

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 13-0217**

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

Plaintiffs below, Petitioners,

v.

Civil Action No. 11-C-1762  
(Hon. Charles E. King, Judge)

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

Defendant below, Respondent,

and

**PHYLLIS GATSON, Kanawha County Assessor,**

Intervenor.

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

**APPEAL BRIEF**

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### III. ASSIGNMENTS OF ERROR

**ASSIGNMENT OF ERROR NO. 1:** The Circuit Court erred in failing to consider or address the applicability of *W. Va. Code* § 11-1A-23, governing the confidentiality of appraisal records: “That nothing herein shall make confidential the itemized description of the property listed[.]”

**The Issue:** A specific statute addresses the confidentiality of the itemized description of real property, and such records are specifically determined by statute to be “not confidential.”

**Why the Court Should Address the Issue:** The Circuit Court did not apply the clause in *W. Va. Code* § 11-1A-23 directing that the itemized description of property is not confidential.

**ASSIGNMENT OF ERROR NO. 2:** The Circuit Court erred in failing to consider or address the threshold question for application of the privacy exemption under FOIA, which requires the government to prove first that the information in the requested records are, “detailed Government records on an individual which can be identified as applying to that individual.’ [citation omitted]” *Id.*, 456 U.S. at 602, 102 S.Ct. at 1961, 72 L.Ed.2d at 364.” *Hechler v. Casey*, 175 W. Va. 434, 444, 333 S.E.2d 799, 809 (1985). Because of this error, the Circuit Court improperly concluded the disclosure of the itemized description of real property in the CAMA database would result in an unreasonable invasion of privacy.

**The Issue:** Itemized descriptions of real property are not records “on an individual which can be identified as applying to that individual.” Rather, they are real property appraisal records describing the characteristics of property, not individuals, and a person’s ownership of real property is hardly a fact bound to cause a person or a corporation embarrassment or scorn. Government records describing real property, such as number of rooms in a house, square footage, *etc.*, are not information of a “personal nature such as that kept in personal, medical or

similar file.”

**Why the Court Should Address the Issue:** The Circuit Court failed to address the threshold question for applying the privacy exemption, and instead went straight to the “balancing test.”

Because the answer to the threshold question is that the records describe property and not people, no privacy issue is extant and the Circuit Court should not have addressed the balancing test.

Descriptions of real property form the underlying basis for the calculation of the total amount of an assessment, and thus the amount of tax levied upon the property. Without this information, citizens cannot make an informed, independent analysis of the fairness and efficiency of the property tax assessment function.

**ASSIGNMENT OF ERROR NO. 3:** The Circuit Court erred in failing to consider or address the fact that the many other courts that have addressed whether information about real property obtained in the appraisal process is public have held that there is no privacy interest at stake in the requested public records.

**The Issue:** Whether the Circuit Court should ignore all caselaw from around the country holding that property tax appraisal records are public records, and not private or exempt.

**Why the Court Should Address the Issue:** Precedent from around the country holds that these kinds of records are public and no privacy exemption applies.

**ASSIGNMENT OF ERROR NO. 4:** The Circuit Court erred in failing to consider or address the fact that neither the Tax Commissioner nor the Intervener ever identified a single record that allegedly contained exempt information, and failed to support their assertions of exemptions with a *Vaughan* Index.

**The Issue:** A public agency asserting an exemption in FOIA litigation must create and,

“**must** produce a *Vaughn* index[.] The *Vaughn* index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under W. Va.Code, 29B-1-4 is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. [ . . . ] The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt[.]”

*Syllabus* Point 6, in part, of *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004).

**Why the Court Should Address the Issue:** The Circuit Court made findings and conclusions about the information without examining any records purported to be exempt because the Tax Commissioner never produced any such records or a *Vaughan* Index. The exemption assertions should be deemed waived for failure to comply with *Syllabus* Point 6 of *Farley v. Worley*.

**ASSIGNMENT OF ERROR NO. 5:** The Circuit Court erred in concluding that disclosure of the requested public records in the CAMA database, “contains substantial information of a personal nature,” based on records petitioners specifically stated they did not want.

**The Issue:** Petitioners expressly stated they did not want most of the kinds of information the Tax Commissioner and Intervener asserted were subject to the privacy exemption.

**Why the Court Should Address the Issue:** A court can not rely on records a requester does not want in order to find that *all* of the records requested are exempt.

**ASSIGNMENT OF ERROR NO. 6:** The Circuit Court erred in relying on affidavits containing hearsay, conclusory statements and improper descriptions and interpretations of records that were not made exhibits to the affidavits, and because of that error, the Circuit Court erred in finding (a) the requested records include information given with an “expectation” of confidentiality; (b) the requested records are stored in such a way with private information being contained in

different fields that it is extremely impractical and prohibitively expensive to redact such data; and (c) the requested records include trade secrets and homeland security risk associated information. The Circuit Court compounded these errors by failing to view the evidence in a light most favorable to petitioners.

**The Issue:** Affidavits filed in opposition to a motion for summary judgment must present evidence in substantially the same form as if the affiant were testifying in court, may not be based on hearsay, and conclusory statements set forth in affidavits must be disregarded. Affidavits that purport to interpret or describe a document's substance without making the document an exhibit is insufficient. The Circuit Court failed to apply *W. Va. Code* § 11-1A-23, which governs the confidentiality of the tax appraisal records: "That nothing herein shall make confidential the itemized description of the property listed[.]" The Circuit Court also relied solely on two inadmissible affidavits, one of which was inadmissible hearsay, and the other of which was conclusory. Moreover, neither the Tax Commissioner nor the Assessor ever identified a single specific field of data in the CAMA database that contains private information, and neither the Tax Commissioner nor the Intervener asserted the trade secret or homeland security exemptions in their Answers. The basis for the Circuit Court's "finding" on the trade secret and/or homeland security risk exemption was a conclusory and hearsay affidavit statement that does not even state the vague information was included in the CAMA database. Finally, Rule 56 requires a court to view all evidence in a light favorable to the non-moving party, which the lower court did not do.

**Why the Court Should Review the Issue:** A summary judgment order must be reversed if it is based on inadmissible or incomplete evidence, such as hearsay or conclusory statements, and neither the Tax Commissioner nor the Assessor supplied admissible material evidence to meet

their burden of proving the information could not be redacted, and neither the Tax Department nor the Assessor met their burden of proving the CAMA data requested included trade secrets or homeland security risks. Moreover, the trial court got the Rule 56 standard backwards. It ignored the evidence (or caselaw) put forward by Petitioners. The trial court did not reject any evidence of Petitioners, it just ignored *all* of it, and adopted respondent's and Intervener's arguments and assertions wholesale.

**ASSIGNMENT OF ERROR NO. 7:** The Circuit Court erred in relying on testimony in a Jefferson County case from the year 2000.

**The Issue:** The Circuit Court's reliance on alleged testimony recounted in the 2000 Jefferson County Order is inadmissible hearsay and violates petitioners' due process rights. Additionally, it violates rules of judicial notice. None of the parties here were parties to that case.

**Why the Court Should Address the Issue:** *Syllabus* Point 8, *Conley v. Spillers*, 171 W. Va. 584, 586, 301 S.E.2d 216, 218 (1983) ("A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim."). The Petitioners were not parties to that case, and the testimony cited from that order is nothing more than inadmissible hearsay that must be disregarded by the Court. Petitioners point out that the evidence is undisputed that Jefferson County has since disclosed its property appraisal information and it is available online publically through the private party, Spec-Print.

**ASSIGNMENT OF ERROR NO. 8:** The Circuit Court erred in failing to find that the Tax Commissioner is the custodian of the CAMA records.

**The Issue:** The sole basis the Tax Department gave for denying the FOIA request was that it was

not the custodian of the CAMA information. The Court refused to address that issue.

**Why the Court Should Review the Issue:** This was the only basis for the denial of the FOIA request, and the Tax Commissioner admits he has possession of the requested records.

