

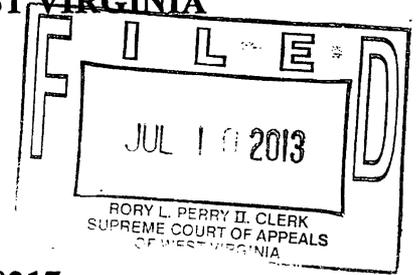
IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

ROGER W. HURLBERT, and
SAGE INFORMATION SERVICES,

Plaintiffs Below, Petitioners,

v.

Docket No. 13-0217
(Civil Action No. 11-C-1762)



CRAIG A. GRIFFITH, Tax Commissioner,
West Virginia State Tax Department,

Defendant Below, Respondent.

and

SALLIE ROBINSON, KANAWHA COUNTY ASSESSOR,

Respondent.

BRIEF OF RESPONDENT, KANAWHA COUNTY ASSESSOR

Lower Court: Kanawha County Circuit Court
(Civil Action No.: 11-C-1762)

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I. RESPONSES TO ASSIGNMENTS OF ERROR

1. The Circuit Court correctly found that the requested Computer Assisted Mass Appraisal (CAMA) data contains confidential tax return information that cannot be disclosed pursuant to West Virginia Code §11-1A-23. The CAMA data is not an “itemized description of real property.”
2. The Circuit Court correctly found that the requested CAMA data falls within the privacy exemption of the FOIA statute; the Court correctly determined that the data contains information about private individuals and businesses that is “information of a personal nature such as that kept in personal, medical or similar files.” The Circuit Court correctly found, before applying the balancing test, that the requested data contains personal identifiers including property owners’ names and addresses, as well as information concerning property owners’ nursing home stays, disabilities, photographs and drawings of the inside and outside of private citizens’ homes and businesses, information about the construction materials used in private homes and businesses, blueprints, profit and loss statements for commercial properties, and even information about whether the property owner is home during the day, all of which could result in a substantial invasion of privacy if disclosed.
3. The Circuit Court correctly applied West Virginia law finding that the CAMA data is confidential, and the Circuit Court appropriately disregarded the inapposite foreign case

law cited by the Petitioner. The foreign cases are not only not precedent, they do not involve similar data.

4. The Kanawha County Assessor was not required to prepare a Vaughn index because Petitioners never made a FOIA request to it and because the nature of the CAMA data would make preparation of such an index unduly burdensome. The Circuit Court correctly found that the affidavits and exemplar documents produced by Respondents were sufficient to allow the court to determine the validity of the government's claims.
5. The Circuit Court correctly found that the private information contained in the CAMA data is so intertwined with the nonexempt data as to make it overly burdensome to redact the private information. As such, the fact that Petitioners stated, in the middle of this litigation, that they did not want some of the private information, does not alter the fact that the private information exists throughout the CAMA data and cannot be redacted without the expenditure of excessive public funds.
6. The Circuit Court had a reasonable basis for its decision, and the affidavits and other documents it considered were not inadmissible hearsay.
7. The Circuit Court appropriately considered, as persuasive authority, the decision of the Circuit Court of Jefferson County.
8. The Circuit Court correctly found the issue of whether the Tax Commissioner is the custodian of the requested records moot as it found the records exempt from FOIA on other grounds.

9. The Public Domain Doctrine does not mandate disclosure of the CAMA data in this case because it has not been recognized in West Virginia and because the data requested in this case has not been released by the Tax Department or the Kanawha County Assessor in the past.
10. It was appropriate for the Circuit Court to allow the Kanawha County Assessor to intervene in this case and its assertion of the privacy exemption was timely and appropriate.
11. The Circuit Court appropriately found that the nonexempt information in the requested CAMA data is available from an alternative source, the assessment records.
12. The Circuit Court properly considered the Petitioners' ownership, business, and purpose as part of the Cline balancing test in determining whether the requested CAMA data is exempt from FOIA. Child Protection Group v. Cline, 177 W.Va. 29, 350 S.E.2d 541 (1986). The second factor of this test, "the extent or value of the public interest," involves consideration of the "purpose or object of the individuals seeking disclosure." 177 W. Va. at 32, 360 S.E.2d at 543.

II. STATEMENT OF THE CASE

Petitioners, a business man from California and his company, filed this case under the West Virginia Freedom of Information Act (FOIA) statute seeking confidential tax return and private CAMA data about West Virginia property owners. Instead of making their FOIA request to the County Assessors who are statutorily charged with collecting and maintaining assessment records and computer assisted mass appraisal (CAMA) data, the Petitioners made their FOIA request only

to the State Tax Department. (App. 485) In this letter, they requested that the Tax Department produce both the CAMA data and the assessment records for the entire state of West Virginia.

(App. 485) The State Tax Commissioner responded to the FOIA request granting the Petitioners' request for the assessment records, but referring the Petitioners to the County Assessors to request the CAMA data. (App. 487-488) Petitioners never made a FOIA request to the Kanawha County Assessor for the CAMA data, but instead filed this lawsuit against the State Tax Commissioner. (App. 424) Petitioners never paid the requested money to enable them to obtain the assessment records.

The Petitioners have refused to provide information concerning their purpose in requesting this private data about West Virginia taxpayers and property owners. (App. 373-386)

Petitioners admit that Mr. Hurlbert is not a licensed appraiser, attorney or surveyor in West Virginia or in any other state. (App. 373-386) It appears that the Petitioners have a business in which they FOIA CAMA data and real estate records from around the country.

The requested CAMA data contains personal identifiers for West Virginia property owners and includes their confidential tax return information and private information such as sketches of houses, details about the insides of homes, information about property owner's nursing home stays and disabilities, profit and losses of businesses and vacancy rates and rent for apartment buildings. (App 395-397; 406-411) Property owners in Kanawha County have asked the assessor to keep their information private. (App. 396-397; 399-400). The confidential information is recorded in different fields in the CAMA data, so it would be very expensive and highly burdensome for the

Tax Department to electronically redact through the use of expensive computer programmers all of the exempt, confidential data. (App. 395-396; 322-323)

The non-exempt data is available from a less intrusive alternative source, the assessment records. (App. 233-247) The Tax Commissioner and the Kanawha County Assessor remain willing to provide the Petitioners' with the assessment records. These would enable the Petitioners to gather information concerning the itemized descriptions of real property in West Virginia while at the same time would protect the confidentiality of tax return information and the privacy of West Virginia property owners.

III. SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County properly found that the Computer Assisted Mass Appraisal (CAMA) data requested by the Petitioners is exempt from the West Virginia FOIA statute because it contains confidential tax return information that cannot be disclosed pursuant to West Virginia Code §11-1A-23. The CAMA data goes far beyond an "itemized description of the property listed" and contains detailed information about the interior of residences and information about owners, including information about such things like security systems, whether or not owners are home during the day, whether or not property owners are living in a nursing home or are disabled and whether a property is vacant. (App. 395-397; 406-411) It also includes income and expense information and other details concerning commercial properties. (App. 397-398; 407-411)

The Circuit Court also correctly found that the requested CAMA data falls within the privacy exemption of the FOIA statute because it is “information of a personal nature such as that kept in personal, medical, or similar files.” West Virginia Code §29B-1-4(a)(2).

The exempt information contained in the FOIA is so intertwined with the non-exempt information that it would be unduly burdensome for the Respondents to redact exempt information. (App. 395-396; 322-347) Additionally, an alternative source for the non-exempt data exists; the non-exempt data is contained within the assessment records that the Tax Commissioner already offered to produce to the Petitioners. (App. 233-247)

The CAMA data for the requested years differs substantially from prior assessment data and has not been produced by the Kanawha County Assessor. (App. 704-705) Additionally, given the importance of maintaining the privacy of the property owners of West Virginia, it was appropriate for the circuit court to find that the requested data is exempt from production under West Virginia FOIA.

Thus, the Respondent, the Kanawha County Assessor, respectfully requests that this Court affirm the well-reasoned decision of the Circuit Court of Kanawha County.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Kanawha County Assessor, in light of the factors contained in Rule 18(a) of the Rules of Appellate Procedure, would welcome oral argument in this matter. The Assessor notes that she does not believe that the appeal is meritorious, but she does believe that the various assessors would benefit from a clear-cut decision from this Court concerning the matters addressed in this

appeal. Additionally, the Assessor believes this case would be suitable for a Rule 20 oral argument.

V. ARGUMENT

- A. **The Circuit Court correctly found that the requested Computer Assisted Mass Appraisal (CAMA) data contains confidential tax return information that cannot be disclosed pursuant to West Virginia Code §11-1A-23.**

The requested CAMA data contains confidential tax return information that, pursuant to West Virginia Code §11-1A-23, cannot be disclosed to Petitioners. West Virginia Code §11-1A-23 states, in pertinent part, that:

Property tax returns and return information filed or supplied pursuant to this Article and Articles three . . . four . . . five . . . and six of this chapter . . . **shall be confidential** and except as authorized in this section, **no officer or employee of the State Tax Department, county assessors, county commissions and the Board of Public Works shall disclose any return or return information obtained by him or her**, including such return information obtained by subpoena, in any manner in connection with his or her service as an officer, member or employee: Provided, That nothing herein shall make confidential the itemized description of the property listed, in order to ascertain that all property subject to assessment has been subjected to appraisal: Provided, however, **That the commissioner and the assessors shall withhold from public disclosure the specific description of burglar alarms and other similar security systems held by any person, stocks, bonds, and other personal property held by a natural person, except motor vehicles and other tangible property utilized publicly, and shall withhold from public disclosure information claimed by any taxpayer to constitute a trade secret or confidential patent information**

West Virginia Code §11-1A-23(a)(emphasis added)

Under this statute, the Legislature has specified that all tax return information shall be kept confidential. Furthermore, the Legislature explicitly prohibits the State Tax Department and the county assessors from disclosing any return information. The only exception to this explicit confidentiality is “the itemized description of the property listed.” Id.

The CAMA data requested by Petitioners is much more than the “itemized description of the property listed.” The CAMA data contains many fields of highly confidential information including detailed information about floor plans, number of bathrooms and bedrooms, how recently the property was renovated, whether or not the property has a finished basement, whether the property’s owners are home during the business day, whether the property’s owners are staying in a nursing home, whether the property has outbuildings such as sheds or play structures, whether the property has a fireplace, whether the property owners are disabled, and even information relating to whether a property is vacant or not. (Affidavit of Stephen Duffield at ¶ 3, App. 396)

Furthermore, the CAMA data requested by the Petitioners contains information about burglar alarms and similar security systems, and such data is recorded in different fields, making redaction difficult, if not impossible. (Affidavit of Stephen Duffield, at ¶ 4, App. 396.)

Kanawha County residents must file tax returns disclosing information about their real property every year. (Affidavit of Stephen Duffield at ¶ 5, App. 396.) This information is inputted into the CAMA system. (Affidavit of Stephen Duffield at ¶ 5, App. 396) Some of the data that the Kanawha County Assessor’s Office collects includes information about commercial properties that could constitute trade secrets, including profit and loss statements, photographs and blueprints. (Affidavit of Stephen Duffield at ¶¶ 8-12, App. 397) Much of this information is

obtained from business owners on tax returns they file with the assessors. (App. 407-411) This information falls fully within the specifically enumerated items in West Virginia Code §11-1A-23 that are deemed confidential and cannot be disclosed. As such, under West Virginia Code §29B-1-4(a)(5), such information is specifically exempted from disclosure by statute, and is exempt from disclosure under WV FOIA.

In Daily Gazette Company v. Caryl, 181 W.Va. 42, 380 S.E.2d 209 (1989), this Court held that the tax compromise information made and maintained pursuant to West Virginia Code §11-10-1, *et seq.*, is exempt from disclosure under the provisions of the West Virginia Freedom of Information Act and West Virginia Code §11-10-5q. Syl. pt. 2, Id. While that case dealt with a different confidentiality provision, *i.e.* Code §11-10-5q, it is important to note that both statutes are designed to protect the confidentiality of information pertaining to West Virginia taxpayers. Additionally, Daily Gazette Company v. Caryl also stands for the proposition that, when a West Virginia statute that protects confidentiality of tax return information applies, WV FOIA does not require the production of such protected information.

Additionally, this Court, in looking at another confidentiality provision, this time pertaining to business and occupation tax returns, held that “The legislative intent to keep confidential the contents of all tax returns, including B&O tax returns, is clear.” Syl. pt. 4, Town of Burnsville v. Cline, 188 W.Va. 510, 425 S.E.2d 186 (1992). While this Court in Town of Burnsville ultimately held that making a list of taxpayers who paid the tax to the town would not violate the confidentiality provisions of West Virginia Code §11-10-5d(a), it also found that the respondents are precluded from obtaining the Town of Burnsville’s complete B&O tax records and

strongly affirmed its holding in Caryl which guaranteed taxpayer confidentiality. 188 W.Va. at 514, 425 S.E.2d at 190.

