she obtained a DVD from the County. The current Custodian affirmed that, after she obtained the DVD with the responsive photographs, Custodian's Counsel contacted the Complainant on August 11, 2017, instructing him to contact her to arrange for the DVD's delivery. The current Custodian affirmed that Custodian's Counsel advised the GRC on October 16, 2017, that the Complainant had not attempted to contact her and has failed to do so to this point. The current Custodian thus certified that she is not aware of any outstanding issues with the Complainant's OPRA request and believes that she fully complied with the Council's Order.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose responsive CAMA data and photographs. The Council further ordered the Custodian to certify if no photographs 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 July 27, 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 August 3, 2017.

Following distribution of the Order, the current Custodian disclosed CAMA data to the Complainant and advised that the County maintained responsive photographs. The Complainant advised the Custodian that the CAMA data was "incomplete" and contended that Village had an obligation to obtain the photographs from the County and to disclose them. Over the next few days, the parties corresponded about the "incomplete" nature of the response and the Village's obligation to obtain the photographs. On August 3, 2017, the fifth (5th) business day after receipt of the Council's Order, Counsel sought an extension to obtain a DVD containing photographs from the County. The GRC granted said request and extended the time frame through August 11, 2017. Thereafter, Counsel confirmed that the Village received the DVD but that the Complainant had not contacted the current Custodian to obtain it. Further, Counsel advised, well beyond the expiration of the extended time frame, that a legal certification would be forthcoming. The GRC did not receive the certification until more than three (3) months after the expiration of the extended time frame.

Here, the evidence of record supports a finding that the current Custodian failed to comply with the Council's Order. Specifically, the current Custodian did not obtain another extension to provide the responsive DVD to the Complainant. Thus, she did not meet the August 11, 2017 extended deadline. Also, the current Custodian did not provide certified confirmation of compliance until more than three (3) months after the extended time frame expired. Further, the evidence of record does not support that the current Custodian rectified the incomplete CAMA data response. Finally, the current Custodian obtained a DVD of photographs from the County but

then attempted to shift the burden to the Complainant to obtain it instead of sending the responsive DVD to him upon receipt.

Therefore, the current Custodian failed to comply with the Council's July 25, 2017 Interim Order because she failed to provide all responsive records within the extended time frame, failed to provide certified confirmation of compliance to the Executive Director within that same time frame, and further failed to disclose the DVD to the Complainant upon receipt.

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.

The instant complaint was complicated initially by confusion regarding the original Custodian's failure to respond to the Complainant's OPRA request and the subsequent failure to submit an SOI. In its July 25, 2017 Interim Order, the Council held that the Custodian "might have unlawfully denied access to the responsive CAMA data and property photographs." Id. Thus, the Council ordered disclosure of those records to the Complainant or a certification that no records existed where applicable. Following the Order, the evidence of record supported that the current Custodian possessed disclosable CAMA data and could obtain a DVD from the County that contained the responsive photographs. During the course of the extended compliance time frame, the parties disagreed on two pertinent issues: 1) that the CAMA data provided was complete and represented the data available on January 2, 2014 (the OPRA request date); and 2) that the current Custodian had an obligation to obtain and disclose responsive photographs from the County.

Regarding the CAMA data issue, the Complainant has continued to assert that the data provided was both incomplete and not responsive to his OPRA request. However, after the Complainant initially made his position known to the current Custodian and Counsel, neither party took any further action to cure the alleged deficiencies. Regarding the photographs, and notwithstanding the Village's position that none existed, the current Custodian obtained a DVD from the County. However, through Counsel, the current Custodian inexplicably and improperly shifted the burden to the Complainant by requiring him to contact the Village to "arrange" disclosure.

Based on all the foregoing, the GRC finds that the Custodian unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6. However, based on the facts specific to the instant case, the GRC is providing the current Custodian one last opportunity to comply properly with the Council's Order. Thus, the current Custodian shall:

- Disclose the CAMA data responsive to the Complainant's OPRA request in its entirety;
- Include as part of her certified confirmation of compliance an explanation of how the parties have rectified the CAMA data issues to date; and

- Provide the Complainant with a copy of the DVD by regular mail because said records only exist on DVD.