**ASSIGNMENT OF ERROR NO. 9:** The Circuit Court erred in refusing to consider or address the application of the public domain doctrine.

**The Issue:** Both the State Tax Commissioner and the Kanawha County Assessor previously disclosed records identical to those requested here, but now they assert a privacy exemption. Because these records already were made available in the public domain through disclosure to third parties, the public domain doctrine bars Respondent and Intervener from censoring who may see these records by selectively asserting an exemption over identical records.

**Why the Court Should Address the Issue:** As stated in *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Engineers*, 722 F. Supp. 2d 66, 72 (D.D.C. 2010), once a public agency has released allegedly exempt information, the FOIA exemptions do not apply because the information already is in the public domain.

**ASSIGNMENT OF ERROR NO. 10:** The Circuit Court erred in failing to find that the Tax Commissioner failed to timely assert any exemptions in response to the FOIA request and therefore such exemptions are waived, and in allowing the Kanawha County Assessor to intervene in this case.

**The Issue:** *West Va. Code* § 29B-1-3(4) mandates that the custodian of records must within five days of the records request either (a) provide copies; (b) advise the requestor of a time and place for inspection and copying of the records; or (c) “Deny the request **stating in writing the reasons for such denial.**” (Emphasis added). The trial court relied on new “reasons” not

asserted as required by statute, and allowed a subordinate to the Tax Commissioner (the Assessor) to intervene and assert that same rationale. Petitioners never made a FOIA request to the Kanawha County Assessor, and there is no precedent for one government agency to intervene in a FOIA case where the FOIA request was made to a different government official.

**Why the Court Should Address the Issue:** The Tax Commissioner had a mandatory duty to state the reasons for the denial, in writing, within five days of the records request. He never asserted an exemption until much later, after this lawsuit was filed. Other jurisdictions hold untimely assertions of an exemption constitute waiver of the exemption. Further, the Assessor did not meet the standard for intervention, and a FOIA plaintiff should not be forced to go through the expense of litigating against multiple government agencies arguing identical points.

**ASSIGNMENT OF ERROR NO. 11:** The Circuit Court erred in finding that the CAMA records are available from an alternative source.

**The Issue:** The statewide CAMA records requested are not part of the assessment files.

**Why the Court Should Review the Issue:** The Court wrongly found the information in the CAMA records requested were available publically in the assessment files when they are not.

**ASSIGNMENT OF ERROR NO. 12:** The Circuit Court erred in finding that Petitioners ownership, business and purpose were relevant to the Tax Commissioner's duty to disclose the requested records.

**The Issue:** The individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed:

“It is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed. All requesters are considered to have equal

rights of access.”

*United Technologies Corp. by Pratt & Whitney v. F.A.A.*, 102 F.3d 688, 690-91 (2d Cir. 1996).

**Why the Court Should Review the Issue:** Whether a public record is exempt under FOIA depends on the nature of the record, not the individuating circumstances of the requestor.

#### IV. STATEMENT OF THE CASE

This is a case under the West Virginia Freedom of Information Act, *W.Va. Code* § 29B-1-5 (“FOIA”), seeking disclosure of public records, consisting of all “CAMA files for all real property in all counties.” “CAMA” is an acronym for Computer-Assisted Mass Appraisal, and refers to the statewide electronic data processing system network for property tax administration the Tax Commissioner devised and caused to be established. *W.Va. Code* § 11-1A-21(a). Article 1A of Chapter 11 goes on to declare that the itemized description of real property (with one exception<sup>1</sup>) is **not** confidential: “[Nothing herein shall make confidential the itemized description of the property listed[.]” *W.Va. Code* § 11-1A-23(a). Despite this clear declaration of non-confidentiality of the records requested, the Tax Commissioner refuses to release the CAMA real property records.

The State Tax Department’s position in refusing to release the requested CAMA records hardly is a bastion of consistency. Indeed, almost half of West Virginia’s counties make county CAMA information publically available online. App. at 495-628; 682-96. Similarly, the Kanawha County Assessor (“Assessor”) intervened in this case to support nondisclosure, yet for many years she sold Kanawha County’s CAMA records to a third party (App. at 497-502) who

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<sup>1</sup> The lone exception to the statute is the itemized description of burglar alarms and similar security systems. Petitioners have specifically stated they do not want that information. App. at 784, 811-12.

even today makes those records publically available online. App. at 504-05; 511-12. The Assessor never has explained why Kanawha County's CAMA records were disclosed and not declared exempt when she signed yearly contracts to sell it to a third party vendor, but somehow became exempt when Petitioner requested it under FOIA from the Tax Department.

Discovery in this case revealed the Tax Commissioner's inconsistent position. He produced documents showing the Tax Department regularly has provided CAMA real property records identical to those requested here to private third parties who then make those records available to the Public online, so long as a particular county assessor approves. However, when Petitioner was the records requestor, and not until after this lawsuit was filed, the Tax Commissioner asserted *all* CAMA records are subject to FOIA's privacy exemption.<sup>2</sup>

This case was precipitated by Petitioners' FOIA request to the State Tax Department in May of 2011. By letter delivered May 16, 2011, addressed to Jeffrey A. Amburgey (Director of the Property Tax Division of the State Tax Department), Petitioners requested, *inter alia*, "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. at 24-30.

In response, by letter dated May 27, 2011, addressed to Petitioners, General Counsel for Revenue Operations Mark S. Morton agreed to disclose "assessment files," but refused to disclose the requested "CAMA files for all real property in all counties." App. at 32-33. Mr.

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<sup>2</sup> The Tax Commissioner's convoluted explanation for why he releases the CAMA records without asserting any FOIA exemption when a county assessor approves the disclosure lies in his position that, even though he is charged by statute with collecting from assessors and keeping all CAMA records on a statewide database network, that he somehow is not the "custodian" of the CAMA records. His narrow definition of "custodian" differs sharply from the broad statutory definition of "custodian" in FOIA. *W.Va. Code* § 29B-1-2 (1) ("Custodian" means the elected or appointed official charged with administering a public body.").

Morton wrote that the Tax Department would not disclose the requested public records on the basis that the Tax Commissioner was not the “custodian” of the requested records, even though the Tax Department had the requested public records in its custody. *Id.* Mr. Morton explained the Tax Department’s refusal to disclose the requested records as follows:

“To the extent that you seek copies of the “CAMA files for all real property in all [of the] counties [in West Virginia],” your request is **denied**. The Tax Commissioner is not the custodian of those particular records. Under the West Virginia Freedom of Information Act, requests for information must be directed to the custodian of the public records sought. W.Va. Code §29B-1-3(2). 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. . . . You are advised that the Freedom of Information Act affords you the opportunity to seek injunctive or declaratory relief in the Circuit Court of Kanawha County.”

*Id.*

By letter dated June 21, 2011, Petitioners asked the Tax Commissioner to reconsider the denial. App. at 35. By letter dated July 1, 2011, the Tax Commissioner, by his General Counsel Mr. Morton, stated that Defendant again was denying the request:

“The Tax Department *denies* your request for reconsideration of the determination issued on May 27, 2011[.] Any appeal of a determination made by the West Virginia State Tax department in response to a Freedom of Information Act response lies with the Circuit Court of Kanawha County, West Virginia.”

App. at 37.

When a records custodian denies a FOIA request, *W.Va. Code* § 29B-1-3 requires the custodian to, within five days, “stat[e] in writing the reasons for such denial.” However, at the time of his response to Petitioners’ FOIA request, the Tax Commissioner did not assert any FOIA

exemption (e.g., the “invasion of privacy” exemption under *W.Va. Code* § 29B-1-4(a)(2)). The failure to cite that exemption was unsurprising, because that rationale would have been inconsistent with the November 23, 2009 letter of Jeffrey A. Amburgey, the Director of the Property Tax Division of the State Tax Department, directed to all county assessors in the State of West Virginia stating the Tax Department’s position that appraisal records are not confidential unless specifically protected from disclosure by statute:

“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 [by] statute. [ . . . ] Many county assessors freely disclose most appraisal data or ask that the Tax Department do so on their behalf.”