Similarly, in the case at bar, providing Petitioners with the CAMA data would provide them with the detailed information taxpayers in Kanawha County and throughout West Virginia provide to county assessors as part of their property tax returns, including, but not limited to, information about burglar alarms and security systems as well as trade secrets. The Circuit Court correctly held that the CAMA data contains confidential tax return information that is exempt from FOIA disclosure.

B. The Circuit Court correctly found that the requested CAMA data falls within the privacy exemption of the FOIA statute; the Court correctly determined that the data contains information about private individuals and businesses that is “information of a personal nature such as that kept in personal, medical or similar files.”

The CAMA data collected by the Kanawha County Assessor contains substantial “information of a personal nature” as that term is used in the West Virginia Code provision that outlines the exemptions to the WV FOIA statute. The Legislature specifically exempted this type of information from disclosure, listing, among the other items that are “specifically exempt from disclosure”:

Information of a personal nature such as that kept in a personal, medical or similar file, *if the public disclosure thereof would constitute an unreasonable invasion of privacy*, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: Provided, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file...

West Virginia Code §29B-1-4(a)(2)(emphasis added). This Court has interpreted this exemption, holding that, “[t]he primary purpose of the invasion of privacy exemption to the Freedom of Information Act . . . is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” Syl. Pt. 6, Hechler v. Casey, 175 W.Va. 434, 434, 333 S.E.2d 799, 799 (1985); Syl. Pt. 2, Manns v. City of Charleston Police Dep’t, 209 W.Va. 620, 620, 550 S.E.2d 598, 598 (2001). “Under W.Va. Code, 29B-1-4(2) [1977], a court must balance or weigh the individual’s right of privacy against the public’s right to know.” Syl. Pt. 7, Hechler, 175 W.Va. at 434, 333 S.E.2d at 799; Syl. Pt. 1, Child Protection Group v. Cline, 177 W.Va. 29, 29, 350 S.E.2d 541, 541 (1986); Syl. Pt. 3, Manns, 209 W.Va. at 620, 550 S.E.2d at 598.

The *dicta* Petitioners quote from Hechler v. Casey, 175 W. VA. 434, 333 S.E.2d 799 (185), only strengthens Respondents’ position. The CAMA data at issue in the case at bar contains names and addresses of the owners of the real property along with other personal information and, as such, without a doubt constitutes “detailed Government records on an individual which can be identified as applying to that individual.” 175 W. Va. at 444, 333 S.E.2d at 809.

In the case at bar, the requested CAMA data includes significant personal information including photographs and drawings of the inside and outside of private citizens’ homes and businesses, information about the construction materials used in private homes and businesses, blueprints, profit and loss statements for commercial properties, and even information about whether the property owner is home during the day. (Affidavit of Stephen Duffield, App. at 395.) Indeed, the Property Valuation and Procedures Commission’s regulations concerning the proper

methods for the collection of this data by county assessor's representatives reveal how much private information is collected. C.S.R. § 189-2-1, *et seq.*, App. at 256-277. The regulations mandate that Assessors' representatives collect comprehensive data on residential real property and its inhabitants and owners and even contain a step by step guide of how to inspect a property's interior and exterior. C.S.R § 189-2-4. The regulations instruct county assessor's representatives to request to see the inside of the property and to ask the property owner or occupant questions such as how long they have occupied the house, the sales price, the type of purchase, how old the house is, the number of bedrooms and bathrooms, when they remodeled, etc. *Id.*, (App. 262-272) They are instructed to note and record items such as the interior finish, the kind of floors, the type of kitchen, paneled rooms, fireplaces and other features that would affect and determine grade, the type of basement, detached buildings and structures such as garages, swimming pools and other buildings. *Id.*

For commercial properties, the regulations contain instructions to keep the information collected on income and expenses (used for the income approach to valuation) confidential. "Information concerning income and expenses is available only under conditions of the strictest confidence. If we break that trust, we will be cut off by the business community from future information, and justly so." (App. at 273)

Certainly, information such as the location and number of bedrooms, the location and number of bathrooms, the type of finishes and floor coverings inside a private residence, the type of kitchen, the type of basement, whether a home has a garage, photographs of the inside of a private home, and whether the home is left unoccupied during the work day are all pieces of

information that are private and, if disclosed to the wrong person, could risk not only resulting in a substantial invasion of privacy, but could also present a significant risk of harm to the private citizens who occupy that property. In the modern world, where parents no longer place stickers on the windows of their children's bedrooms for fear that a pedophile might see them and prey on sleeping innocents, citizens have a significant interest in keeping the details of the insides of their homes private.

This Court addressed the privacy exception to WV FOIA in Robinson v. Merritt, 180 W.Va. 26, 375 S.E.2d 204 (1988). The plaintiff in Robinson sought copies of the entire microfiche claim records of the West Virginia of the West Virginia Compensation Fund, which contained names, addresses, employer information, and information regarding the injury sustained by numerous workers. Robinson v. Merritt, 180 W.Va. at 28, 375 S.E.2d at 206. Appellant, plaintiff below, was an attorney who made general requests for information from the then-Commissioner of the Workers' Compensation Fund. See, Id. The request was not made in connection with a particular client. Id. The Commissioner denied the request, stating that the records were not subject to disclosure. The court did not dispute that the records were public records, however, the court applied W.Va. W.Va. Code § 23-1-4(2) (1986)¹, and found that there was a "substantial and potentially serious invasion of privacy." See, Robinson, 180 W.Va. at 208, 375 S.E.2d at 208. Additionally, critical to this Court's decision was the fact that information sought by the appellant could be found through a less intrusive method. See, Id.; see, also Sly. Pt. 2, Child Protection Group v. Cline, 177 W.Va. 29, 350 S.E.2d 541 (1986) (implementing a five-step test in deciding

¹ The language in W.Va. Code § 23-1-4(2) (1986), and relied on by the court in Robinson, is identical to the language of the current W.Va. Code § 23-1-4(2) (2013).

whether the public disclosure of information would constitute an unreasonable invasion of privacy).

While our present case deals with real property records, and not West Virginia Workers' Compensation Fund Records, Robinson is still instructive. West Virginia Workers' Compensation Fund Records are recognized as public records containing personal information that may not be disclosed, even though the record itself is "public." CAMA records, like West Virginia Workers' Compensation Fund records, contain public information, *i.e.* the portion that contains "assessment records", but also extensive private information regarding homeowners, similar to the records of a personal nature in the West Virginia Workers' Compensation Fund records. Like the information about injuries contained in the Workers Compensation records, revealing the information regarding the interior of homes, nursing home stays, and physical disabilities contained within the CAMA data would be a "substantial and potentially serious invasion of privacy." Moreover, much like the attorney in Robinson, who was able to get the information he needed through a less intrusive measure, the same is true for the Petitioner in this case. Petitioner was granted his initial request for the assessment files "for all real property in all of the counties in West Virginia". The Respondents demonstrate a clear privacy interest in the CAMA data, and the information Petitioner has requested is in the assessment records; the lower Court correctly found it to be exempt from FOIA.

