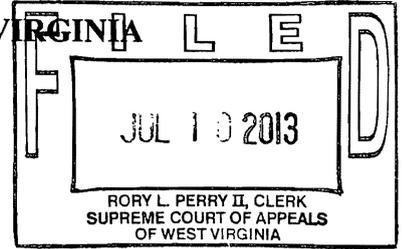


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0217



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

*Plaintiffs Below, Petitioners,*

v.

**MARK W. MATKOVICH,  
ACTING STATE TAX COMMISSIONER,  
WEST VIRGINIA STATE TAX DEPARTMENT,**

*Defendant Below, Respondent,*

and

**SALLIE ROBINSON,  
KANAWHA COUNTY ASSESSOR,**

*Intervenor Below/Respondent.*

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**BRIEF OF RESPONDENT MARK W. MATKOVICH,  
ACTING STATE TAX COMMISSIONER,  
WEST VIRGINIA STATE TAX DEPARTMENT**

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SALLIE ROBINSON,  
KANAWHA COUNTY ASSESSOR,

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---

BRIEF OF RESPONDENT MARK W. MATKOVICH,  
ACTING STATE TAX COMMISSIONER,  
WEST VIRGINIA STATE TAX DEPARTMENT

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I.

STATEMENT OF FACTS

The Freedom of Information Act (FOIA) request of Roger W. Hurlbert and Sage Information Services (collectively “Hurlbert” or “Petitioners”) must be placed in context.

Petitioners do not own any real or personal property in West Virginia. App. 327.

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<sup>1</sup>Pursuant to W. Va. R. Civ. P. 25(d), Mark W. Matkovich is automatically substituted as a party, having succeeded Charles O. Lorensen as Acting State Tax Commissioner. Mr. Lorensen had previously succeeded Craig A. Griffith as State Tax Commissioner.

Additionally, neither Petitioner holds a current business registration certificate from the Tax Department, which is required to engage in business in West Virginia.<sup>2</sup> App. 330. Furthermore, Roger Hurlbert served as secretary of Real Estate Information Providers Association (REIPA), an organization whose members “provide store houses of data products that consist of refined data collected from public records of home buyers, mortgage holders, selling prices, plat listings, and the like.” Letter from REIPA president Linda Wendt to the FTC Mar. 31, 2000, available at <http://www.ftc.gov/privacy/glbact/comments/wendtlinda.pdf> at 1, referenced in Order Granting Defendant’s and Intervenor’s Motions for Summary Judgment and Denying Plaintiffs’ Motion for Injunction, Declaratory Judgment and/or Summary Judgment, App. 826-27.

Notwithstanding the foregoing, the Petitioners made a written FOIA request to the West Virginia Tax Department on May 16, 2011. They specifically sought “a copy, on CD or similar electronic media, of both the assessment files and the CAMA files<sup>3</sup> for all real property in all counties.” App. 52. The letter further requested that the information be provided in a “database format capable of being sorted and manipulated” and that “[k]eys to any coded items (i.e. 01=gas heat; 02=oil heat, etc.)” be provided. *Id.* Counsel for the Tax Department responded on May 27, 2011, stating that the Department would only provide CDs containing all assessment records upon the payment of \$9.23 to cover the cost of providing the information. App. 60-61. The Department refused to provide the requested “CAMA files,” stating that the Tax Department is not the custodian of those records. App. 61. The Tax Department’s response went on to inform the Petitioners,

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<sup>2</sup>Furthermore, neither Petitioner holds, or has held, a real estate license from the West Virginia Real Estate Commission. App. 331. Neither holds, or has held, a real estate appraiser license from the West Virginia Real Estate Licensing & Certification Board. App. 332.

<sup>3</sup>The term “CAMA” is an acronym for computer-assisted mass appraisal.

The County Assessors are the custodians of the “CAMA files for all real property in all [of the] counties [in West Virginia]. Freedom of Information Act inquiries relating to these records should be directed to the Assessors of the counties in which the records reside. The names and mailing addresses for each county assessor can be accessed using the following website:

<http://www.state.wv.us/taxrev/ptdweb/WVCountyAssessors.htm>.

*Id.* Petitioners did not send any payment and therefore did not receive the assessment records. Additionally, Petitioners chose not to send FOIA requests to the county assessors, choosing instead to institute the case at bar against the Tax Commissioner. The circuit court refused Petitioners’ request for declaratory and injunctive relief seeking to compel disclosure of all 55 counties CAMA records, concluding that the CAMA records were exempt from disclosure under FOIA. App. 835-36.

With regard to the assessment records, which were offered to the Petitioners, the Circuit Court of Kanawha County found at Findings of Fact 2:

The assessment records requested by [Petitioners] are a compilation of the contents of the land books for all 55 counties in West Virginia. The land book is an inventory of all real estate in a county, showing an assessed value for each property. [App. 235]; W. Va. Code § 11-3-2. The land book contains the tax ticket number, taxpayer name, map, parcel, deed book and page, property description, assessed value, and tax for each parcel of property. [App. 236]. Copies of the land book for each county are available for public inspection in the county assessor’s office and in the county record room.

App. 819-20.

With regard to Kanawha County’s CAMA files for residential property, Stephen Duffield, the Chief Deputy Assessor of Kanawha County, stated in an affidavit, “the computerized records contain information such as sketches of the house and property, floor plans, number of bathrooms, presence or absence of security systems, type of materials the house is constructed from, the type of heating, whether the property owner was home during the time of inspection, and other

information.” App. 396. Furthermore, the record reflects that information in the Kanawha County’s CAMA files regarding residential property reflects whether the resident has a disability or whether the residence is unoccupied because of an admission to a nursing home or whether the property is vacant.<sup>4</sup> App. 403. Additionally, Mr. Duffield’s affidavit states, “[d]ifferent field representatives record 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. 396.

With regard to citizen’s concerns regarding the Kanawha County field appraisers collection of data, Mr. Duffield indicated that “[r]esidents in Kanawha County sometimes raise privacy concerns to the Kanawha County Assessor and representatives from her office. Some citizens indicate that they are willing to provide the requested information to the Kanawha County Assessor, but they specifically request that the information not be disclosed to anyone else.” App. 396-97. Consistent with Mr. Duffield’s affidavit, Noelle A. Starek, a taxpayer from Kanawha County submitted an affidavit stating, “I had the expectation of confidentiality when I provided the Kanawha County Assessor’s Office with information concerning said property. I consider information concerning my property to be information of a personal nature that, if disclosed to non-governmental entities, would invade my privacy.” App. 399-400.

Mr. Duffield’s affidavit went on to say the following with regard to information requested from taxpayers contained in Kanawha County’s CAMA file for commercial property:

The Kanawha County computerized records for commercial properties contain profit and loss statements, which Kanawha County requires to be disclosed. Commercial properties are valued using the income approach. Under that approach,

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<sup>4</sup>The general description of these records was provided to all counsel in Kanawha County in the Intervenor Phyllis Gatson, Kanawha County Assessor’s Supplement to her Motion for Summary Judgment and Motion for *In Camera* Review of Confidential Documents; however, individual records were provided to Judge King for *in camera* review. App. 402-11.

the value of the property is based on the type of business (*e.g.*, retail, apartment building, doctor's office, fast food restaurant, etc.) and the amount of income it produces.

The Kanawha County Assessor's Office records for commercial properties also often include other detailed information such as photographs, blueprints, and other documentation that may be used by competitors of businesses to gain a commercial advantage.

While the Assessor's Office needs this information in order to properly value commercial properties, competitors of the business could use the information to put the business at a competitive disadvantage if it were readily available to them.

The Kanawha County Assessor views the profit and loss statements and other information obtained concerning commercial properties as property tax return information, which is confidential under West Virginia Code § 11-1A-23(a), and therefore exempt from disclosure under West Virginia Code § 29B-1-4(a)(5).

App. 397-98.