App. at 39.

On October 5, 2011, Petitioners filed the Complaint in this case. App. at 1-6. Petitioners filed a Motion for Summary Judgment on December 29, 2011. App. at 11-34. This Court held a hearing on Petitioners’ Motion for Summary Judgment on January 11, 2012. App. at 146-68. At the hearing, the Court allowed the Tax Commissioner additional time to file his own Rule 56 motion. *Id.* at 165. However, the Court specifically directed that the parties could *not* engage in deposition discovery. *Id.* at 163-68. Thereafter, the Kanawha County Assessor moved to intervene, and the lower court granted the motion. App. at 176-207.

Per the Court’s direction, both the Tax Commissioner and Assessor filed cross-motions for summary judgment in June, 2012. App. at 209-401. The Assessor untimely supplemented her motion thereafter. App. at 402-11. The parties filed responses and replies (App. at 454-776), and the Court entertained oral argument on the summary judgment motions at a hearing held on September 24, 2012. App. at 777-817. On January 14, 2013, an Order was entered denying

Petitioner's motion for summary judgment, and granting the cross-motions for summary judgment of the Tax Commissioner and Assessor. App. at 818-36. Petitioners then timely noticed this appeal.

## V. SUMMARY OF ARGUMENT

To summarize Petitioner's argument, a paramount consideration in West Virginia's Freedom of Information Act requires courts to construe requests for public records liberally. Moreover, *W.Va. Code* § 11-1A-23(a) states that confidential property tax return information supplied pursuant to Article 1A ("Appraisal of Property") of Chapter 11 ("Taxation") specifically **does not include** "the itemized description of the property listed[.]" Both the Tax Commissioner and the Assessor have released these exact same kind of records many times in the past. Petitioners are unaware of a property tax jurisdiction anywhere else in the Country who has attempted to censor records of the type requested. Petitioners have in fact gathered such records from thousands of jurisdictions nationally, and relevant caselaw consistently holds that individuals do not have a privacy interest in the itemized description of real property. For all of the reasons stated herein, the order of the lower court should be reversed, and this case remanded with directions to enter an order directing disclosure of the requested records.

## VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary because (1) the parties have not waived oral argument; (2) the appeal is meritorious; (3) the dispositive issues have not been addressed in West Virginia; and (4) oral argument would significantly aid the decisional process. The criteria for Rule 20 argument is satisfied because the case raises a number of issues of first impression, and there are inconsistencies or conflicts among decisions of lower tribunals. *W. Va. R. App. P.* 20(a).

## VII. ARGUMENT

This Court consistently has held FOIA's disclosure provisions must be construed liberally in favor of disclosure, and its exemptions must be strictly construed against non-disclosure:

“[i]n addition to setting forth a clear statement of the public policy behind the Act, the Legislature also guided us in how to interpret disputes arising under that Act when it mandated that ‘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. We recognized this mandate of liberal construction in Syllabus Point 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985), where we held that:

‘The disclosure provisions of this State's Freedom of Information Act, W.Va. Code, 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va. Code, 29B-1-1 [1977].’”

*Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 700 S.E.2d 805, 810 (2010). *Accord* Syl. Pt. 4, *In re Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008); Syl. Pt. 4 *Farley*, 215 W. Va. 412, 599 S.E.2d 835. Additionally:

“Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”

*Farley*, 215 W. Va. at 420, 599 S.E.2d 835.

Indeed, “[t]he general policy of the [WVFOIA] act is to allow as many public records as possible to be available to the public.” *AT & T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia*, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (footnote omitted)). Said another way, “the following two salient points must be remembered in any FOIA case, regardless of which exemption is claimed to be applicable. First, the *fullest responsible disclosure*, not confidentiality, is the dominant objective of the Act.” *Ogden*

*Newspapers v. City of Williamstown*, 192 W. Va. 648, 654, 453 S.E.2d 631, 637 (1994) (quoting *Hechler v. Casey*, 175 W.Va. at 445, 333 S.E.2d at 810 (1985)) (emphasis in original). This Court has issued numerous decisions emphasizing, “[t]he disclosure provisions of this State’s Freedom of Information Act . . . are to be liberally construed, and the exemptions . . . are to be strictly construed.” *Syl. Pt. 4, Hechler v. Casey*, 333 S.E.2d 799 (W.Va. 1985) (citations omitted). The Court consistently has emphasized in its WVFOIA cases that the:

“liberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.”

*Id.*, 333 S.E.2d at 808. Even if there was an ambiguity, this Court must construe FOIA’s disclosure provisions liberally. This rule of construction is not and should not be treated as a mere platitude, and liberal construction of FOIA leads inexorably to the conclusion that the Tax Commissioner must disclose the public records requested by the Petitioners.

**A THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER OR ADDRESS THE APPLICABILITY OF *W. VA. CODE* § 11-1A-23, WHICH GOVERNS THE CONFIDENTIALITY OF THE TAX APPRAISAL RECORDS: “THAT NOTHING HEREIN SHALL MAKE CONFIDENTIAL THE ITEMIZED DESCRIPTION OF THE PROPERTY LISTED[.]”**

The CAMA records requested by Petitioners are the itemized description of real property appraised in West Virginia. The answer to the question of whether such records are exempt from disclosure should be obvious because *W. Va. Code* § 11-1A-23(a) specifically states, “**nothing herein shall make confidential the itemized description of the property listed[.]**” which is precisely the CAMA records requested by Petitioners.<sup>3</sup> Inexplicably, the lower court failed to

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<sup>3</sup> The lone exception to *W. Va. Code* § 11-1A-23(a)’s declaration of non-confidentiality concerning the itemized description of real property is that the “specific

address or even mention this central argument of Petitioners. The Legislature spoke clearly that the information in the records requested by Petitioners, *i.e.*, itemized description of real property, is not confidential. Applying *W.Va. Code* § 11-1A-23 leads inexorably to the conclusion that the records requested are not confidential, and should have been released. This Court should hold, as a matter of law, that the itemized description of property, such as the CAMA records requested by Petitioners, is not confidential, and thus such records are not exempt under FOIA.

**B THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER OR ADDRESS THE THRESHOLD QUESTION FOR APPLICATION OF THE PRIVACY EXEMPTION UNDER FOIA, WHICH REQUIRES THE GOVERNMENT TO PROVE FIRST THAT THE INFORMATION IN THE REQUESTED RECORDS ARE, “DETAILED GOVERNMENT RECORDS ON AN INDIVIDUAL WHICH CAN BE IDENTIFIED AS APPLYING TO THAT INDIVIDUAL.”**

Both Tax Commissioner and Assessor assert the privacy exemption under FOIA allows nondisclosure of CAMA real property records, but neither they nor the lower court addressed (or  

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description” of burglar alarms or similar security systems are deemed confidential:

“(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: 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[.]”

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

even acknowledged) the threshold question for application of the privacy exemption under FOIA.

The threshold question to be answered before a balancing test can be considered is as follows:

“The threshold inquiry as to the type of information initially subject to this exemption turns [on whether the information in the records are] detailed Government records on an individual which can be identified as applying to that individual.’ [citation omitted]” *Id.*, 456 U.S. at 602, 102 S.Ct. at 1961, 72 L.Ed.2d at 364.”

*Hechler v. Casey*, 175 W. Va. 434, 444, 333 S.E.2d 799, 809 (1985).

The lower court ignored the threshold inquiry, and only considered only the “balancing test” articulated in *Syllabus Pt. 2 of Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986)). However, the *Cline* test does not apply because the CAMA real property records do not meet the “threshold test” under *Hechler v Casey, supra*. The *Cline* test is applied only if there is an existing, valid privacy interest in “detailed government records on an individual” - but here, the public records sought do not pertain to an individual – rather, they are records pertaining to real property, and public records identifying only characteristics of *real property*. As records with information on real property, they are not, and can not meet the threshold test of being, “detailed Government records on an individual.” Therefore, because the lower court failed to address the threshold inquiry, and because neither the Tax Commissioner nor the Assessor addressed (let alone met) their burden under this threshold inquiry for application of the privacy exemption, the trial court erred in granting summary judgment based on the privacy exemption in FOIA, and summary judgment should be reversed.