C. The Circuit Court correctly applied West Virginia law that states that the requested CAMA data is to be kept confidential, and the Circuit Court appropriately disregarded the inapposite foreign case law cited by the Petitioner.

The Circuit Court's decision that the requested CAMA data was confidential tax return and private, information was correct and supported by West Virginia statutes and case law.

Petitioners' reliance upon cases from foreign jurisdictions that discuss whether "tax assessment lists" and "assessment records" are public information is misplaced. CAMA data is not the same as "tax assessment lists" or "assessment records." The Circuit Court correctly disregarded the inapposite foreign case law cited by Petitioners.

1. Petitioners conflate assessment records with computer assisted mass appraisal data.

The underlying fallacy throughout Petitioners' brief is an assumption that the CAMA data is synonymous with "assessment records" or "tax assessment lists." In reality, the CAMA data at issue in this case is very different from mere assessment records or tax assessment lists. The West Virginia State Code of Regulations § 189-3-18.8 describes Computer Assisted Mass Appraisal as:

The process of using a computer to assist in property tax appraisal and equity evaluation. A CAMA system will include one or more relational databases and may also have a GIS component. The CAMA system for West Virginia is called the Integrated Assessment System (IAS).

C.S.R. § 189-3-18.8. Thus, by definition, a request for CAMA data is a request for one or more relational databases. Rather than listing property valuations and basic information regarding a home like tax assessment records, the CAMA *system*, takes a wide variety of information, and organizes that information for the purpose of tax appraisal. The assessment records are at most a small part of what makes up the CAMA data system, and the two are not co-extensive.

Petitioners even acknowledged the difference between the assessment records and the CAMA data in their FOIA request to the West Virginia State Tax Department on May 16, 2010. (App. 24) In his letter to Mr. Amburgey, Petitioner stated, “We would appreciate your making us a copy, on CD or similar electronic media, of **both the assessment files and the CAMA files** for all real property in all counties.” (App. 24; emphasis added) In response to Petitioners’ request, Mark S. Morton granted the request for the assessment files, but denied the request for the CAMA files. Curiously, Petitioners elected not to receive the assessment records and instead filed this action seeking the CAMA data.

2. The foreign cases cited by Petitioners are inapposite because they do not involve requests for CAMA data.

Petitioners’ reliance upon foreign case law is misplaced; the cases they cite do not involve CAMA data and, as such, are inapposite. Indeed, the jurisdictions from which the cases come had not even instituted CAMA data systems by the date of their decisions. Petitioner cites New Jersey case law addressing assessment records, yet does not acknowledge that New Jersey is only now in the process of implementing its own CAMA system; it is scheduled to be implemented by September 1, 2013. See, NJ ST. 54:1-104. Therefore, courts in New Jersey have not had the opportunity to address whether CAMA data is the equivalent of “assessment data”, as Petitioner would have this Court believe. Additionally, Montana and Missouri² are two more states that have adopted a state-wide CAMA system by code, and which Petitioner relies on for his assertion that CAMA records are equivalent to assessment records. See, MT ADC 4.18.128, see, also Mo

² Petitioners assert that Attorneys General from those states have issued opinions, but fail to cite those opinions in their brief.

St.137.115. However, no court in these two states has squarely addressed whether files within the CAMA system are the equivalent of assessment files. Petitioner has conflated the assessment records with CAMA files, and therefore, his contention that CAMA files are subject to public inspection should be disregarded by this Court.

A brief look at the case law cited by Petitioners also reveals that the data at issue in those cases was not CAMA data or even similar in nature in terms of potential privacy issues. Petitioners cite a New Jersey Supreme Court opinion, Higg-A-Rella, Inc. v. County of Essex, 660 A. 2d 1163 (New Jersey 1995), a case that dealt with the issue of whether a company had a right to obtain a computerized copy of the property tax list (not CAMA data). According to the opinion, the lists that were at issue in Higg-A-Rella were not a CAMA system involving multiple relational databases with extensive personal information about real property and its owners, instead it was a list of the following information for each parcel:

- 1) street address and block and lot numbers; 2) brief description, including lot size and lot numbers; 3) assessed value, broken down into land and improvements; 4) whether the parcel is subject to farmland assessment, tax abatement, or any charitable or statutory tax exemption; 5) name and address of the owner, if different from the address of the parcel; and 6) if residential, whether the owner is entitled to a deduction or exemption as a senior citizen, veteran, disabled veteran, or surviving spouse of a person in one of those categories.

660 A.2d at 1163. This is markedly different from the CAMA databases requested by Petitioners in the case at bar. It does not contain detailed information about whether the owner or others are home during the business day, it does not contain detailed information about the inside features of a residence like finishes, flooring, how many bedrooms and bathrooms, how recently it was

renovated, GIS coordinates of the improvements, sketches and photographs of property, income and expense reports, and whether the owner is in a nursing home. Instead, the data at issue in Higg-A-Rella was assessment records, the same records that the Tax Department offered to produce to Petitioners and Petitioners rejected.

Similarly, the New York case cited by Petitioners, Szikszay v. Buelow, 107 Misc.2d, 886, 436 N.Y.S.2d, 558 (N.Y.Sup.Ct. 1981), is distinguishable. Szikszay pertained to a request for tax maps and computer tapes that contained much more limited information about parcels. Specifically, the decision indicates that the computer tapes at issue in that case contained “the name and mailing address of each property owner.” 436 N.Y.S.2d at 559. There is no indication that the court in Szikszay found that the assessment records in that case contained the detailed, private information at issue in our lawsuit.

Furthermore, the third case cited by Petitioners, Gordon v. Sandoval County Assessor, 28 P.3d 1114 (Ct.App. New Mexico, 2001), pertained to vastly different data. Specifically, the New Mexico court was considering a FOIA request for written property cards pertaining to nine properties. 28 P.3d at 1115. This is vastly different from the CAMA data for the entire State of West Virginia requested in the case at bar. Furthermore, the court in Gordon found that the type of information that Respondents contend are private in the case at bar were also private in that case but could be redacted, given the small universe of information requested, *i.e.*, the nine properties. 28 P.3d at 1120.