Additionally, Mr. Duffield's affidavit stated that data collection for commercial property can sometimes contain "trade secrets . . . which could raise potential homeland security risks. Examples of this type of information include the specific longitude and latitude of commercial properties such as chemical plants, photographs of said plants, blueprints of said plants, etc." App. 398.

Because the circuit court found the CAMA records for all counties were not subject to disclosure under FOIA, the court did not address the question of whether the Tax Commissioner or a county's assessor is the custodian of the CAMA file. App. 835. However, the uncontroverted facts in the record support the Tax Commissioner's position that he is not the custodian of the CAMA files for any of the counties. In agreement with the Tax Commissioner's position, the Kanawha County Assessor intervened in the case *sub judice*. In the Kanawha County Assessor's Motion to Intervene, she stated that she was "the sole custodian of the information sought by the [Petitioners] with regard to property located within Kanawha County." App. 178. The Kanawha

County Assessor's position regarding the custodian issue is plainly stated in Mr. Duffield's affidavit, which in pertinent part provided, "[t]he Assessor's Office is the sole legal custodian of the data requested by the [Petitioners]." App. 184.

Kris Pinkerman is the person at the Tax Department who responds to requests for property tax information which includes requests for CAMA files. To place the volume of information in context, "Kanawha County has the largest number of real property tax accounts of any county in the state. It currently has 124,160 such accounts, while the total for the entire state is 1,426,165. Thus, Kanawha County has 8.7% of the real property accounts in the State of West Virginia." App. 319. With regard to disclosure of the CAMA files, Ms. Pinkerman's affidavit also stated, "[a] substantial number of county assessors do not release the computer assisted mass appraisal (CAMA) data that is stored in the IAS statewide network because they view it as containing information that is exempt from disclosure under the Freedom of Information Act or confidential under tax statutes." App. 320.

Ms. Pinkerman also outlined the Department's policy regarding the CAMA files:

Since 1984, and perhaps earlier, the Tax Department has had an unwritten policy that it does not provide CAMA data without written authorization from the county assessor for the county for which the data is sought, without regard to whether the request is based on FOIA. (The sole exception to this is that taxpayers who are seeking to challenge their own assessment are entitled to have the data related to their own property. However, they usually request this information from their own assessors rather than the Tax Department.)

....

The Property Tax Division receives requests for CAMA data by telephone, letter, fax, and email. In response to such requests, staff tell requesters other than the property owners requesting their own records that written authorization from the assessor is required.

App. 321.

Thus, Ms. Pinkerman's affidavit, which was uncontroverted, establishes that the county

assessor determines whether CAMA files are released to anyone other than a taxpayer. Simply stated, if authorization is given by the assessor, then the CAMA file is disclosed. Conversely, if authorization from the assessor is denied, then disclosure does not occur. App. 321. While Petitioners point to the fact that some county assessors release the CAMA files or authorize the Tax Commissioner to disclose the CAMA files, this supports the Tax Commissioner's position that he is not the custodian.<sup>5</sup> It is uncontroverted that, the decision to disclose CAMA files belongs to the assessor. This is appropriate because the assessor is the elected constitutional officer, who collects virtually all of the data, is the most familiar with the data collected, controls the data, and is answerable to the taxpayers in the county.<sup>6</sup>

With regard to the counties who disclosed the CAMA information pursuant to a request or have the information online, there are different levels of disclosure and some counties, like

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<sup>5</sup>Mr. Amburgey's letter to the assessors has been taken out of context. It states in full:

Recently, I have had calls concerning the disclosure of property record cards. Our position is that the provisions of West Virginia Code § 11-1A-23 do not protect appraisal records from disclosure, unless the records contain taxpayer return information that is specifically protected from disclosure statute.

*As a practical matter, a taxpayer needs this information to fully judge whether they are treated fairly. Many county assessors freely disclose most appraisal data or ask that the Tax Department do so on their behalf.*

*Should you have questions specific to your situation you should consult your legal advisor. If your questions are more general in nature, feel free to contact me at 304-558-3946.*

App. 39 (emphasis added).

<sup>6</sup>Contrary to the Petitioner's assertions, the 55 elected assessors are constitutional officers who are not subordinate to the Tax Commissioner. W. Va. Const. art. IV, § 1.

Kanawha, do not disclose the information anymore.<sup>7</sup> Furthermore, the global release sought here is a tacit acknowledgment that not all counties disclose, authorize disclosure, or provide the CAMA files online. In fact, Petitioners' own information contained in their brief at p. 21 reveals that less than half of the counties have authorized the Tax Commissioner to release their CAMA records. In addition to, at times, authorizing the Tax Commissioner to disclose their CAMA files, some of the counties have made the records available online or have provided them to the parties requesting them. Pet'rs' Br. 22. However, all the disclosure including making the information available online is done by less than half of the assessors.

Furthermore, the unrebutted evidence set out below delineates the respective appraisal and assessment responsibilities of the assessors and the Tax Commissioner. Legislative rules describe the responsibilities of the Commissioner and the county tax assessors in connection with this system. W. Va. Code R. § 110-2-1 *et seq.* App. 317. The Tax Commissioner establishes and maintains a "statewide electronic data processing system network" to facilitate the "administration of the ad valorem property tax on real and personal property" throughout the state. W. Va. Code § 11-1A-21(a). App. 317. The Tax Commissioner determines the most appropriate hardware and the associated equipment to be used in the network and is responsible for maintaining the equipment and providing training to those who will use the system. W. Va. Code R. § 110-2-3.2.1. App. 317-

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<sup>7</sup>In response to Request for Admissions sent by Petitioners, the Tax Commissioner made further inquiry regarding the online accessibility of the county's CAMA file. The degree and scope of the information available and restrictions regarding use among the counties differ. The counties who provide CAMA records online do not provide all the records. Cabell, Fayette, Greenbrier, Hampshire, Hancock, Jackson, Marshall, Pocahontas, Raleigh, Randolph and Wood counties only provide some data. App. 595-97. For example, Brooke County only provides access to its website if the recipient agrees not to redistribute the information. App. 595. Fayette County does not allow downloading or resale of the information. Additionally, a number of counties do not disclose the note field. Furthermore, Monongalia County no longer makes its records available online. App. 595-96.

18. The Commissioner is also responsible for assuring the safety and security of the network.<sup>8</sup> W. Va. Code R. § 110-2-6.1. App. 320.

The counties generally acquire,<sup>9</sup> at their expense, the data processing equipment required by the Commissioner and provide the necessary staffing and operating personnel and communication equipment to allow interaction with the state server. W. Va. Code R. §§ 110-2-4.1, -4.2. App. 318. With regard to the CAMA data at issue in this case, all county assessors are responsible for entering all assessment rules, tables, cost lists, modifiers, and the like into the system. W. Va. Code R. § 110-2-5.1.2. App. 320. They are also responsible for entering all changes in the description, status, classification, and value of all real and personal property in their respective counties. W. Va. Code R. § 110-2-5.2.1. App. 319. “Only county assessors have the authority to change information relating to property and accounts in their respective counties. W. Va. Code R. § 110-2-5.2.1.a.” *Id.* In contrast, the Tax Department does not have authority to change county data such as prior assessed values. W. Va. Code R. § 110-2-5.1.3. *Id.*

Faith Dangerfield, Appraiser Chief of the Appraisal Services Unit, of the Tax Department, provided an un rebutted affidavit which explained the division of responsibilities between the Tax Commissioner and the 55 county assessors regarding real property appraisal<sup>10</sup> and assessment.

The Tax Department has no role in appraisal or assessment of residential properties or in developing or collecting any data regarding such properties. These properties comprise approximately 94% of the total property parcels assessed in West Virginia. County assessors and their staffs receive property tax returns and

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<sup>8</sup>“A password is required for each user of the system. W. Va. Code R. § 110-2-6.1.1.” App. 320.

<sup>9</sup>Kanawha County opted to purchase and operate its own IAS server and related computer hardware and software. App. 318.