**C THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER OR ADDRESS THE FACT THAT MOST OTHER COURTS THAT HAVE ADDRESSED WHETHER RECORDS ON REAL PROPERTY OBTAINED IN THE APPRAISAL PROCESS ARE PUBLIC HAVE HELD THAT THERE IS NO PRIVACY INTEREST**

In his Motion for Summary Judgment, the *only* argument made by the Tax Commissioner identifying an alleged personal privacy interest was the conclusory statement in his brief that the exemption somehow applies to, “information about the number of rooms and the particular features of residential and commercial properties[.]” App. at 228. Such information is not exempt under the privacy exemption, and no other basis for asserting a privacy exemption was asserted.

As noted above, *W. Va. Code* § 11-1A-23 specifically states the itemized description of real property gathered in the appraisal process is not confidential. However, even if West Virginia law did not explicitly mandate that itemized listings of real property are not confidential, authority from other courts addressing this issue have held no privacy interest is extant in such public records. For example, the New Jersey Supreme Court in *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 48-49, 660 A.2d 1163, 1170 (1995), held that information about real property gathered in the appraisal process is of a “very public nature.” That Court further noted such information has, “historically been available to the public, and that do not give rise to expectations of privacy”:

“[P]laintiffs have the right to obtain computer copies of the tax-assessment lists. The computer tapes are common-law public records; plaintiffs have a legitimate interest in them; and defendants assert no interest whatsoever in keeping the computerized lists confidential. Initially, defendants claimed that release of certain information in computer form would risk unwarranted intrusion into the privacy of property taxpayers. Before this Court, defendants, represented by the Attorney General, have rescinded that argument. We find that, **given the very public nature of the**

**information in the lists, defendants properly chose not to pursue the confidentiality/privacy claim. The State has no interest in confidentiality: The lists contain simple, non-evaluative data that have historically been available to the public, and that do not give rise to expectations of privacy. See Szikszay v. Buelow, 107 Misc.2d 886, 436 N.Y.S.2d 558, 563 (Sup.Ct.1981) (requiring county to provide computer copy of property tax-assessment roll in part because of “the history of public access to assessment records”).”**

*Id.* (Emphasis added). See also *Szikszay v. Buelow*, 107 Misc. 2d 886, 894, 436 N.Y.S.2d 558, 563 (N.Y. Sup. Ct. 1981):

**“Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format.”**

(Emphasis added). And in *Gordon v. Sandoval County Assessor*, 130 N.M. 573, 577, 28 P.3d 1114, 1118 (N.M. 2001), the Supreme Court of New Mexico has held likewise:

**“We reject at the outset the Assessor's argument that the presence of any of the above information on a property card renders the entire card excepted from being a public record. Such a literal reading of the statute is, in our view, unreasonable and would effect a nullification of the statutes providing that valuation records are, in general, public.”**

(Emphasis added).

Similarly, in Kentucky, where the Attorney General determines disputes over the disclosure of public records, the law is that the same real property appraisal information Petitioners request here is not exempt from disclosure because it “is not of a personal nature.” 1989 Ky. AG 50, 6-7 (Ky. AG 1989). Indeed, Kentucky’s tax appraisal’s law, like *W.Va. Code* § 11-1A-23, mandates that such information is an open public record:

**“Information regarding the location of real property, its description, ownership history through time, and valuation history, as well as**

**information concerning the description and valuation of tangible personal property such as vehicles, watercraft, and mobile homes, are the principal types of information recorded upon the cards in question. Such information, in being factual information about property, rather than a person, is not of a "personal nature."** This is particularly so where the information (e.g., ownership, location, etc.) regarding that property is, in general, subject to recognized public recordation and routine public perusal - for example, in a deed book. Much of the property description information contained upon the cards in question is typically readily observable such as from a public street (number of stories, type of construction, etc.). What might be termed the major elements of concern, upon, or called for by, the cards in question, are the same elements that appear on the standard tax roll forms published by the Revenue Cabinet. The Tax Rolls, pursuant to KRS 133.047(1), are an 'open public record for five years.' If information is subject to routine public scrutiny under one statute (e.g., KRS 133.047(1)), that same information, in general, cannot be properly termed confidential pursuant to KRS 61.878(1)(a).

Because information concerning ownership, location, **description**, and valuation of real property and vehicles **is information regarding "property," rather than information regarding a person**, and because information of such character is subject to recognized public recordation and routine public perusal, **we find information of such character is not of a "personal nature" within the meaning of KRS 61.878(1)(a).**"

1989 Ky. AG 50, 6-7 (Ky. AG 1989) (emphasis added).

Tennessee, likewise through its Attorney General, holds that such information is public and not private. 1978 Tenn. AG 40 (Tenn. AG 1978) (“[A]ssessment roles [*sic*], property record cards, personal property tax return schedules [ . . . ] , tax maps, personnel records, and correspondence files [ . . . ] are public records and subject to public inspection[.]”). Attorneys General from Montana, North Dakota, Ohio and Missouri also have held property description and valuation records are public and not exempt under those states open records laws. These numerous reported cases and Attorney General opinions address the threshold inquiry of whether the records requested are subject to the privacy exemption, and unequivocally show that they are

not records about a person, not “personal” in nature, and not exempt under any privacy exemption. These many authorities stand in stark contrast to the fact that neither the Tax Department nor the Assessor presented *any* reported authority suggesting the requested records are personal or private.

Even if there was not a West Virginia statute on point showing the requested records are not confidential or private as a matter of law, the threshold inquiry necessary to assert a privacy exemption (*i.e.*, whether the CAMA real property records relate to individuals, as opposed to property) still could not be met. There was no reported caselaw cited by the lower court, nor argued below by the Tax Commissioner or Assessor, that suggests public records describing real property are personal or private to an individual, like medical records or a personnel file. Records like the CAMA files requested, describing and itemizing real property, are by their very nature not personal to any individual, and thus are not be subject to a privacy exemption. As addressed *infra*, at least twenty counties in West Virginia, and a number of States and the District of Columbia, make similar appraisal records available online. Those facts further show there is no privacy exemption for the requested records, and the Tax Commissioner can not meet this threshold inquiry for application of the privacy exemption. The fact that the lower court completely ignored reported caselaw supporting Petitioners position (while citing no caselaw to the contrary) provides further reason why the summary judgment order should be reversed.

**D      MANY WEST VIRGINIA COUNTIES, INCLUDING KANAWHA COUNTY, HAVE DISCLOSED THE SAME CAMA RECORDS SOUGHT BY PETITIONERS**

While the lower court refused to address or acknowledge it in his summary judgment order, it is undisputed and material that both the Tax Commissioner and the Assessor produced

CAMA real property appraisal records to other third parties many times in recent years. The Tax Commissioner routinely has released to third parties CAMA real property appraisal records for at least twenty (20) West Virginia counties, including: Berkeley, Brooke, Cabell, Calhoun, Gilmer, Greenbrier, Hampshire, Hancock, Jackson, Lincoln, Marion, Mason, Morgan, Marshall, Mercer, Mingo, Morgan, Ohio, Pocahontas, Preston, Raleigh, Wayne, Webster and Wood. App. at 495-628; 682-696. Both the Tax Department and Assessor on several occasions have released real property CAMA records to Spec-Print, a company that even today makes CAMA records for those counties available (for a price) to the public online. The Assessor, while providing those same CAMA real property records to Spec-Print, year after year, never asserted a privacy exemption under FOIA. App. at 497-502.<sup>4</sup>

Inexplicably, the lower court ignored the foregoing undisputed material facts, and made a finding (clearly disputed by Petitioners submissions) that, “[t]he Kanawha County Assessor considers this information to be confidential tax return information that cannot be disclosed pursuant to *W.Va. Code* § 11-1A-23(a).” App. at 822-23 (Order at ¶ 13). Because the Assessor several times released CAMA real property records to an online company who makes those records available online even today, the Court’s finding that the Assessor considers such records to be confidential is in clear and obvious dispute, and thus was improper under Rule 56.