Petitioner has conflated the meaning and purpose of CAMA files with real estate assessment records. Consequently, because the assessment records are inherently different than

CAMA data, the circuit court did not err in finding that the CAMA data contained information of a personal nature, and thus not subject to public disclosure.

D. The CAMA data for the requested years has not been disclosed by the Kanawha County Assessor, and the disclosure by some other assessors of limited fields of their CAMA data does not justify violating the privacy of the Kanawha County property owners.

The Kanawha County Assessor has not disclosed its CAMA data files for the years requested by Petitioners. Specifically, Mr. Hurlbert requested “the assessment files and the CAMA files for all real property” in his letter dated May 16, 2011. (App. at 485) It would appear from this request that Petitioners were requesting the CAMA data as it appeared in May of 2011. The limited releases of CAMA data referred to by Petitioners in their brief and in the record with respect to Kanawha County occurred the last time for the 2008 tax year. (App. at 497-502) Thus, since that time, the Kanawha County Assessor has not disclosed its CAMA data without obtaining the consent of the property owner to anyone other than the property owner or an appropriate party to receive the information. (Affidavit of Stephen Duffield, App. 704-705) The Kanawha County Assessor has specifically not disclosed any CAMA data to SpecPrint in 2011 or 2012, the years requested by Petitioners. Id.

This Court’s recent decisions in tax assessment cases have required assessors to gather more data, especially on commercial properties, than in years past. See Pope Properties v. Robinson, 738 S.E.2d 546 (2013); Stone Brooke v. Sisinni, 224 W. Va. 691, 668 S.E.2d 300 (2009). As assessors have been made aware that they must meticulously document their consideration of the factors listed in W. Va. C.S.R. §110-1P-2.1.1 to 2.1.4., they have gathered

even more information on commercial properties and their owners. This has substantively changed the CAMA data.

Additionally, the alleged disclosure by other county's assessors of citizens' CAMA data for limited fields does not justify violating the privacy of the citizens of Kanawha County, West Virginia. As discussed above in Sections A and B, the CAMA data for Kanawha County contains numerous fields of very confidential information some of which constitutes confidential tax return information and some of which constitutes information of a personal nature about Kanawha County property owners. Additionally, as is discussed below in Section E, Kanawha County has substantially more information than other counties, and to redact the private information and separate it from the nonexempt information (that is already contained within the assessment files that have been offered to Petitioners) would be unduly burdensome for Kanawha County. It appears that some of the alleged CAMA data disclosures that have been attached by Petitioners in the record contain much less private information than that which is contained within the Kanawha County CAMA data. (App. at 495-628) Thus, it appears that Kanawha County is uniquely situated to be unable to allow the production of non-exempt information because of the volume of data and the substantial amount of private information that is contained within Kanawha County CAMA data.

Furthermore, the Kanawha County Assessor refers to its discussion of why the public duty doctrine does not apply below in Section J as Petitioners appear to raise essentially the same argument in that Section as in Section D.

E. The Kanawha County Assessor was not required to prepare a Vaughn index because Petitioners never made a FOIA request to it and because the nature of the CAMA data would make preparation of such an index unduly burdensome.

Petitioners never directed any FOIA request to the Kanawha County Assessor. See, W.Va. Code § 29B-1-3(2) (“a request to inspect or copy any public record of a public body shall be made directly *to the custodian* of such public record”) (App. 424) Petitioners instead directed their FOIA request to the State Tax Commissioner. Petitioners cite no authority that would require the Kanawha County Assessor, who was not the recipient of any FOIA request, to create or produce a Vaughn index.

Furthermore, even if Petitioners had made a FOIA request directly to the Kanawha County Assessor, creation and production of a Vaughn index would have been unduly burdensome and would not have assisted Petitioners or the lower court in analyzing the asserted exemptions to disclosure. Courts have not universally required agencies to produce detailed Vaughn indexes in response to every FOIA request. See, e.g. Minier v. CIA, 88 F.3d 796 (9th Cir. 1996) (finding that “because the identity or presence of documents would not aid [the requester’s] legal arguments, a Vaughn index was not required”); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) (“when the affidavit submitted by an agency is sufficient to establish that the requested documents should not be disclosed, a Vaughn index is not required”) Brown v. FBI, 658 F.2d 71 (2d Cir. 1981)(finding that a Vaughn index was not required because the FOIA requester had acquired sufficient facts to permit the adversary process to function); Bassiouni v. CIA, 248 F. Supp. 2d 795 (N.D. Ill

2003)(recognizing that a state agency “need not produce a Vaughn index if sufficiently detailed affidavits or declarations will achieve the same purpose”).

This Court has recognized that the purpose underlying a Vaughn index is "to allow the courts to determine the validity of the Government's claims without physically examining each document." Daily Gazette Co., Inc. v. West Virginia Dev. Office, 198 W. Va. 563, 574, 482 S.E.2d 180, 191 (1996). This objective was achieved through the Tax Commissioner and the Kanawha County Assessor’s production of several affidavits, exhibits, and exemplar documents submitted for *in camera* review in support of their respective motions for Summary Judgment. The Tax Commissioner and the Kanawha County Assessor submitted affidavits of several Tax Department and Kanawha County employees, including the affidavit of Faith C. Dangerfield, Appraiser Chief of the Appraisal Services Unit (App. 234-242), Kris A. Pinkerman, Tax and Revenue Manager (App. 317-323), and Stephen Duffield, Chief Deputy Assessor of Kanawha County (App. 395-398). These affidavits describe in detail the inner workings of the Integrated Assessment System and the CAMA system and describe the confidential information that prevents the Tax Commissioner and the Kanawha County Assessor from disclosing this data. Additionally, in its supplement to its Motion for Summary Judgment, the Kanawha County Assessor produced exemplar documents for an *in camera* review and, to all parties, exhibits showing a profit and loss return form, a mobile home return, an apartment return, and a hotel/motel return. (App. 402-410). These affidavits and exhibits adequately describe the documents Petitioners sought in their FOIA request and the justification for the Tax Commissioner’s refusal to produce the requested documents and serve the function of a Vaughn index.