<sup>10</sup>The Tax Commissioner values industrial property which comprises approximately 1% of the real property parcels in the State.

collect additional data on each property by means of periodic visits to all owner-occupied residential properties. County assessors create the cost lists for valuation by checking the prices of construction materials at local businesses and seeking out information from local contractors. They input this data to IAS state computer system (or, in the case of Kanawha County, its own IAS system), and the *Tax Department cannot change this information*. The Department's sole responsibility is to supervise the process and monitor the county assessors annually. The Department does this by going into each county and reviewing a sample of residential assessments. *If there are errors, the Department informs the assessor and asks that they be corrected.*

Likewise, the Tax Department has no role in appraisal or assessment of commercial properties. These properties comprise approximately 5% of the total property parcels assessed in West Virginia. As with residential properties, the assessor's office receives the property tax return, collects additional data related to the property, and inputs the data to the IAS computer network. The assessor's office values the property in accordance with the information it has collected and the applicable valuation method. *The Tax Department cannot change the information in the computer or the resulting value but has a similar supervisory role as with residential properties.*

App. 241 (emphasis added).

With regard to appraisal of 99% of the real property parcels in the State, Ms. Dangerfield's affidavit stated:

Because approximately 99% of the real estate parcels in West Virginia are residential or commercial, most of the information contained in the statewide IAS state computer system is collected, prepared, owned, and input to the statewide computer system by the county assessors. The Tax Department has shared access to the information because of its supervisory role but does not own, manage, or control the information in the system except for the approximately 1%<sup>11</sup> of the properties that are industrial properties.

App. 242. As discussed *supra*, the Tax Department receives information from the assessors to establish a value for the industrial property in their county. App. 241-42.

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<sup>11</sup>The 1% figure referenced in Ms. Dangerfield's affidavit is based upon the number of parcels.

Additionally, with regard to the industrial property, Ms. Dangerfield's affidavit stated:<sup>12</sup>

Some information contained on industrial property record cards, which is entered into IAS for appraisal purposes, raises both privacy and public safety concerns. For example, some large chemical plants name buildings according to what chemical is manufactured inside the building. If a building is named for a dangerous chemical - for example, chlorine or methyl isocyanate (MIC) - even disclosing the name of the building poses public safety issues. As to such property, the owners provide detailed information to the Tax Department with the expectation that it will be used for tax assessment purposes only but otherwise be held private and confidential.

App. 242.

After a value is determined, the assessor makes an assessment and issues a tax ticket. *Id.* In summary, the "Tax Department has shared access to the [CAMA] information [collected by county assessors] because of its supervisory role but does not own, manage, or control the [counties] information in the system." *Id.*

While some of the information in the CAMA file is not exempt, the volume of the data and different recording practices within Kanawha County alone make segregation of the information cost prohibitive. Ms. Pinkerman provided the following information regarding the substantial obstacles to providing the information requested while preserving the confidential and private information of our taxpayers.

Redacting information in IAS so as to withhold information deemed confidential by the county assessors would be impracticable because of the great difficulty and expense.

a. Redacting information from IAS in response to a FOIA request would require changes to be made to IAS by a computer programmer.

b. The Tax Department has computer programmers on staff; however, they would have to be taken away from other work to perform any programming changes for redaction purposes.

c. Making even simple changes to IAS sometimes causes problems with

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<sup>12</sup>Faith Dangerfield supervises the industrial appraisals and has done some appraisals herself.

its operation.

d. Making the complex changes that would be required if more than a few items were redacted would present a risk of losing or corrupting the data stored on the IAS statewide network.

e. Because of this risk, the Department would likely have to contract with Tyler Technologies, the distributor of the IAS program, for any significant redactions. Tyler Technologies charges \$203 per hour for such services.

f. Because the county assessors have varying views as to which information stored in the IAS network is confidential, it is conceivable that there would have to be 55 separate programs written to accommodate these views.

App. 322-23.

## II.

### SUMMARY OF ARGUMENT

The FOIA question before this Court raises issues of first impression. First, the Court must determine whether the reach of the FOIA statute extends to a commercial business and an individual who are neither taxpayers nor businesses in this State. It is against this back-drop that this Court must determine whether co-mingled personal records regarding the more than one million parcel accounts in West Virginia must be released. Second, the Court must determine whether the Tax Commissioner or the 55 county assessors are the custodians of the counties' CAMA records which store information obtained and collected during the assessors' periodic field visits of residential and commercial parcels. The residential and commercial property in the State represents 99% of the real property parcels in the State.

With regard to the remaining 1% of the property, which includes industrial and natural resource property, the Tax Commissioner arrives at a value, then the county assessors issue the assessment and collect the tax. However, consistent with the Tax Commissioner's policy to release CAMA data only after receipt of express authorization from the assessor, the industrial data is not released without the assessor's permission. The Tax Commissioner and the Kanawha County

Assessor, who intervened in this case, agree that she controls the data and is the custodian. This position is borne out by the fact that the county assessors are constitutional officers who are directly responsible for the assessment role in the county and are answerable to the taxpayers in their respective counties.

The uncontroverted evidence is that CAMA files contain personal information that is obtained by the assessors when they are gathering information to arrive at the true and actual value of residential and commercial property. For example, the Kanawha County CAMA files contain information regarding the lay-out of the residence, the presence of security systems, nursing home stays of property owners, disabled persons and whether property is vacant. With regard to the industrial appraisal, the uncontroverted evidence is that trade secret and homeland security information is contained in the CAMA file. Additionally, the uncontroverted evidence established that redaction of the information would be cost prohibitive. Because the Circuit Court of Kanawha County found that the information sought was private and not reasonably susceptible to segregation, Petitioners' FOIA request was appropriately denied.

The Tax Commissioner asks this Court to respect the 55 county assessors' position as constitutional officers who appraise virtually all of the real property parcels of this State and control all the CAMA files in their county. The assessors' control over the appraisal and assessments of the aforesaid property unequivocally makes the assessors the custodians of this data. Additionally, the Tax Commissioner asks this Court to affirm the circuit court's denial of Petitioners' FOIA request because the information sought contains personal information which cannot be easily segregated.

### III.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Tax Commissioner requests oral argument in this case because its resolution will affect the privacy interests of all the citizens in this State as well as implicating the security of our citizens living in proximity to industrial property.

### IV.

#### **ARGUMENT**

**A. CONTRARY TO PETITIONERS' ASSERTION, WEST VIRGINIA CODE SECTION 11-1A-23, WHEN READ IN ITS ENTIRETY, PROHIBITS DISCLOSURE OF THE CAMA FILES REQUESTED.**

At the circuit court, in addition to maintaining his position that he is not the custodian of the CAMA files, the Commissioner asserted the confidentiality of these files. The Commissioner argued that the CAMA files were exempt from disclosure under FOIA, as records exempt from disclosure by statute pursuant to W. Va. Code §§ 11-1A-23(a) and 29B-1-4(a)(5). App. 210-11, 232; *see also* Supplemental App. 6, 19.

This Court has previously recognized the application of an exemption to disclosure under FOIA in a case involving the disclosure of tax settlement agreements in *Daily Gazette Company, Inc. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989). In the *Caryl* case, the Charleston Gazette had requested the disclosure of settlement agreements resolving the litigation between the Tax Department and CSX Railroad. The Gazette filed suit to obtain the settlement agreements under the provisions of the FOIA statute. This Court affirmed the Tax Commissioner's denial of the release of the records based upon the confidentiality provisions set forth in W. Va. Code §§ 11-10-5d and 11-10-5q(d) and (e). *See* Syl. Pt. 2, *Caryl*, *supra*.

In the case *sub judice*, the Tax Commissioner rests non-disclosure on the explicit confidentiality provisions for ad valorem property tax returns which states:

*(a) Secrecy of returns and return information. -- Property tax returns and return information filed or supplied pursuant to this article and articles three, four, five and six of this chapter and information obtained by subpoena or subpoena duces tecum issued under the provisions of this article 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 such 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.*

W. Va. Code § 11-1A-23 (emphasis added).

The plain language of W. Va. § 11-1A-23(a) states that property tax returns and return information are confidential and shall not be disclosed except as authorized by this Section. In recognition of the personal nature of information contained in taxpayer's property tax returns, the Legislature ensured the confidentiality of these returns. The language contained in W. Va. Code § 11-1A-23 is similar to the language in the *Caryl* case. Section 11-1A-23(d) imposes criminal penalties against any person who violates the confidentiality provisions the same as W. Va. Code §§ 11-10-5d and 11-10-5q.