If the fact that the Assessor released these same records to other private records requestors (without asserting any exemption) was not enough to show the facetiousness of her intervention and assertion of a privacy exemption, the fact that many other West Virginia

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<sup>4</sup> On at least three occasions, the Assessor gave the same CAMA records sought by Petitioners to Spec-Print. According to Spec-Print, its information on Kanawha County properties is current through the year 2011. App at 511-12.

counties disclose the CAMA real property records, either as a public service, or through Spec-Print and other third parties, should resolve any conceivable question about the public, non-private nature of these records. App at 495-628; 682-696. Interestingly, among the many counties that have disclosed their CAMA records through and to Spec-Print is Jefferson County, App. at 512, the same county the lower court cites as rationale for asserting *all* CAMA real property records are exempt from disclosure under the privacy exemption. The other counties that disclose CAMA records through and to Spec-Print and others, who makes those records available to the public online are: Berkeley, Calhoun, Gilmer, Greenbrier, Jackson, Mason, Lincoln, Marion, Morgan, Ohio, Preston, Wayne, Webster and Wood.<sup>5</sup> App. at 509-37.<sup>6</sup> Counties in West Virginia make their CAMA information available online include Brooke, Hampshire, Cabell, Greenbrier, Hancock, Jackson, Marshall, Mercer, Mingo, Ohio, Pocahontas, Raleigh and Wood. App. at 533-88; 594-97. The lower court in its summary judgment order simply ignored the fact that the CAMA real property records of these counties (including those in Kanawha County) already are available publically, over the Internet.

The fact both the Tax Commissioner and Assessor have many times released CAMA real property records, to other private parties, combined with the fact that at least 20 West Virginia counties make CAMA real property records available to the Public, is undisputed material evidence showing the CAMA real property records requested by Petitioners are not exempt under

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<sup>5</sup> Some, if not all of the CAMA real property records for these counties were released by the Tax Commissioner at the request the Assessors from those counties. While he may assert he disclosed those CAMA records only when the county Assessor requested, the undisputed fact remains that the Tax Department released and disclosed some of the same CAMA records for which it now is asserting a “privacy” exemption under FOIA.

<sup>6</sup> Numerous counties in other states likewise have disclosed these same kinds of records to Spec-Print, who makes them available online. App. at 511-12.

FOIA. The lower court failed to address those undisputed facts, and thus it erred by concluding CAMA real property records are personal, private and exempt under FOIA. Because there are genuine issues of material fact, summary judgment was unwarranted and should be reversed.

**E THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER OR ADDRESS THE FACT THAT NEITHER THE TAX COMMISSIONER NOR THE INTERVENER EVER IDENTIFIED A SINGLE RECORD THAT ALLEGEDLY CONTAINED EXEMPT INFORMATION, AND FAILED TO SUPPORT THEIR ASSERTIONS OF EXEMPTIONS WITH A VAUGHAN INDEX**

As noted above, many counties in West Virginia (including Kanawha County) have disclosed these CAMA real property records like those the Tax Commissioner is withholding. The Tax Department itself has disclosed (without asserting any exemption) CAMA real property records to third parties, including parties like Spec-Print, who then make the CAMA records available online. These records come from the Tax Department's CAMA computer system.

Under the law, the Tax Commissioner had the burden of proving *all* the CAMA records are exempt, and if he chooses to assert an exemption, he had the clear and specific obligation to detail each record he asserts is exempt from disclosure. Our Supreme Court is clear in holding that a public agency asserting an exemption in FOIA litigation must create and

**“must produce a *Vaughn* index[.] The *Vaughn* index **must** provide a relatively **detailed justification** as to why each document is exempt, specifically identifying the reason(s) why an exemption under W. Va.Code, 29B-1-4 is relevant and **correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies.** [ . . . ] The public body **must** also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt[.]”**

*Syllabus* Point 6, in part, of *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004) (emphasis added). The *Vaughan* Index obligation is mandatory and unambiguous.

Neither the Tax Commissioner nor the Assessor made any effort to address, let alone meet, this mandatory obligation to produce a *Vaughan* Index,<sup>7</sup> and it was reversible error for the lower court to completely ignore this requirement. There are hundreds of “fields” of information in the CAMA system. Each CAMA “field” correlates to a distinct, separate kind of information, be it number of rooms, square footage, *etc.* Neither the Tax Commissioner nor the Assessor ever identified a single “field” of CAMA real property data that contains exempt information. No detailed justification was given, nor was the claimed exemption correlated with the particular part of the withheld record to which the claimed exemption applies in a detailed *Vaughan* Index, as required by law.<sup>8</sup>

The lower court’s refusal to order the reasonable (and required) step of redaction, let

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<sup>7</sup> This Court has held that a public agency who asserts an exemption must explain the refusal to redact at the administrative stage (*i.e.*, at the time of the refusal to disclose the records):

“In 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. If the public body refuses to provide redacted or segregated copies because the process of redacting or segregating would impose an unreasonably high burden or expense, the public body must provide the requesting party a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds.”

*Syllabus* Point 5, *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004). The Tax Commissioner has never, either at the administrative stage, nor before the lower court, provided Petitioners with “a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds.”

<sup>8</sup> The fact that the Tax Commissioner has released CAMA real property data for many counties is evidence that the fields of data easily can be segregated from information in fields that include information that is not related to real property, such as profit and loss statements, trade secrets, nursing home stays and the like.

alone the required first step of identifying any allegedly exempt record(s) as required by law, provides additional reversible error.<sup>9</sup> If government agencies are allowed to get away with asserting exemptions in this nonspecific manner, the purpose of the *Vaughan* Index requirement will be emasculated, and records requestors never will be able to overcome exemptions.

**F THE CIRCUIT COURT ERRED IN CONCLUDING DISCLOSURE OF THE REQUESTED PUBLIC RECORDS IN THE CAMA DATABASE, “CONTAINS SUBSTANTIAL INFORMATION OF A PERSONAL NATURE,” BASED ON RECORDS PETITIONERS SPECIFICALLY STATED THEY DID NOT WANT**

Instead of first addressing the threshold inquiry of whether the CAMA real property records sought by Petitioners are “government records on an individual which can be identified as applying to that individual[.]” *Hechler v. Casey, supra*, 175 W. Va. At 444, 333 S.E.2d at 809, the Assessor argued, and the lower court accepted, that the Court should apply the privacy “balancing test” stated in *Child Protective Services v. Cline, supra*. Of course *Cline*, is inapposite – there was no dispute that the records at issue in *Cline* met the threshold test – they were explicitly exempt *medical* records, items that specifically fall within FOIA exemption 2 because they are “information of a personal nature such as that kept in personal, *medical* or similar file[.]” (emphasis added). That is not the case here, where the records are not “of a personal nature” like medical records – rather, they are descriptions of real property. Thus, because CAMA real property records are not “of a personal nature such as that kept in personal, medical or similar file,” the balancing test in *Cline* is not implicated.

The Assessor’s in her Motion for Summary Judgment identifies the allegedly “personal”

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<sup>9</sup> At a minimum, the Court should reverse summary judgment and remand the case and direct the lower court to instruct the Tax Commissioner and Assessor to comply with *Syllabus* Point 6 of *Farley v. Worley, supra*. Only if that occurs will Petitioners have a proper and fair opportunity to respond to the alleged exemption.

information as allegedly exempt under FOIA. App. at 365. The records she identified as a basis for the alleged privacy exemption were complete red herrings. Petitioners' response to those red herrings was to state affirmatively they were not requesting, wanting, or seeking any of the information identified as "personal" by the Assessor, and therefore her intervention was irrelevant and unnecessary. App. at 784, 811-12. 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 (discussing irrelevant photographs and "sketches" of buildings), 10 (discussing 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), 15 (discussing profit and loss statements), 17 (discussing photos and blueprints of commercial property), 18 (discussing photos, blueprints and trade secrets of chemical plants), 19 - 21 (discussing industrial property data), 36 and 38 (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).