As demonstrated by the affidavit of Kris A. Pinkerman, as of June 5, 2012, Kanawha County had 124,160 real property tax accounts. (App. 319 at ¶ 6(e)). Statewide there were 1,426,165 real property tax accounts as of that date. Id. The affidavit of the Chief Deputy Assessor of Kanawha County, Stephen Duffield, describes the types of information contained within the CAMA records. (App. 395-398). Examples of the information described in Mr. Duffield's affidavit include "sketches of [resident's] house[s] and property, floor plans, number of bathrooms, presences or absence of security systems, . . . whether the property owner was home during the time of inspection, and other information." Id. at ¶ 3. Mr. Duffield averred that the CAMA records associated with commercial properties contain "specific longitude and latitude of commercial properties such as chemical planes, photographs of said plants, blueprints of said plants . . . profit and loss statements . . . [and] other documentation that may be used by competitors of businesses to gain a commercial advantage." Id. at ¶ 9, 12. The exhibits produced by the Assessor also show the type of the information provided by commercial property owners that is private such as income derived from commercial buildings, expenses for specific categories, rents charged for commercial space, percentages of vacancies, total vacancies, average lease term, etc. (App. 407-411). The exhibits submitted for an *in camera* review show actual CAMA data that includes nursing home information about property owners, security systems, disabilities of property owners, and vacant properties. (App. 403-406). Mr. Duffield's affidavit further demonstrates that different field representatives record the aforementioned private information in different fields, *i.e.*, "one representative might record data about a security system in one field whereas another might record somewhere else." (App. 395-398 at ¶ 4).

To redact the requested CAMA records or to require production of a more detailed Vaughn index which lists each tax record and correlates the claimed privacy exemption which each of Kanawha County's 124,160 real property tax accounts would be an incredibly burdensome undertaking. To redact the electronic data, the Tax Department would have to hire an outside computer programmer at a cost of \$203.00 per hour to write computer programs to redact the data. (App. 322-323) Given that confidential information could potentially be present in a multitude of different data categories, creation of a more detailed document specific Vaughn index could require a separate review and listing of all 124,160 different real property records in Kanawha County alone and more than a million records statewide. The affidavits produced by the Kanawha County Assessor and the State Tax Commissioner sufficiently identified the State Tax Commissioner's justification for refusing to disclose the requested records so as to permit Petitioners and the lower Court an adequate and meaningful review of the Tax Commissioner and Kanawha County Assessor's claimed exemptions.

F. The requested CAMA data, as opposed to the assessment records, are not mere "descriptions of real property" but instead contain substantial private information that the Circuit Court correctly found could not be reasonably redacted from the non-exempt information.

Petitioners' FOIA request for "the CAMA files for all real property in all counties" requested data that is replete with confidential, private information concerning Kanawha County property owners and their real property. The fact that Petitioners, when faced with evidence of the significantly private nature of some of the requested data, indicated in passing that they did not wish to receive that information does not change the fact that their initial request included all CAMA data for all real property which certainly included the private, confidential information. It

is not appropriate to exclude the examples of very private, personal data that was included within the CAMA data simply because Petitioners have made their request a moving target of sorts by saying that they do not wish to gather *that* CAMA data when they are faced with examples of the excessively private nature of some of the data.

Additionally, as is discussed more fully above in Sections A, B and E, the private data about property owners and their real property, both commercial and residential, is intermingled with nonexempt data in different fields. (App. 395-396) This makes it nearly impossible to redact the private information. Thus, even if Petitioners now belatedly say that they do not wish to obtain some of the exempt, private data that is contained in the CAMA data, production of the CAMA data would necessarily require the production of the private information.

It is important to note that there is another source of the nonexempt information requested by the Petitioners. Indeed, Petitioners even requested that alternative source of information, the assessment records, in their initial FOIA request. (App. 485) As this Court held in Robinson,

Where an individual fails to present, by clear and convincing evidence, a legitimate reason sufficient to overcome the exemption from disclosure found in W.Va. Code §29B-1-4(2) (1986), and where an adequate source of information is already available, the records will not be released.”

Syl. pt. 3, Robinson, 180 W.Va. at 26, 375 S.E.2d at 204. If Petitioners were to accept the assessment records, this would provide them with the relevant nonexempt information including tax maps and parcel numbers, assessment tables, taxpayer names, legal description, deed and page.

G. The Circuit Court properly considered the affidavits presented by Respondents; they do not contain inadmissible hearsay.

The Circuit Court of Kanawha County's order was based upon proper, admissible testimony in the form of affidavits. The Respondents' affidavits were not, as Petitioner asserts, "rank hearsay and/or entirely conclusory." (App. Br. 28)

West Virginia Rule of Civil Procedure 56(e) provides as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters therein.

See, also Fed.R.Civ.P. 56(e) To comply with Rule 56(e), there must be a showing that the statements made in the affidavits were made with personal knowledge. "The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon [is] improper." Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir.1972) (per curium). In Antonio, the Court noted that the affidavit provided "no showing whatever that the statements therein were made on personal knowledge as required by the rule . . . [and] [f]rom the face of the affidavits, they might well be based on mere hearsay ..." Id. This Court defines hearsay as a witness testifying in court with regard to out-of-court statements of another for the purpose of proving the truth of the matter asserted. W.Va. R. Evid. 801(c). State v. Richey, 171 W. Va. 342, 298 S.E.2d 879 (1982); State v. Zaccagnini, 172 W. Va. 491, 308 S.E.2d 131 (1983); State v. Stuckey, 174 W. Va. 236, 324 S.E.2d 379 (1984); State v. Maynard, 183 W. Va. 1, 393 S.E.2d 221 (1990). "[W]here a witness testifies

with regard to statements of another for the purpose of proving the truth of the matter asserted, such evidence constitutes inadmissible hearsay.” Salerno v. Manchin, 158 W.Va. 220, 226, 213 S.E.2d 805, 809 (1974). Hearsay is primarily testimony which consists of an account by one person of matters told to him by another.

In the case at bar, the affidavits relied upon by the lower court do not contain hearsay statements. In this case, unlike Antonio, *supra*, the affiant has personal knowledge of the specific facts stated. Affiant, Stephen Duffield, is the Chief Deputy Assessor of Kanawha County. W. Va. Code, § 11-2-4 provides:

The assessor, after consulting with his deputies, shall *apportion the work of assessing property for the purpose of taxation among his deputies* and himself as nearly equal as possible to magisterial districts, and may, from year to year, make such changes in the apportionment of work as to him may seem proper.

(Emphasis Added)

As Chief Deputy Assessor, Mr. Duffield has personal knowledge of the operations and procedures utilized by assessors in the work of assessing property for the purpose of taxation. To be sure, as Chief Deputy Assessor, Mr. Duffield is apportioned work, and is directly involved in assessing property for the purpose of taxation. It is beyond dispute that Mr. Duffield, in his affidavit, stated things that were within his personal knowledge, not things that he has learned from statements made by other individuals.