Petitioners attempt to argue that the confidentiality provision of W. Va. Code § 11-1A-23 does not apply to the CAMA files because these files are an itemized description of property. However, Petitioners argument is misplaced because it is based upon an incomplete reading of the statute. The *proviso* states in full:

*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: . . .*

W. Va. Code § 11-1A-23 (emphasis added).

Tax returns and return information are not confidential **only** for the purpose of ascertaining that all property subject to assessment has been subjected to appraisal. The assessment files requested by Petitioners, which were offered for a nominal fee, would have provided them with the information necessary to determine whether all property was listed for appraisal. But the Petitioners, who are not West Virginia taxpayers, are presumably not trying to verify the proper listing of all property subject to taxation and as a result chose not to pay for the assessment files. In contrast to the assessment files described in W. Va. Code § 11-1A-23 which can be disclosed, the Petitioners seek the CAMA files. Simply stated, Petitioners seek more detailed and personal information which goes well beyond the authorized statutory disclosure. Consequently, the *proviso* is not applicable to the case at bar. Furthermore, Judge Steptoe has previously reviewed this language and determined:

The Court further finds that “itemized description of the property” mentioned in W. Va. Code § 11-1A-23 is not the CAMA database but rather refers to the legal description of the property that must appear in the land book sufficient to aid in identifying the property for assessment.

*Metropolitan Regional Information Systems v. Bordier*, Circuit Court of Jefferson County, Civil Action No. 99-C-20, p. 12 n.1 (April 10, 2000); App. 344; Supplemental App. 33.

There is no dispute that the ad valorem property tax returns and return information have been obtained by the taxing authorities pursuant to Articles 3, 4 and 5 of Chapter 11 and are included in the CAMA file. App. 396. Consequently, the CAMA files are classified by statute as confidential and exempt from disclosure under FOIA pursuant to W. Va. Code § 29B-1-4(a)(5).

**B. THE CAMA FILES REQUESTED BY PETITIONERS CONTAIN PERSONAL INFORMATION WHICH THE CIRCUIT COURT CORRECTLY RULED WERE EXEMPT FROM DISCLOSURE.**

The threshold FOIA inquiry which must be answered is whether Petitioners qualify as persons entitled to obtain information pursuant to W. Va. Code § 29B-1-1, *et seq.* They do not. Petitioners are not citizens of this State seeking to hold their government accountable. Furthermore, it is disingenuous for them to seek private information about West Virginia citizens without correspondingly providing personal information about themselves.<sup>13</sup>

Assuming *arguendo*, Petitioners have standing to make a FOIA request, the Circuit Court properly concluded that the CAMA files contained:

substantial “information of a personal nature” as that phrase is used in West Virginia Code §29B-1-4(a)(2) because it contains information such 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 this Court finds is information which could result in a substantial invasion of privacy if it was disclosed.

App. 828, ¶ 36.

With regard to commercial property, the circuit court concluded:

In addition, Kanawha County requires the owners of commercial property to provide profit and loss statements, which the Assessor uses to value the property using the income approach. Under this approach, the value of the property is based on the type of business at the location (e.g., restaurant, physician’s office, retail store, apartment building, etc.) and the amount of income it produces. [App. 397.] In the letter requesting the information, the Assessor assures the property owner that she considers the information “property tax information” under W. Va. Code § 11-1A-

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<sup>13</sup>The Kanawha County Assessor sent discovery requests to the Petitioner seeking their tax returns. App. 385. Petitioners objected alleging the request was overly broad and as a result their tax returns remain shielded from public view.

23(a) and that she will hold it “strictly confidential.”<sup>14</sup>

App. 831, ¶ 39 (footnote added). Similarly, with regard to industrial property, the Court determined:

Some information contained in the CAMA files for industrial properties raises privacy (and safety) concerns because buildings are named for dangerous chemicals that are manufactured therein. As to such properties, the taxpayers provide information to the Tax Department with the expectation that it will be used for tax assessment purposes only but otherwise be held confidential.

App. 830, ¶ 40.

Thus, contrary to the Petitioner’s assertion, the Court made a determination that the information requested was private information. In examining whether personal information should be disclosed, the Court in *Child Protection Group v. Cline*, 177 W. Va. 29, 32, 350 S.E.2d 541, 543 (1986) defined private information as “something which affects or belongs to private individuals as distinct from the public generally.” Under this definition there is no doubt that some of the requested CAMA information is private because it contains information about the interior of someone’s house or a business’s financial condition as well as information whose disclosure might raise safety concerns. The fact that the assessors and Tax Department<sup>15</sup> collect real property information does not make it public; otherwise, every piece of information the government has would be public. Under such an interpretation, there would be no need for a personal information exemption in either the federal or state FOIA statutes. Thus, the *Cline* court adopted the five part balancing test<sup>16</sup> utilized by the circuit court to determine whether the CAMA information sought was

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<sup>14</sup>See App. 407.

<sup>15</sup>As discussed herein, the Tax Department performs the industrial and natural resource appraisal and the assessor makes the assessment.

<sup>16</sup> In deciding whether the public disclosure of information of a personal nature under W. Va. Code § 29B-1-4(2) (1980) would constitute

(continued...)

exempt from disclosure.

In discussing the factors to be considered in weighing disclosure, the Court stated:

We are not able to state concisely what information would be embarrassing or harmful to the ordinary person under any given circumstance or how severe the embarrassment would be. Instead, we must look to the trial judge, and his wisdom concerning the nature of people to resolve these issues, and we will allow some discretion in his decision.

*Cline*, 177 W. Va. at 32-33, 350 S.E.2d at 544.

However, the Court went on to say the following regarding the differences between the federal and state FOIA statutes:

The West Virginia Code, with some ambiguity, favors nondisclosure of personal information unless public interest clearly requires disclosure. The simplest explanation of these differences is as follows: If the scales weigh heavily in favor of disclosure, both codes require disclosure; if the scales weigh heavily in favor of nondisclosure, both codes require nondisclosure; but, if the scales weigh even or near even, the Federal Code favors disclosure while the West Virginia Code favors nondisclosure.

*Cline*, 177 W. Va. at 34, 350 S.E.2d at 545 (footnote omitted).

The fact that Petitioners did not provide the circuit court with the purpose for their requests left the Court with no alternative but to grant the exemption requested as is reflected in the circuit

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<sup>16</sup>(...continued)

an unreasonable invasion of privacy, this Court will look to five factors:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious.
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality.
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Syl. Pt. 2, *Cline*, *supra*.

court order. Simply put, without Petitioners reason for seeking the data, there was nothing to weigh the privacy interest against to support disclosure.

**C. IN ADDITION TO HAVING NO PRECEDENTIAL WEIGHT ALL THE CASES FROM OTHER JURISDICTIONS ARE DISTINGUISHABLE. THEREFORE, THE CIRCUIT COURT PROPERLY DISREGARDED THEM.**

As discussed *supra*, W. Va. Code § 11-1A-23 prohibits disclosure because the CAMA files which Petitioners seek are more than “an itemized description of the property listed, in order to ascertain that all property subject to assessment has been subjected to appraisal.” Notwithstanding the fact that Petitioners’ request is not authorized by the aforesaid statute, they point to cases from other jurisdictions to support their request for disclosure of the CAMA files throughout the State. As discussed herein, all the cases discussed by Petitioners are inapposite.

While the Petitioners argue that all assessment records are public and that *Higg-A-Rella* supports their position, the Court needs to look no further than the *Higg-A-Rella* decision to see that Petitioners have expanded this decision beyond its reach. In *Higg-A-Rella, Inc.*, the entities seeking disclosure of assessment records were New Jersey businesses or citizens. Furthermore, the key difference is that the information sought was different from the information in West Virginia’s CAMA files. The records at issue were described as follows:

The lists contain the following information for each parcel: 1) street address and block and lot numbers; 2) brief description, including lot size and use; 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.