As Petitioners explained in their response brief before the lower court, and through counsel at the summary judgment hearing, they do not want any of those records. Appendix at 784, 811-12. And yet, the lower court relied exclusively on those unwanted records to find that all of the other CAMA real property records actually sought by Petitioners were exempt under the privacy exemption. Simply put, the CAMA real property data includes hundreds of "fields" that do not include any of the items addressed by the court, and the lower court was clearly

wrong not to order the Tax Department to provide the information in those fields to Petitioners.<sup>10</sup>

The law requires disclosure of all records not exempt to be disclosed, and that records be redacted if necessary to preserve an exemption. The Assessor relied (and the lower court erroneously agreed) that records not requested, that are not even real property records, are exempt, in order to affirm the wholesale refusal to disclose *all* CAMA records. That conclusion is contrary to law, and ignores the fact that this Assessor on several occasions disclosed CAMA real property records to a third party. Because the lower court's summary judgment order relies exclusively on fields of data the Petitioners specifically stated they were not requesting, and then concludes that unwanted information is exempt and extends that exemption to *all* CAMA records (the vast majority of which do not include any of the information cited as exempt), the lower court clearly was wrong and summary judgment should be reversed.

**G THE CIRCUIT COURT ERRED IN RELYING ON AFFIDAVITS CONTAINING HEARSAY, CONCLUSORY STATEMENTS AND IMPROPER DESCRIPTIONS AND INTERPRETATIONS OF RECORDS THAT WERE NOT MADE EXHIBITS TO THE AFFIDAVITS**

It is hornbook law on Rule 56 that affidavits filed in opposition to a motion for summary judgment must present evidence in substantially the same form as if the affiant were testifying in open court, and may not be based on hearsay. Conclusory statements set forth in affidavits must be disregarded. Affidavits that purport to interpret or describe a document's substance, without making the document an exhibit, is insufficient. "Generally, an affidavit filed in opposition to a

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<sup>10</sup> There are hundreds of "fields" where different kinds of property information is entered into the CAMA system. The number of those hundreds of "fields" that contain the information identified by Intervener as being personal is small, should be "redacted" (by simply not including that "field" when copying the data) and all the other fields of data that do not contain such information easily can be downloaded and released – which is what the Tax Department and Assessor both have done in the past and which is what FOIA requires. In any event, because Petitioners do not want any of the allegedly private information.

motion for summary judgment must present evidence in substantially the same form as if the affiant were testifying in court.” *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir.1996). The affidavit must be made on personal knowledge and contain admissible evidence. *See Fed.R.Civ.P.* 56(e) (“A supporting and opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.”). Thus, the affidavit may not be based on hearsay. *See Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir.), *cert. denied*, 502 U.S. 939 (1991). Conclusory statements set forth in affidavits must also be disregarded. *See Rohrbough v. Wyeth Labs, Inc.*, 916 F.2d 970, 975 (4th Cir.1990) (affirming trial court’s disregard of doctor’s affidavit which was “nearly entirely conclusory and devoid of specific facts to support his opinion”). *See Causey v. Balog*, 162 F.3d 795, 802 (4th Cir.1998) (affirming grant of summary judgment because plaintiff’s “conclusory statements, without specific evidentiary support,” were insufficient to create a genuine issue of fact); *Hall v. City of Huntington*, 2007 WL 2119261, 2 (S.D.W.Va. 2007) (“To defeat a motion for summary judgment, the evidence presented in opposition must be probative, not “merely colorable,” *id.* at 249-50, and cannot be merely “conclusory statements . . . without specific evidentiary support,” *Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir.1998))”.

Despite the foregoing, the lower court made “factual” findings based on affidavit “testimony” that was rank hearsay and/or entirely conclusory. The lower court’s “findings” based on this inadmissible “testimony” include Findings of Fact ¶ 8 (hearsay testimony about what unidentified “field appraisers . . . determine and prepare”, and what unidentified “owners or builders sometimes provide”); ¶ 9 (hearsay testimony about what unidentified “field appraisers”

allegedly do); ¶ 10 (hearsay testimony about what unidentified “field appraisers note”); ¶ 12 (hearsay and conclusory testimony about unidentified “field representatives” allegedly recording “private information in different fields”); ¶¶ 14, 49 (hearsay and conclusory testimony about unidentified “residents of Kanawha County sometimes rais[ing] privacy concerns” and “specifically request[ing] that the information not be disclosed to anyone else.”); ¶¶ 23, 25, 26, 27, 50, 51 (conclusory and speculative testimony as to the alleged practicability, difficulty and expense of redacting exempt public records). App. at 818-836.

The lower court ruled at the January 11, 2012 hearing that the parties were **not** to engage in discovery depositions (Appendix at 161-68) so as to see if the case could be resolved as a **matter of law** on summary judgment. Thus, Petitioners were prejudiced by the lower court’s adoption of the hearsay, conclusory and speculative affidavit statements that had yet to be subject to cross-examination. The lower court indicated it first would consider whether the case was resolvable as a matter of law, and if not he would hear testimony in open court. Even the Tax Commissioner conceded at the January 11, 2012 hearing that there were “definitely disputed issues of fact here”:

“[Counsel for the Tax Commissioner]: In terms of the summary judgment standard, there are definitely disputed issues of fact here.”

Appendix at 162. The Court stated at the hearing that it would either resolve the case “strictly on the law, or, after hearing testimony here in court on a summary judgment motion.” Appendix at 164. The parties understood the Court would either resolve the case as a **matter of law**, or, if the Court concluded that wasn’t possible, there would be testimony and an opportunity for cross examination in open court. Instead, to petitioners’ clear prejudice, the lower court simply accepted disputed affidavit testimony, and granted summary judgment for the Tax Commissioner

without allowing Petitioners to cross-examine the affiants either through discovery or “in court,” as the Court specifically indicated would occur on the record at the January 11, 2012 hearing.

At a minimum, if the Court believed these affidavits somehow were probative (despite their obvious insufficiency), the Court should either have directed the parties to engage in more complete discovery, such as depositions, or denied the motions for summary judgment and held a hearing or trial where the affiants could be subject to cross-examination. The Tax Commissioner and Assessor did not meet their burdens of proof, and summary judgment must be reversed because it was based on inadmissible hearsay or conclusory statements.<sup>11</sup>

#### **H THE CIRCUIT COURT ERRED IN RELYING ON TESTIMONY IN A JEFFERSON COUNTY CASE FROM THE YEAR 2000**

Besides ignoring the relevant statute, and being contrary to reported caselaw, the lower court’s reliance on alleged testimony in a different proceeding in Jefferson County, with different parties, and that occurred over ten years ago, App. at 829-33 (Order at ¶¶ 38, 41 and 52), violated Petitioners’ due process rights. *Syllabus* Point 8, *Conley v. Spillers*, 171 W. Va. 584, 586, 301 S.E.2d 216, 218 (1983) (“A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim.”). Petitioners were not parties to that case, and the alleged testimony characterized therein, and cited by the lower court in the summary judgment order was inadmissible hearsay that should not have been considered. Compounding that error, the lower court ignored the undisputed evidence that today, over ten years later, Jefferson County discloses its CAMA real property records online through Spec-Print, App. at 512. These errors

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<sup>11</sup> In the alternative, the Court should reverse and remand to allow Petitioners the opportunity to do deposition discovery, or, at a minimum, cross-examine the affiants in open court.

show further the facts in this case were in dispute, summary judgment was inappropriate for that reason as well, and should be reversed.

## I THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE TAX COMMISSIONER IS THE CUSTODIAN OF THE CAMA RECORDS

This case arose initially because the Tax Commissioner took the position that he is not the custodian of the public records in his possession (“the CAMA files for all real property in all counties.”). Even though this was the only reason the Tax Commissioner gave for his denial of the Petitioners’ records request, the lower court refused to address this issue. App at 835. (Order at ¶ 59). Because that issue was briefed fully, and it was error for the lower court to deem it moot, it should be addressed in this appeal.