Furthermore, the Kanawha County Assessor also provided the Court with an affidavit provided by Noelle A. Starek, one of the Kanawha County residents who have expressed concerns about the confidentiality of her CAMA data. In her affidavit, Ms. Starek explicitly stated that she

had “the expectation of confidentiality when [she] provided the Kanawha County Assessor’s Office with information” concerning her property. Additionally, Ms. Starek explicitly stated that she considered the “information concerning [her] property to be information of a personal nature that, if disclosed to non-governmental entities would invade [her] privacy.”

Petitioners cite Causey v. Balog, 162 F.3d 795, 802 (4th Cir.1998), in support of their assertion that Mr. Duffield’s statements that field representatives record private information when assessing property are conclusory and do not establish a genuine issue of material fact. Although Causey did find “conclusory statements, without specific evidentiary support” are insufficient to create an issue of fact, that case involved allegations of discrimination, and it is clearly distinguishable from the case at bar. Id. In Causey there was no evidence to support a claim of harassment. Here, there is substantial evidence that indicates field representatives record private information. Mr. Duffield, as Kanawha County Deputy Assessor, has substantial knowledge of the inner workings and operations of field representatives and assessing property. As required by statute, Mr. Duffield is directly involved in assessing property. In addition, W.Va. Code § 11-1A-23 states in part that “the assessors shall . . . withhold from public disclosure [private information]. Thus, the statute supports Mr. Duffield’s affidavit inasmuch as it recognizes that assessors record private information when assessing property.

In a footnote, Petitioners assert that the Court should reverse and remand to allow Petitioners an opportunity to do deposition discovery or cross-examine the affiants in open court. (App. Brief at 30, fn. 11) However, the “rules of civil procedure are quite clear as to what a party must do if he/she feels that discovery is needed before he/she can defend against a motion for

summary judgment.” Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 625 S.E.2d 260 (2005). This court specifically addressed this issue in syllabus point 3 of Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995), and stated as follows:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) *submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.*

(Emphasis added)

Under Williams, if they felt that Respondents’ affidavits were insufficient, Petitioners should have submitted an affidavit that explained the need for additional discovery in order to resist summary judgment. Petitioners failed to do so. Consequently, Petitioners cannot complain to this Court about the need for discovery on that issue. Aluise, 218 W.Va. at 509.

Furthermore, Rule 56 of the West Virginia Rules of Civil Procedure provides for the submission of affidavits to both support and oppose motions for summary judgment. Petitioners could have entirely avoided summary judgment simply by submitting an affidavit that conflicted with affidavits provided by Respondents. See, Syl. Pt. 4 Burns v. Cities Service Co., 158 W.Va. 1059, 217 S.E.2d 56 (1975); Kiser v. Caudill, 215 W.Va. 403, 599 S.E.2d 826 (2004).

Accordingly, not only did Petitioners fail to notify the court below as to why the parties should have engaged in more complete discovery, but Petitioners had the opportunity, and failed, to provide the court below with an affidavit that conflicted with affidavits provided by Respondents.

The Circuit Court had a reasonable basis for its decision, and the affidavits and other documents it considered were not inadmissible hearsay. This Court should uphold the factual findings made by the lower court that were based on affidavit testimony.

H. The Circuit Court appropriately considered, as persuasive authority, the decision of the Circuit Court of Jefferson County.

The Circuit Court did not rely on testimony from a different proceeding in reaching its decision in this case. Petitioner's brief cites to three paragraphs contained in the "Conclusions of Law" portion of the lower Court's Order. (App. Brief at 30) These three paragraphs of the lower Court's Order discuss an April 2000 decision from the Jefferson County Circuit Court that dealt with a similar legal issue. While not binding, a Circuit Court can properly consider decisions from other Circuit Courts as persuasive authority. Cf. Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987)(recognizing that opinions from one federal district court, while not binding on other courts in that district, may be considered as persuasive authority); In re Texaco Inc. Shareholder Derivative Litig., 123 F. Supp. 2d 169, 173 n.4 (S.D. N.Y. 2000) (same).

The lower court did not give the opinion of the Jefferson County Court or any finding made by the Jefferson County Circuit Court any binding or collateral estoppel effect. The legal conclusions reached by the Jefferson County Circuit Court and the rationale underlying the Jefferson County Court's legal conclusions were cited and discussed by the lower Court merely as persuasive authority. The lower Court committed no error in considering the opinion of a sister Circuit Court as persuasive authority.

I. **The Kanawha County Assessor is the custodian of its CAMA data.**

The Kanawha County Assessor is the custodian of its CAMA data. We incorporate by reference the analysis contained in the Tax Commissioner's brief. Furthermore, it was appropriate for the lower court to find this issue moot, given the fact that the Court found the documents were exempt from FOIA on other grounds.

J. **The Circuit Court correctly rejected Petitioners' Public Domain Doctrine arguments.**

The public domain doctrine does not apply in the case at bar, and it does not justify violating the privacy interests of the citizens of West Virginia.

Petitioners point to no case law whatsoever from the West Virginia Supreme Court of Appeals (or even any circuit court decisions) wherein our state courts have recognized the "Public Domain Doctrine." Instead, Petitioners cites only the federal court in the District of Columbia for the proposition that this doctrine exists. (App. Brief at 35, citing Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs, 722 F.Supp.2d 66 (D.D.C. 2010)). This is not binding precedent on this Court and, as such, does not justify violating the privacy interests of the citizens of the State of West Virginia, and, more particularly, the citizens of Kanawha County.

Additionally, the Public Domain Doctrine, "only requires release of information *identical* to the information that is publicly available" and the CAMA data (for Kanawha County, at least) Petitioners' request is not identical to that which they claim was published by SpecPrint. See,

Chesapeake Bay Found., Inc. v. U.S. Army Corps. Of Eng'rs, 722 F.Supp.2d 66, 71 (noting, “the public domain exception, however, only requires release of that information identical to the information that is publicly available....”) Furthermore, in a more recent, unpublished decision by the federal court for the District of Columbia, “the fact that some information may be publicly available from other sources does not mean that FOIA’s privacy exemptions cease to apply.” People for Ethical Treatment of Animals v. NIH HHS, 2012 U.S. Dist. LEXIS 49823, at 21 (2012).

Even if the CAMA data from Kanawha County was published by SpecPrint in its entirety (which Respondent contends is not the case at all) for the tax year 2008, that information is by no means identical to the CAMA data for the tax year 2011 or 2012. As such, the *identical* information requested by the Petitioners has never been publicly produced or published by the Kanawha County Assessor, and, even if this Court takes the bold step of adopting the federal public domain doctrine, such a doctrine would not void the privacy exemption here.