*Higg-A-Rella, Inc. v. County of Essex*, 660 A.2d 1163, 1166 (N.J. 1995). The list did not include, as the CAMA files in West Virginia do, whether the property is vacant, whether residents are home

during the day or at all, the profit and loss statement of a commercial business or trademark or safety information regarding industrial property. Additionally, the *Higg-A-Rella* court acknowledged the limited applicability of its ruling when it commented, “We emphasize, however, that our holding is fact-specific, and may not be generalized to all cases in which people seek computer copies of common-law public records.” *Higg-A-Rella*, 660 A.2d at 1170.

Similarly, the records sought in *Szikszy v. Buelow*, 436 N.Y.S.2d 558 (N.Y. Sup. 1981) are distinguishable from the CAMA files sought in this case. The records for which disclosure was sought in *Szikszy* were tax maps, the assessment roll and the levy module. Thus, they are, in part, the records offered to Petitioners and importantly, they are not records which contain personal information like the CAMA records sought by Petitioners.

Furthermore, although *Gordon v. Sandoval County Assessor*, 28 P.3d 1114 (N.M. App. 2001) ordered the disclosure of parcel record cards, it too is distinguishable. In that case, the plaintiff was a taxpayer protesting the value of property. The New Mexico property tax statutes plainly state that property tax valuation records are classified as public records while a few specific pieces of information on the return, such as burglar alarms and income information, are subject to restrictive disclosure. *Gordon*, 28 P.3d at 1115, citing N.M.S.A. 7-38-19(D) & (E). The West Virginia property tax confidentiality statute works in the opposite manner. West Virginia Code § 11-1A-23(a) plainly states that property tax returns and return information are confidential with disclosure being the exception.

The Court of Appeals of New Mexico ordered redaction of personal information and a stay was authorized to allow the property owners for the 9 affected parcels to intervene. In *Gordon*, redaction would have been a relatively simple task because only 9 parcels were the subject of the

information requested. This is in sharp contrast to the case *sub judice*, where there are 1,426,165 real property accounts. Additionally, the *Gordon* court signaled that its holding was tied to the facts of the case where the records were sought for a taxpayer protest. Specifically addressing the assessors' concerns about the "mining of data," the situation in this case, the *Gordon* court stated, "As for the fears of 'mining' [the data], this presents a hypothetical circumstance that we leave for another day." *Gordon*, 28 P.3d at 1120.

**D. THE FACT THAT SOME COUNTIES HAVE RELEASED OR MADE CAMA RECORDS AVAILABLE TO PRIVATE PARTIES IS NOT CONTROLLING.**

The undisputed facts are that most counties do not make their CAMA files available to anyone other than a taxpayer seeking information about his own property. Furthermore, with the passage of time, some counties have changed their position about disclosure. The Kanawha County Assessor felt so strongly about the invasion of privacy that she intervened in this case. Moreover, to the extent that this is another way to argue the public domain doctrine, it must fail because everyday the records are different as a result of the on-going assessment process.

Finally, because the assessors are independent constitutional officers answerable to the citizens of their county, the good faith actions of a minority of the assessors should not shape a universal rule which will intrude on the privacy of every West Virginia citizen. It is important to remember that this request is not being made for the public good. It is being made for the commercial good of the Petitioners who are not taxpayers so they have no CAMA file. In conclusion, the release will be detrimental to the privacy rights of our citizens and may result in creating a chilling affect on full disclosure for tax reporting.

**E. THE PREPARATION OF A VAUGHN INDEX IS UNNECESSARY BECAUSE PETITIONERS KNOW THE BASIS FOR THE EXEMPTIONS CLAIMED AND THE PREPARATION OF A VAUGHN INDEX WOULD BE BURDENSOME.**

Prior to addressing whether the preparation of a Vaughn index is appropriate under the extraordinary circumstances in this case, Petitioners' suggestion that the Tax Commissioner was responsible, if either Respondent was, for completing a Vaughn index is wrong. It is based on an erroneous assumption addressed herein that the Tax Commissioner is the custodian of the requested CAMA records. Simply put, because the Tax Commissioner is not the custodian of the requested records, he had no obligation to compile a Vaughn index.<sup>17</sup>

Because no FOIA request was made of the Kanawha County Assessor, she had no obligation to compile a Vaughn index. App. 379. Furthermore, because the Petitioners are not taxpayers, or residents of this State, the protections afforded by FOIA, even assuming the need for an index, do not extend to them. Plainly stated, Petitioners are not the persons contemplated by West Virginia's FOIA statute because they are not citizens who are "represented" by the Tax Commissioner or any of the 55 county assessors. Likewise, the Tax Commissioner and county assessors are not the public servants of the Petitioners. Thus, it is clear that Petitioners, who are neither residents or taxpayers in West Virginia, are not the people referred to in FOIA's policy declaration which states, "[t]he people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy." W. Va. Code § 29B-1-1.

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<sup>17</sup>In addition to mis-allocating the responsibility for the preparation of a Vaughn index to the Tax Commissioner, Petitioners are wrong with regard to when the obligation to compile a Vaughn index is triggered. As the Court stated in *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004), a Vaughn index is not required at the time a public body denies a FOIA request.

However, liberal construction does not extend so far as to afford the benefits of FOIA to Petitioners. This is especially so in the case *sub judice* where Petitioners' request, presumably for a commercial purpose, must be balanced against the privacy interests of our citizens and taxpayers.

Furthermore, it is disingenuous for the Petitioners to claim that not one single record was identified which was exempt. The record demonstrates that security systems are contained in the CAMA files which are private information not subject to disclosure. Moreover, the record reflects, that other personal information in Kanawha County's CAMA files includes, but is not limited to, whether a residence is vacant, unoccupied due to a stay in a nursing home, or the home of a disabled person. Likewise, information regarding some industrial property in all counties, "raises privacy and public safety concerns." App. 242. Thus, the purpose of the Vaughn index has been satisfied because Petitioners know the basis of the exemption sought. To ask either public body to go through the time and taxpayer expense to compile a Vaughn index is both unwarranted and unnecessary. The burden is clear where Kanawha County has 124,160 parcel accounts, while the total for the entire State is 1,426,165. The burden is compounded because the evidence reflects that Kanawha County's field appraisers do not uniformly record information in the same area in the CAMA file.

**F. THE CIRCUIT COURT CORRECTLY FOUND THAT UNDER THE CIRCUMSTANCES THE SUBSTANTIAL COST OF REDACTION WAS NOT REQUIRED UNDER FOIA.**

Petitioners tacitly acknowledge that information contained in the CAMA files is personal and private. This admission is contained in their Brief where they state:

The lower court in its summary judgment order, instead of acknowledging Petitioners were not requesting any of the records the Assessor asserted were exempt, made numerous findings and conclusions about those irrelevant records, and thus based its conclusions wholly on records the Petitioners stated they **do not want**. App. at 821 (Order at ¶¶ 8 and 9).

Pet'rs' Br. 26.

The Petitioners' characterization of the records they did not want include:

irrelevant photographs and "sketches" of buildings . . . , whether a property is "vacant," the specific descriptions of security systems and whether a homeowner is home at the time the field representative is present . . . , profit and loss statements . . . , photos and blueprints of commercial property . . . , photos, blueprints and trade secrets of chemical plants . . . , industrial property data . . . , nursing home stays, disabilities, photos and drawings, blueprints, profit and loss statements for commercial properties, and information about whether a homeowner is home during the day.

*Id.*

Assuming that this Court would find that Petitioners' lack of citizenship, as well as the fact that they are not taxpayers in the State, does not prevent them from making a FOIA request, other obstacles prevent disclosure. As Mr. Duffield's affidavit established, the records in Kanawha County are co-mingled such that private information can exist in any of the files. Additionally, the affidavit provided by Ms. Pinkerman from the Tax Department unequivocally established the substantial taxpayer burden that redaction would cause, especially since the county assessors have varying views on what information is confidential.