The Tax Commissioner admits he possesses the requested records App. at 225. But he disavows his responsibility to disclose those public records in his possession by arguing that possession of public records is insufficient to create a disclosure duty under FOIA. He further argued Petitioners must own real or personal property in West Virginia to make a valid FOIA request, which is not a requirement of FOIA. Those arguments are patently wrong.

As stated by the United States Supreme Court:

“FOIA requires that records and material in the **possession** of federal agencies be made available on demand **to any member of the general public.**”

*N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221, 98 S. Ct. 2311, 2317, 57 L. Ed. 2d 159 (1978) (emphasis added).<sup>12</sup>

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<sup>12</sup> This Court has made clear that there is a close relationship between West Virginia’s FOIA and the federal FOIA, and federal precedents are valued:

“ Recognizing the close relationship between the federal and West Virginia FOIA, we note, in particular, the value of federal precedents in

The public records requested are the electronic tax assessment records that the Tax Department is *required by statute* to collect from county assessors and maintain on the Tax Department's own computer system. Despite the foregoing, the only argument made by the Tax Commissioner when he denied Petitioners' FOIA request was his assertion that he was not the "custodian" of the records. He did not assert the records were exempt from disclosure.

After this suit was filed, the Tax Commissioner conceded the public records requested by Petitioners are in his possession. App. at 225. He nevertheless continues to assert he is not the "custodian" even as he admits they are in his possession. This argument is utter nonsense.

The FOIA statute is simple, straightforward and unambiguous. *W.Va. Code* § 29B-1-3(1) gives "every person" (without limitation) the right to copy "any public record":

"Every person has a right to inspect or copy any public record of a public body in this State, except as otherwise expressly provided by section four [§ 29B-1-4] of this article."

The FOIA statute goes on to provide that the "custodian" of "**any public records**" must allow inspection "**of the records in his or her office**", and if those records in the custodian's office "exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested[]":

"The custodian of **any public records**, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for **inspection and examination of the records in his or her office** and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. [ . . . ] If the records requested exist in magnetic,

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construing our state FOIA's parallel provisions."

*Daily Gazette Co., Inc. v. W. Virginia Dev. Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996). The Tax Commissioner cited no case, from any jurisdiction, to the contrary.

electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested.”

*W. Va. Code* § 29B-1-3(3). The Tax Commissioner admitted the requested records are, in fact, “in his office[,]” and in the electronic form requested by Petitioners. Appendix at 225. FOIA refers to records **in the custodian’s office**, not to whom the records were supplied by – and the definition of a “public record” in FOIA specifically includes “any writing . . . **retained** by a public body.”

FOIA defines “custodian” very simply: “the elected or appointed official charged with administering a public body.” As the appointed official charged with administering the Tax Department, the Tax Commissioner is the custodian obligated by law to disclose “any public records in his or her office” that is “retained” by the Tax Department. There is no exception to FOIA’s disclosure obligations for records first collected by county tax assessors.

In *Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010), this Court held that “possession” of a “public record” triggers a custodian’s disclosure obligation - and the only “records” in the “possession” of a “custodian” that the custodian does not have an obligation to disclose are those that are not, in fact, “public records,” or those that fall within a statutory exemption under *W.Va.Code*, 29B-1-4.[]”:

**“A writing in the possession of a public body is a public record required to be disclosed under the Act where the writing relates to the conduct of the public's business and is not specifically exempted from disclosure pursuant to *W.Va.Code*, 29B-1-4. Conversely, a writing in the possession of a public body is not a public record and need not be disclosed under the Act where the writing does not relate to the conduct of the public's business or where the writing is specifically exempt from disclosure pursuant to *W.Va.Code*, 29B-1-4.”**

*Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010).

Thus, both the FOIA statute and the applicable caselaw are clear that, “any public record” in the “possession” of the Tax Department must be disclosed unless it is exempt from disclosure by statute. There is not, nor can there be any dispute that the CAMA real property records at issue are “public records,” and that they are in the “possession” of the Tax Department. *Ipsa facto*, the Tax Commissioner is the “custodian” who must release those records under FOIA unless they are exempt from disclosure by statute.<sup>13</sup> Because the requested statewide CAMA real property records are not exempt, the Tax Commissioner must disclose them, and he can not insist that a records requestor first get separate approval from each county assessor.

**J THE CIRCUIT COURT ERRED IN REFUSING TO CONSIDER OR ADDRESS THE APPLICATION OF THE PUBLIC DOMAIN DOCTRINE**

The Tax Commissioner and Assessor previously have released records identical to those requested here by Petitioners, but over which they now assert a privacy exemption. Because

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<sup>13</sup> *W.Va. Code* § 11-1A-12 specifies the relationship between the Tax Commissioner and the county assessors as one where the Tax Commissioner utilizes subordinate county assessors and their employees:

“It is the intent of the Legislature that in carrying out the appraisal functions required by this article, **the Tax Commissioner shall utilize the county assessors and their employees.**”

By statute, the property appraisal function is that of *the State Tax Commissioner*, not the county assessors. *W.Va. Code* § 11-1A-1 (“In conducting the reappraisals of property mandated by the West Virginia Constitution and required by this article, **the Tax Commissioner shall appraise all property[.]**” (emphasis added)). Additionally,

“It is likewise the duty of the several county assessors [ . . . ] **to assist the Tax Commissioner** in his efforts to ascertain the true value of all such property[.]”

*W.Va. Code* § 11-1A-29a (emphasis added). Thus, by statute, all the information in the requested CAMA real property records was gathered *for the Tax Commissioner*.

these records (or a substantial portion of them) already are available in the public domain through their disclosure to Spec-Print and others, the public domain doctrine should bar the assertion of an exemption over such records. As explained in *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Engineers*, 722 F. Supp. 2d 66, 72 (D.D.C. 2010), once a public agency has released allegedly exempt information, the FOIA exemptions do not apply because the information already is in the public domain:

“Under the public domain doctrine, FOIA-exempt information may not be withheld if it was previously “disclosed and preserved in a permanent public record.” *Cottone v. Reno*, 193 F.3d 550, 554 (D.C.Cir.1999). The plaintiff “bear[s] the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.” *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C.Cir.1983); *accord Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C.Cir.1992). [ . . . ] See *Hall v. Dep't of Justice*, 552 F.Supp.2d 23, 30-31 (D.D.C.2008) (“[T]he FOIA exemptions do not apply once the information is in the public domain.”).”

Here, both the Tax Commissioner and Assessor previously released CAMA records in the same form as requested by Petitioners. The Assessor gave CAMA records to Spec-Print annually for a number of years, and according to Spec-Print, that information is available online and is current through the year 2011. App at 497-512. Likewise, the Tax Commissioner disclosed CAMA real property records for many other counties. App. at 221, 581-696. Because CAMA records in the same form as those requested by Petitioners were disclosed into the public domain, the public domain doctrine applies to bar the assertion any exemption over previously disclosed information. Because the lower court failed to address and apply that doctrine, this is another reason why the summary judgment order should be reversed.

**K THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE TAX COMMISSIONER HAD FAILED TO TIMELY ASSERT EXEMPTIONS IN RESPONSE TO THE FOIA REQUEST AND THEREFORE SUCH EXEMPTIONS ARE WAIVED, AND ERRED IN ALLOWING THE KANAWHA COUNTY ASSESSOR TO INTERVENE IN THIS CASE**

Petitioner requested the records at issue in May of 2010. Through its two responses, the Tax Department never asserted any exemption as its reason for denying the request. App. at 594. It did so for the first time in its response to Petitioners' Motion for Summary Judgment.

The Tax Department's belated assertion of an additional reason for nondisclosure, *i.e.*, the privacy exemption, was improper. *W.Va. Code* § 29B-1-3(4) mandates that the custodian of records must within five days of the records request either (a) provide copies; (b) advise the requestor of a time and place for inspection and copying of the records; or (c) "Deny the request **stating in writing the reasons for such denial.**" (Emphasis added).