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 current Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian failed to comply with the Council's July 25, 2017 Interim Order because she failed to provide all responsive records within the extended time frame, failed to provide certified confirmation of compliance to the Executive Director within that same time frame, and further failed to disclose the photograph DVD to the Complainant upon receipt.
2. The GRC finds that the Custodian unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6. However, based on the facts specific to the instant case, the GRC is providing the current Custodian one last opportunity to comply properly with the Council's Order. Thus, the current Custodian shall:
 - Disclose the CAMA data responsive to the Complainant's OPRA request in its entirety;
 - Include as part of her certified confirmation of compliance an explanation of how the parties have rectified the CAMA data issues to date; and
 - Provide the Complainant with a copy of the DVD by regular mail because said records only exist on DVD.
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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
4. 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 current Custodian's compliance with the Council's Interim Order.

⁷ "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."

⁸ 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.

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
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-48

v.

Loch Arbour Village (Monmouth)
Custodian of Record

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

1. The Custodian 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 might have unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. *See also* Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). The Custodian must therefore disclose all responsive records. If the Custodian believes that certain records do not exist, the Custodian 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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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



4. 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.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-48

v.

**Loch Arbour Village (Monmouth)²
Custodial Agency**

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

Custodian of Record: Daniel J. Mason

Request Received by Custodian: Unknown

Response Made by Custodian: None

GRC Complaint Received: January 23, 2014

Background³

Request and Response:

On January 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian did not respond to the Complainant’s OPRA request.

Denial of Access Complaint:

On January 23, 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 noted the Village’s failure to respond to his OPRA request.

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 No legal representation listed on record.

² No legal representation listed on record.

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 Village 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 as their MOD-IV/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 MOD-IV/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 February 19, 2014, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On March 24, 2014, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. To date, the GRC has not received a response from the Custodian.

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).⁶ 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).

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 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.

In this matter, the evidence of record indicates that the Custodian did not respond to the Complainant's OPRA request. Additionally, the Custodian did not submit an SOI, either accepting or disputing that he did not respond to the Complainant's OPRA request.

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.

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.

In the instant matter, the Complainant sought access to CAMA data and property photographs. However, the Custodian did not respond to the Complainant's OPRA request. Additionally, the Custodian failed to submit an SOI. In the absence of either a response or an SOI to provide any evidence to the contrary, the GRC concludes that the Custodian might have unlawfully denied access to the responsive records.

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), an agency or judge may take official notice of judicially noticeable facts (as explained in the New Jersey Rules of Evidence at N.J.R.E. 201) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. *See Sanders v. Div. of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974). Aside from the reasons above for the GRC's conclusion, the Council's decision here must take into account the Final Decision of the Honorable Kimberly A. Moss, Administrative Law Judge ("ALJ"), in Hopkins, GRC 2014-01, *et seq.* (Interim Order dated July 26, 2016), because the ALJ held that CAMA data is a "government record" that is subject to access under OPRA.⁷ Further, the ALJ held that "CAMA data . . . are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter." Id. at 18.

Accordingly, the Custodian might have unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. *See also Hopkins*, GRC 2014-01, *et seq.* (Interim Order dated July 26, 2016). The Custodian must therefore disclose all responsive records. If the Custodian believes that certain records do not exist, the Custodian must certify to this fact.

Finally, the Supreme Court's recent decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017) is binding on requests for electronic data. There, the Court accepted

⁷ The ALJ's Initial Decision became final by operation of law on April 4, 2016.

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.

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.

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 might have unlawfully denied access to the responsive CAMA data and property photographs. N.J.S.A. 47:1A-6. *See also* Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). The Custodian must therefore disclose all responsive records. If the Custodian believes that certain records do not exist, the Custodian 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 provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.⁹**

⁸ "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."

⁹ 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.

4. 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.

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

July 18, 2017