Therefore, the circuit court's order was proper and consistent with this Court's ruling in *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004). In *Farley*, commenting on the Town of Burnsville, the court stated,

Thus, we implied that the duty to redact or segregate is not necessarily absolute, stating in Town of Burnsville that if the steps needed to segregate non-exempt from exempt information were "overly burdensome or costly," then such steps may not be required. 188 W. Va. at 515, 425 S.E.2d at 191 ("We do not believe compiling a list of only taxpayer names will be overly burdensome or costly given the size of the Town of Burnsville.")

*Farley*, 215 W. Va. at 422, 599 S.E.2d at 845.

In Syllabus Point 5 of *Farley*, the court held in part that “[i]n response to a proper Freedom of Information Act request, a public body has a duty to redact or segregate exempt from non-exempt information contained within the public record(s) responsive to the FOIA request and to disclose the nonexempt information unless such segregation or redaction would impose upon the public body an unreasonably high burden or expense. . . .”

It is anticipated that Petitioners will argue that the Tax Commissioner cannot invoke the burden of redaction or segregation because his FOIA response was allegedly not detailed enough. However, if this assertion is made it is wrong because no proper FOIA request was made. Here the burden is high. Additionally, the Petitioners’ failure to obtain the assessment records that were offered at a nominal cost, which contain the public information in the counties’ land books, further supports non-disclosure.<sup>18</sup>

**G. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS AS A MATTER OF LAW AND UPON THE UNCONTROVERTED AFFIDAVITS SUPPLIED TO SUPPORT THE MOTION FOR SUMMARY JUDGMENT.**

Petitioners assert that Judge King erred in relying upon affidavits as the basis for granting summary judgment. They claim that the affidavits contained hearsay, conclusory statements and improper descriptions and interpretations of records.

The appropriate response to such affidavits are counter-affidavits. There were no counter-affidavits filed in response to the Tax Department’s motion for summary judgment. The asserted hearsay is not hearsay at all, but the culmination of knowledge gained from the experience of the affiant.

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<sup>18</sup>The county land books include an inventory of all real estate in a county, showing an assessed value for each property as well as the tax ticket number, taxpayer name, map, parcel, deed book and page, property description, assessed value, and tax for each parcel of property.

It has long been the rule in this State that “[s]ummary judgment is the preferred method of resolving cases brought under (FOIA).” *Farley*, 215 W. Va. at 418, 599 S.E.2d at 841, citing *Evans v. Office of Personnel Mgt.*, 276 F. Supp.2d 34, 37 (D.D.C. 2003).

Judge King, in reviewing the affidavits filed in support of the motion for summary judgment, found that the affidavits were asserting fact and opinions based upon the training and experience, and that, coupled with lack of any counter-affidavits, was sufficient evidence to support the motion for summary judgment. Additionally, because W. Va. Code § 11-1A-23 prevents the disclosure requested, the circuit court’s denial was correct as a matter of law.

**H. THE CIRCUIT COURT HAD AN AMPLE INDEPENDENT BASIS TO FIND THAT THE RELEASE OF THE CAMA RECORDS WOULD INVADE THE PRIVACY OF WEST VIRGINIA CITIZENS.**

As is reflected in the Statement of the Case, the circuit court had ample evidence in the record demonstrating the personal nature of the information contained in the CAMA files as well as the cost prohibitive nature of segregating the public and exempt information. Thus, Petitioners’ due process rights were not violated. Moreover, in the *Cline* case the Court stated “[t]he right of privacy is relative to the customs of the time and place, and is determined by the norm of the ordinary man.” *See Cline*, 177 W. Va. at 32, 350 S.E.2d at 543. Therefore, Judge King’s use of *Metropolitan Regional Information Systems v. Bordier*, Circuit Court of Jefferson County, Civil Action No. 99-C-20, (April 10, 2000), to reinforce his independent judgment as to what constitutes an invasion of privacy for the ordinary man was appropriate.

**I. THE TAX DEPARTMENT IS NOT THE “CUSTODIAN OF THE PUBLIC RECORD” FOR FREEDOM OF INFORMATION ACT PURPOSES AS REQUIRED PURSUANT TO W. VA. CODE § 29B-1-3(2).**

The dispute between the Tax Commissioner and Petitioners raises a fundamental question

under the Freedom of Information Act. The Tax Commissioner believes the language of W. Va. Code § 29B-1-2(1) is clear. The “custodian,” simply put, is the official in charge of the public body. The clear language of the statutory definition does not include any reference to public records or limitations to public records within the agency for which the official is in charge. However, the equally clear language found in the operative section of the Freedom of Information Act must also be reviewed. The Legislature specifically directed persons requesting public records how to proceed: “A request to inspect or copy any public record of a public body *shall be made directly to the custodian of such public record.*” W. Va. Code § 29B-1-3(2) (emphasis added). As discussed herein, all CAMA file records are controlled by the assessors. However, assuming the statutory language is ambiguous, it is well settled that ambiguous statutes must be construed before they can be applied to the facts of a case. This Court has determined that a statute is ambiguous if it is susceptible to two conflicting meanings.

Indeed, this Court has held that “[a] statute is open to construction *only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions* or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

*Davis Memorial Hospital v. West Virginia State Tax Commissioner*, 222 W. Va. 677, 682-83, 671 S.E.2d 682, 687-88 (2008).

This Court has a long standing position that the Legislature employs the language in a statute carefully and with precise objectives in mind. Significance and effect must be accorded to every word in the statute; statutory language was not selected or crafted haphazardly. *See Bullman v. D & R Lumber Company*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995). Furthermore, this Court has also set forth a corollary rule that every word used in a statute should have some meaning. “A

cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.’ Syllabus point 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).” Syl. Pt. 6, *Davis, supra*.

The underlying question before this Court is simple. Either the Legislature meant that persons requesting public records must submit that request to the **custodian of such public record** or the Legislature indulged in superfluous language in drafting W. Va. Code § 29B-1-3(2). The Tax Department’s response to the Petitioners assumed that the Legislature meant what it said in W. Va. Code § 29B-1-3(2).

The Tax Commissioner takes the position that he is not the custodian of the CAMA files since he does not control access to and the content of the residential and commercial CAMA files. Persons requesting copies of the CAMA files created, maintained, and updated by the fifty-five county assessors, must submit the request directly to the custodian of the CAMA files—the county assessors. Adopting the Petitioners’ argument renders the clear language of the statute in the operative provision superfluous.

According to statute, the 55 county assessors have the duty to ascertain true value of all property in their respective counties.<sup>19</sup> *See* W. Va. Code § 11-1A-29; *see also* W. Va. Code § 11-1C-7(a). The county assessors are under a continuing duty to update and maintain the values on all property located in their respective counties.

After completion of the initial valuation required under section seven of this article, *each assessor shall maintain current values on the real and personal property within the county. In repeating three-year cycles, every parcel of real property shall be visited by a member of the assessor's staff who has been trained*

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<sup>19</sup>The Tax Department appraises industrial and natural resource property. However, as discussed herein, no CAMA files can be released without the assessor’s permission.

pursuant to section six of this article to determine if any changes have occurred which would affect the valuation for the property. *With this information and information* such as sales ratio studies provided by the tax commissioner, *the assessor shall make such adjustments as are necessary to maintain accurate, current valuations of all the real and personal property in the county and shall adjust the assessments accordingly.*

W. Va. Code § 11-1C-9(a) (emphasis added).

County assessors have the primary role in valuing property located in their respective counties while the State Tax Commissioner has a secondary role - oversight of the county assessors and coordination of the electronic data processing system. *See* W. Va. Code §§ 11-1C-9(a) and 11-1C-5(a)(2)(A). The Tax Commissioner provides the method to appraise personal property and the local assessors actually employ the methodology. *See* W. Va. Code § 11-1C-5(a)(2)(A). It would be nonsensical to require the individual county assessors to create several different methodologies to value property throughout the State for ad valorem property tax purposes. Furthermore, the official books and papers of the 55 county assessors remain as the permanent records of their office and not the Tax Commissioner. *See* W. Va. Code § 11-2-8.