By law, the Tax Commissioner had a mandatory duty to state the reasons for the denial, in writing, within five days of the records request. The FOIA statute does not permit additional reasons for nondisclosure to be conjured up after litigation is commenced. Thus, the Tax Commissioner's assertion of the privacy exemption after this lawsuit was filed violates *W.Va. Code* § 29B-1-3(4)(c). As stated recently by the Pennsylvania Appeals Court:

"the [Pennsylvania Right-to-Know] Law does not permit an agency that has given a specific reason for a denial to assert a different reason on appeal. . . . If an agency could alter its position after the agency stated it and the requester addressed it in an appeal, then the requirements in [the Right-to-Know] Law would become a meaningless exercise. An agency could assert any improper reason for the denial of a right-to-know request and would not have to provide an arguably valid reason unless and until the requester filed an appeal. Such a reading of [the Right to Know] Law would make a mockery of the process set forth in the Law. . . . It is not fair or just to a requester to allow an agency to alter the reason given for a denial after the requester has taken an appeal based on the stated reason. Moreover, permitting an agency to set forth additional reasons for a denial

at the appeal level does not allow for an expeditious resolution of the dispute.”

*Signature Info. Solutions, LLC v. Aston Twp.*, 995 A.2d 510, 514 (Pa. Commw. Ct. 2010).

The same logic applies here. If the Tax Commissioner is permitted to alter his position after stating it and the requester addressed that position in filing this action, then the requirement in FOIA to “state in writing the reasons for the denial” is a meaningless exercise. Such a reading of FOIA would make a mockery of the process set forth in the FOIA, and it is neither fair nor just to allow state agencies to alter the reason given for the denial after the requester appeals by filing a Complaint based on the reasons the agency gave for the denial.<sup>14</sup> State agencies should not be permitted to create a “moving target” of reasons for nondisclosure – such does not allow for an expeditious resolution of the dispute, and for that reason as well the Court should reverse the lower court’s summary judgment order because no exemption was asserted timely.

**L THE CIRCUIT COURT ERRED IN FINDING THAT THE REQUESTED CAMA RECORDS ARE AVAILABLE FROM AN ALTERNATIVE SOURCE**

The lower court made the erroneous finding that the statewide CAMA records requested by Petitioners are part of “assessment files,” such as “tax maps” and “parcel numbers,” “assessment tables,” “taxpayer names,” and “legal description, deed and page.” App. at 832 (Order at ¶ 46 - 48). Simply put, the CAMA real property records requested include hundreds of other types of information relative to characteristics of real property. The records identified by the lower court is not what was requested. The lower court’s holding that the assessment files

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<sup>14</sup> It should go without saying that a state agency (the Tax Department) should not be permitted to circumvent this rule, as here, by coordinating the intervention of an a subordinate public official (the Assessor) who then asserts the exemption that supervising public official did not assert timely.

“would provide [Petitioners] with the relevant non-exempt information” and “is available from an alternative source” is factually incorrect, and contrary to legislative policy:

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and not good for the people to know.”

*W. Va. Code* § 29B-1-1.

The CAMA real property records requested by Petitioners are not available in assessment files, and more importantly, the law does not allow the Tax Commissioner, the Assessor or the circuit court to decide what records, such as assessment files, are “good for the people to know” and what records (CAMA real property records) are “not good for the people to know.” *Id.* Because the summary judgment order was based, in part, on the erroneous conclusion that CAMA real property records are available from another source, it should be reversed.

**M THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONERS OWNERSHIP, BUSINESS AND PURPOSE WERE RELEVANT TO THE TAX COMMISSIONER’S DUTY TO DISCLOSE THE REQUESTED RECORDS**

At the urging of the Assessor, the lower court made a number of findings concerning Petitioners. App. at 826-27 (Order at ¶¶ 28 - 33). The Tax Commissioner and Assessor argued that whether a records requestor owns property in this State, or has a real estate license somehow is relevant to whether a particular record is exempt. The lower court seemingly agreed, and made certain findings thereon in its summary judgment order. However, the law is clear that a requestor’s purpose is not a proper line of inquiry in a FOIA case.

For example, as held by *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463, 880 N.E.2d 10, 15 (N.Y. 2007):

“[The Freedom of Information Law] does not require the party requesting

the information to show any particular need or purpose (*see Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 156, 688 N.Y.S.2d 472, 710 N.E.2d 1072 [1999]; *Farbman*, 62 N.Y.2d at 80, 476 N.Y.S.2d 69, 464 N.E.2d 437). Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request."

The Court of Appeals for the Second Circuit in *United Technologies Corp. by Pratt & Whitney v. F.A.A.*, 102 F.3d 688, 690-91 (2d Cir. 1996) held individuating circumstances of a requester may not be considered in deciding whether a particular document should be disclosed:

"It is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed. All requesters are considered to have equal rights of access. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 1513 n. 691 10, 44 L.Ed.2d 29 (1975). "[A FOIA requester's] rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the [withheld documents] greater than that shared by the average member of the public." *Id.* "

*See also Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1078-79 (6th Cir. 1998):

"Basing a denial of a FOIA request on a factor unrelated to any of these nine exemptions clearly contravenes this dictate. In general, any member of the public may invoke FOIA to obtain *disclosure of agency records* without regard to whether the requester has shown a need for the information; **the requester's intended use is also irrelevant in a FOIA action.** *See Parke, Davis & Co. v. Califano*, 623 F.2d 1, 7 (6th Cir.1980) [ . . . ] Even in evaluating the applicability of various exemptions, courts have generally remained consistent with the notion that "[t]he Act's sole concern is with *what* must be made public or not made public" rather than with the identity of the person requesting the information." *Comm.*, 489 F.2d 1101 (6th Cir. 1974).

the information to show any particular need or purpose (*see Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 156, 688 N.Y.S.2d 472, 710 N.E.2d 1072 [1999]; *Farbman*, 62 N.Y.2d at 80, 476 N.Y.S.2d 69, 464 N.E.2d 437). Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request."

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*And see Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1089 (9th Cir. 1997).

Because caselaw from around the country is clear that a requestor's purpose is not an appropriate factor to consider in determining whether a the public interest outweighs the asserted privacy interest in the records, the lower court erred in taking that into account, and summary judgment on that basis should be reversed.

### CONCLUSION

For all of the foregoing reasons, the CAMA real property records requested by Petitioners are public records that must be disclosed under FOIA. No statutory exemption allows nondisclosure, and the summary judgment order of the lower court should be reversed and this case remanded with instructions to enter summary judgment for Petitioners.<sup>15</sup>



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<sup>15</sup> Alternatively, the summary judgment should be reversed with instructions for the lower court to allow further discovery, including cross examination of witnesses, and directing the Tax Commissioner and Assessor to provide *Vaughan* Indexes of the records they claim are exempt.

IN THE SUPREME COURT OF APPEALS OF, WEST VIRGINIA

Appeal No.: 13

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

Plaintiffs,

v.

Civil Action No. 11-C-1762  
(Hon. Charles E. King, Judge)

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

Defendant.

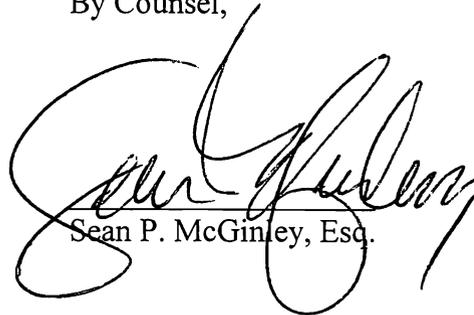
**CERTIFICATE OF SERVICE**

I, Sean P. McGinley, counsel for the plaintiff, do hereby certify that a true and accurate copy of the foregoing “**PETITIONER’S BRIEF AND APPENDIX**” was served upon counsel for defendants by placing in the U.S. mail, postage prepaid, this 15<sup>th</sup> day of May, 2013, addressed as follows:

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