The federal courts which have considered similar arguments to those advanced by the Petitioners here have still applied a balancing test, weighing the public interest in disclosure against the citizens’ interest in privacy. One such court, asked to produce employees’ home addresses to labor unions based upon the argument that they were publicly available through telephone directories and voters registration lists, noted:

Against the virtually nonexistent FOIA-related public interest in disclosure, we weigh the interest of bargaining unit employees in nondisclosure of their home addresses....Because a very slight privacy interest would suffice to outweigh the relevant public interest, we need not be exact in our quantification of the privacy interest. It is enough for present purposes to observe that the employees' interest in nondisclosure is not insubstantial. It is true that home addresses often are publicly available through sources such as telephone directories

and voter registration lists, but "in an organized society, there are few facts that are not at one time or another divulged to another." ...The privacy interest protected by Exemption 6 "encompass[es] the individual's control of information concerning his or her person." ... An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.

United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 500-501, 114 S. Ct. 1006, 127 L. Ed. 2d 325, (1994).

In the case at bar, the fact that the Kanawha County Assessor may have provided some portions of its CAMA data for previous tax years (and never the 2011 data requested herein) does not justify disregarding the privacy interests in the citizens of Kanawha County, West Virginia in information concerning their homes, and, in some cases, themselves (e.g., the disability and nursing home information). Indeed, the type of information that is contained in the CAMA data is substantially more private than the home addresses requested by the union in the above-cited case. As such, the lower court correctly found the CAMA data exempt from disclosure.

K. The Circuit Court correctly permitted the Kanawha County Assessor to intervene in this case.

The Kanawha County Assessor is the sole custodian of the information sought by the Petitioners with regard to property located within Kanawha County, West Virginia. (App. 183-185)

The role of the Assessor is to "supervise the work of the [assistant] assessors in the valuation and assessment of property, either in its progress or after completion thereof, by and through the action of other officers, agents, and tribunals." State ex rel. Hallanan v. Rocke, 91

W.Va. 423, 113 S.E. 647(1922); W.Va. CONST. Art. 4, § 6, and Art. 9, §§ 1, 2, as affected by Art. 10, § 1.

As a result of these code sections, the office of the Assessor prepared and maintains appraisal records of all property in Kanawha County. (App. 183-185) These records include the requested CAMA data requested by the Petitioners. Id. Accordingly, the Kanawha County Assessor was a necessary party to the this action because her office possesses the requested data, and it was proper for the Circuit Court to permit her to intervene. W. Va. R. Civ. P. 24(a).

The Kanawha County Assessor also believes that the Tax Commissioner did not waive any exceptions to FOIA, and the Assessor incorporates by reference the Tax Commissioner's analysis on that issue.

L. The Circuit Court correctly found that the non-exempt information contained within the CAMA data is available from an alternative, less invasive source, the assessment records.

As noted above, the assessment records initially requested along with the CAMA data by Petitioners are “an adequate source of information,” that does not invade the privacy of property owners in the same manner that the production of the CAMA data would. Syl. Pt. 3, Robinson, 180 W. Va. 26, 375 S.E.2d 204. The Tax Commissioner and the Kanawha County Assessor have provided, through affidavits and documents, evidence that shows that the assessment records contain non-exempt information that is also contained in the CAMA data. (App. 233 - 247) As such, the lower court's decision to grant Respondents' motions for summary judgment was appropriate.

M. The Circuit Court properly found that Petitioners' ownership, business, and purpose were relevant to the case at bar under the Cline Balancing Test

The Circuit Court properly considered the extent or value of the public interest in the purpose or object of the Petitioners' request in adjudicating this dispute because such matters are included as a factor in the Cline balancing test. Cline establishes a balancing test which includes as a second factor, "the extent or value of the public interest, and the purpose or object of the individuals seeking disclosure." Syl. pt. 2, Child Protection Group v. Cline, 177 W. Va. 29, 350 S.E.2d 541.

In the case at bar, under the framework outlined by this Court in Cline, it was proper for the lower court to consider Mr. Hurlbert and Sage Information Services' business and purpose in requesting the CAMA data for the entire state of West Virginia because it is required by factor two of the Cline test.

The New York State and federal case law cited by Petitioners is not proper to consider when there is clear precedence from this Court pertaining directly to the West Virginia FOIA statute. Indeed, as this Court noted in Cline, the West Virginia FOIA statute and the Federal statute contain different language in their privacy exemption provisions: "the Federal Code unambiguously favors disclosure of personal information with the resisting party having to show clear evidence of an unwarranted invasion of personal privacy. The West Virginia Code, with some ambiguity, favors non-disclosure of personal information unless public interest clearly requires disclosure." 177 W. Va. 33, 350 S.E.2d 545.

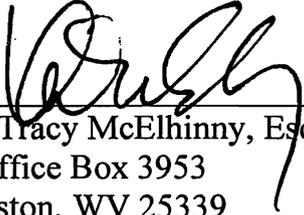
As such, under the West Virginia FOIA statute, which is the proper statute to consider in this case, it was entirely appropriate for the lower court to consider the Petitioners' purpose in requesting the data because such purpose goes directly to the issue of whether the public interest requires disclosure. It would be inappropriate to rely upon Federal case law when the two statutes differ in important ways on this specific point.

VII. CONCLUSION

As such, for the reasons stated above, it is appropriate to uphold the Circuit Court's decision that the CAMA data requested by Petitioners is exempt from disclosure under the West Virginia FOIA statute because it contains information of a personal nature and because it contains confidential tax return information.

**SALLIE ROBINSON, KANAWHA
COUNTY ASSESSOR,**

Respondent,



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IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

Docket No. 13-0217

**ROGER W. HURLBERT, and
SAGE INFORMATION SERVICES,**

Plaintiffs Below, Petitioners,

v.

**CRAIG A. GRIFFITH, Tax Commissioner,
West Virginia State Tax Department,**

Defendant Below, Respondent.

and

SALLIE ROBINSON, KANAWHA COUNTY ASSESSOR,

Respondent

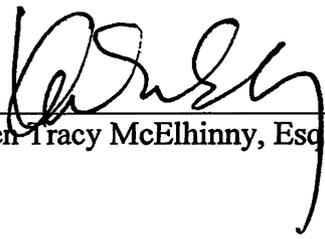
CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny, counsel for Intervener Phyllis Gatson, Kanawha County Assessor, do hereby certify that I served a true and exact copy of the foregoing “**Brief of Respondent**” on counsel of record, via facsimile and the United States Postal Service, in a stamped envelope addressed as follows:

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Dated this 10th day of July, 2013.



Karen Tracy McElhinny, Esc. (WVSB 7517)