The West Virginia Legislature directed the Tax Commissioner to devise and establish the statewide electronic data processing system network to “facilitate administration of the ad valorem tax on real and personal property.” W. Va. Code § 11-1A-21(a). The Tax Commissioner was directed to promulgate rules governing the operation of the electronic data processing system. *See* W. Va. Code § 11-1A-21(d). The rules are significant and demonstrate, much like the statutes at issue, that the county assessors control the data in the CAMA files, not the Tax Commissioner. Counties must acquire suitable and compatible equipment at their own expense. *See* W. Va. Code R. §§ 110-2-4.1 and -4.2. All county data is entered into the CAMA files at county expense. *See* W. Va. Code §§ 11-1A-21(b) and (e). Any work performed by the Tax Commissioner shall be paid

for by the various county commissions. *See* W. Va. Code § 11-1A-21(h). Further, the 55 counties foot the bill to maintain the CAMA system.

The 55 county assessors control the CAMA files not the Tax Department. According to the legislative rules, only the county assessors can input county data into the CAMA files. Only the county assessors can update that county's data.

*5.2.1. Each assessor shall enter all changes in the description, status, classification and value of real property and personal property situated in his or her county. All changes shall be entered no later than the calendar month following the month during which the changes occurred. All changes when entered are to be communicated to the statewide server via the statewide network to the Tax Commissioner on a daily basis. If a county assessor chooses to install in his or her respective county a server upon which the real property and personal property appraisal and assessment data resides, all changes entered shall be communicated to the statewide server via the statewide network on no less than a weekly basis on a day and time designated by the Tax Commissioner.*

*5.2.1.a. Only county assessors have authority to change information relating to property and accounts in their respective county.*

W. Va. Code R. §§ 110-2-5.2.1 and 5.2.1.a. (emphasis added).

The Tax Commissioner's role is limited to coordinating activities to assure the availability of suitable facilities for network operation. *See* W. Va. Code R. § 110-2-3.

*5.1.3. The State Tax Commission may not change certain county data such as prior assessed values. Data errors detected by the State Tax Commission through edits shall be forwarded to the respective county assessor who in turn shall correct the erroneous information.*

W. Va. Code R. § 110-2-5.1.3.

The Tax Commissioner is expressly prohibited from changing county data. If the Tax Commissioner discovers a data error, the Property Tax Division cannot correct the error. Only the individual county assessor can correct the error. Furthermore, only county assessors have the authority to access and alter their own county's data.

6.1.3. Assessors. -- Assessors in one county shall not be able to access information on properties located in another county without the written permission from the assessor of the county in which the property is located. In no event may assessors in one county change information on properties located in another county.

W. Va. Code R. § 110-2-6.1.3. For example, the Wood County Assessor cannot even look at Raleigh County data without first obtaining the **written permission** of the Raleigh County Assessor.

In short, the statewide network of CAMA files is analogous to a digital file cabinet. The Tax Commissioner merely owns the file cabinet and stores the county files for the use of the counties; only the individual county assessors can collect, maintain and change the content of 99% of the CAMA files.

A review of the component parts of the statutory definition is essential. The valuation of property for ad valorem tax purposes by the assessing officer clearly falls within the public's business. Correspondingly, the underlying data is critical to the smooth, efficient operation of the assessment process. The electronic version of the data clearly falls with the definition of a writing in W. Va. Code § 29B-1-4(a)(5).

Nevertheless, the writing must be **prepared, owned, and retained** by the public body for FOIA purposes. The FOIA statute does not define those three terms; however, this Court has analyzed the terms in previous cases. In Syl. Pt. 2, *Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 700 S.E.2d 805 (2010), this Court concluded that the term public record includes any document in the possession of a public body regardless of whether the document was prepared by, on behalf of, or at the request of the public body. Therefore, the writings need not be prepared by or owned by the public body. The CAMA files would easily fall within the Court's view of writings prepared or owned by public bodies.

Nevertheless, the Tax Department does not **retain** the document under the parameters

adopted by this Court in an earlier case. In the case of *Daily Gazette Company, Inc. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986),<sup>20</sup> the Supreme Court reviewed the issue of whether the Kanawha County Sheriff's Office retained a public record. In *Withrow*, the Charleston Gazette requested the Sheriff's Office to produce a settlement agreement related to a civil rights action against the Sheriff of Kanawha County. *Withrow*, 177 W. Va. at 113, 350 S.E.2d at 740. The Sheriff denied the request on the ground that the settlement agreement was in the possession of the Sheriff's private attorney and the attorney for the insurance company. *Withrow*, 177 W. Va. at 113-14, 350 S.E.2d at 741. In effect, *Withrow* argued that the settlement agreement was not retained by his office. The Supreme Court rejected Sheriff *Withrow*'s argument and stated:

Lack of possession of an existing writing by a public body at the time of a request under the State's Freedom of Information Act *is not by itself determinative* of the question whether the writing is a "public record" under W.Va.Code, 29B-1-2(4), as amended, which defines a "public record" as a writing "retained by a public body." *The writing is "retained" if it is subject to the control of the public body.*

Syl. Pt. 3, *Withrow, supra* (emphasis added).

Sheriff *Withrow* lacked possession of the public record but had control over the document and access to the document. Control over a public record is far superior to possession of a document or lack thereof. The Tax Department is in the opposite position from Sheriff *Withrow*. The Tax Department has mere possession of the public records - the CAMA files for the 55 counties. While the files are physically located in the Tax Department's server, the Tax Department has no

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<sup>20</sup>Subsequently, Syllabus Point 6 of *Withrow* was superceded by an amendment to W. Va. Code 29B-1-7 on the issue of awarding attorneys fees and costs. This Court officially recognized the statutory amendment and overruled *Withrow*, by implication, on that issue in *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W. Va. 51, 62 n.9, 521 S.E.2d 543, 554 n.9 (1999).

meaningful control of the data with the exception of industrial property.<sup>21</sup> As noted above, the Tax Department cannot enter, update, or manipulate the data in the CAMA files. The Tax Department cannot disclose a county's CAMA file without that county's written permission. The Tax Department cannot even allow the Ritchie County Assessor to peak at the Ohio County's CAMA file without the Ohio County Assessor's **written permission**.

To adopt Petitioner's argument would be contrary to W. Va. Code §§ 11-1A-21 and 11-1A-23 as well as the express terms of the legislative rule quoted above, W. Va. Code R. § 110-2-6.1.3, which prohibits assessors from one county having access to another county's CAMA files. If this Court were to adopt Petitioner's argument, then the Court must also strike down W. Va. Code R. § 110-2-6.1.3. According to Petitioner's argument, the Mason County Assessor could simply submit a FOIA request to the Tax Commissioner for the CAMA files for all 55 counties, and receive the files. Such an outcome repeals the clear language of the legislative rule quoted *supra*.

The Tax Department correctly denied the FOIA request for the CAMA files. While it has possession of the files, it does not control access to or the content of the underlying data. Nor can the Tax Department give anyone access to Wirt County's CAMA file without the written approval of the Wirt County Assessor.

**J. THE PUBLIC DOMAIN DOCTRINE IS INAPPLICABLE IN THIS MATTER BECAUSE THE PETITIONERS HAVE FAILED TO SHOW THAT THE PREVIOUSLY RELEASED INFORMATION IS IDENTICAL TO THAT WHICH THEY ARE CURRENTLY REQUESTING.**

The Petitioners assert that the circuit court was erroneous in failing to apply the Public

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<sup>21</sup>As stated *infra*, the Tax Commissioner will not release any CAMA files, including those pertaining to industrial property, to anyone other than the taxpayer without the assessor's express authorization.

Domain Doctrine. Specifically, the Petitioners assert that the Tax Commissioner and assessors have previously released records similar to those requested by the Petitioners in this matter. The Petitioners' argument fails because the public domain doctrine only applies when there has been a showing that the previously disclosed information is identical to information that is already publicly available.

Under the public domain doctrine, information exempt from disclosure under the Freedom of Information Act may not be withheld if it was previously disclosed and preserved in a permanent public record. *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Engineers*, 722 F. Supp.2d 66, 72 (D.D.C. 2010). The public domain exception only requires release of information that is *identical* to the information that is publically available. *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (emphasis added). In *Davis*, the presiding court determined that the requesting party "has the burden of showing that there is a permanent record of the *exact* portions he wishes." *Id.* at 1280 (emphasis added). "FOIA plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain . . ." *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C.Cir.1993) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1129 (D.C.Cir.1983)).

In the matter before this Court, the Petitioners have failed to show that the previously released information is identical to that which they are currently seeking. Rather, they are seeking a broad disclosure of all "CAMA files for all real property in all counties." App. 24-30. In their brief to this Court, the Petitioners assert that the information requested is merely "in the same form." Pet'rs' Br. 35. Furthermore, as acknowledged by Petitioners not all counties have disclosed or made their CAMA files available. Additionally, some of the counties who have disclosed the CAMA data

have restricted disclosure and some have not produced all information requested. Thus, the Petitioners' sweeping request does not fall within the realm of the public domain doctrine and the circuit court did not rule improperly in failing to apply the doctrine.

**K. THE TAX COMMISSIONER DID NOT WAIVE EXEMPTIONS IN RESPONSE TO THE FOIA REQUEST BECAUSE THE TAX COMMISSIONER WAS NOT THE "CUSTODIAN" OF THE APPLICABLE RECORDS AND THE WAIVER ARGUMENT TENDERED BY THE PETITIONERS IS LEGALLY FLAWED.**

The Petitioners assert that the Tax Commissioner failed to timely assert exemptions in response to the FOIA request.<sup>22</sup> This argument fails for two reasons. As discussed *supra*, the Tax Commissioner is not the "custodian" of the requested records; therefore, he had no duty to comply with the requirements imposed upon a custodian under the West Virginia Freedom of Information Act. Secondly, the waiver argument advanced by the Petitioners is legally flawed. Specifically, the Petitioners based their waiver argument solely upon a holding by the Commonwealth Court of Pennsylvania that was recently overturned by the Pennsylvania Supreme Court. *See Signature Information Solutions, LLC v. Aston Tp.*, 995 A.2d 510 (Pa. Cmwlth. 2010) (abrogated by *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013)). In *Levy*, the Supreme Court of Pennsylvania concluded that the state senate, by asserting only attorney-client privilege as a basis for partially denying a Right-to-Know Law request, did not waive other bases. The Pennsylvania Supreme Court

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<sup>22</sup>In their heading to Section K, the Petitioners assert that the Circuit Court erred in allowing the Kanawha County Assessor to intervene in this case. However, the Petitioners did not address this argument or cite to any relevant legal authority in the body of their brief. Nonetheless, the Tax Commissioner maintains that Kanawha County Assessor's intervention was proper and in accord with all relevant rules and laws.

In this matter, Assessor Gatson's Motion for Intervention was timely filed and did not impair or delay the resolution of the case. A review of the additional factors in W. Va. R. Civ. P. 24(a)(2) shows that the Kanawha County Assessor had a direct and substantial interest in the outcome of the case inasmuch as the Assessor is the sole custodian of the CAMA files in Kanawha County.

concluded that the adoption of the *Signature Information* Rule undermines the specific legislative intent to shield these documents from disclosure, merely as a consequence of an open records officer's failure to list a legitimate reason for nondisclosure on the agency's initial written denial. *Id.* at 382. The Petitioners cite no additional authority.

In accord with *Levy*, requiring the Tax Commissioner to list every possible reason for denial (if he were in fact the custodian of the requested documents) would be adverse to the legislative intent to shield certain documents from disclosure. While the Petitioners assert that the Tax Commissioner's failure to give an exhaustive list of reasons for denial would make a mockery of the FOIA process, their position is without legal support. Moreover, the Petitioner's assertion of waiver asks this Court to make new law applicable retroactively. This Court should not accept Petitioners' invitation for the additional reason that the Tax Commissioner made a legitimate response. Assuming, *arguendo*, that this Court were to disagree with the Tax Commissioner on the custodian question, our citizens' right to privacy should not be overlooked as suggested by Petitioners.

In conclusion, the Tax Commissioner did not fail to timely assert exemptions in response to the FOIA request because the response requirements were not triggered as he was not the custodian of the applicable records. Additionally, the Petitioners' legal argument regarding waiver of exemptions is flawed as it is based upon law that has been abrogated.

**L. PETITIONERS' ATTEMPT TO RE-ARGUE THEIR DISAGREEMENT WITH THE CIRCUIT COURT'S ORDER MUST FAIL.**

Petitioners' argument adds nothing in support of their position. Nothing contained in this argument expands disclosure under West Virginia Code § 11-1A-23 to encompass the information contained in the CAMA files. Furthermore, nothing addresses the reason why they seek the CAMA

files so that their purpose could be weighed against the invasion of privacy that West Virginia citizens would experience. Additionally, the fact that Petitioners are not West Virginia citizens or taxpayers makes a difference. Because Petitioners are not citizens or taxpayers of this State, they lack standing to invoke the right to obtain information under FOIA.

**M. BECAUSE PETITIONERS SEEK PERSONAL INFORMATION REGARDING MOST WEST VIRGINIA CITIZENS, THE CIRCUIT COURT CORRECTLY FOUND THEIR BUSINESS PURPOSE RELEVANT.**

The fact that Petitioners own no real or personal property in West Virginia and have no West Virginia appraisal or real estate license (App. 327, 331, 332) is a relevant consideration in this matter for a number of reasons. These facts as well as Petitioner's commercial business purpose had to be weighed by the circuit court to determine whether the intended use of the information outweighed the intrusion to the privacy of West Virginia citizens. *Cline, supra*. Furthermore, contrary to the authorities presented by Petitioners on this point, Syl. Pt. 2, *Cline, supra* and disclosure under W. Va. Code § 29B-1-4(a)(2) is governed by West Virginia law which balances the invasion of privacy against the governmental purpose. Additionally, as discussed *supra*, the Petitioner's lack of West Virginia property, professional licenses, and a business license establish that they are not entitled to any information under FOIA because they are not seeking the information to hold their public official accountable.

V.

**CONCLUSION**

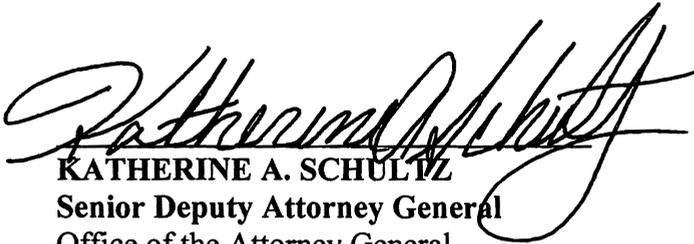
Based upon the foregoing, the Tax Commissioner respectfully requests that the Kanawha County Circuit Court's Order be affirmed.

**Respectfully submitted,**

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TAX COMMISSIONER,**

**By counsel**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0217

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

*Plaintiffs Below, Petitioners,*

v.

**MARK W. MATKOVICH,  
ACTING STATE TAX COMMISSIONER,  
WEST VIRGINIA STATE TAX DEPARTMENT,**

*Defendant Below, Respondent,*

and

**SALLIE ROBINSON,  
KANAWHA COUNTY ASSESSOR,**

*Intervenor Below/Respondent.*

**CERTIFICATE OF SERVICE**

I, Katherine A. Schultz, Senior Deputy Attorney General, do hereby certify that a true and accurate copy of "*Brief of Respondent Mark W. Matkovich Acting State Tax Commissioner*" was served upon counsel for all parties by placing into the U.S. mail, postage prepaid, this 10th day of July, 2013, addressed as follows:

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