

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)

**MARK MATKOVICH, Acting Tax Commissioner,  
West Virginia State Tax Department,**

Defendant below, Respondent,

and

**SALLIE ROBINSON, Kanawha County Assessor,**

Intervenor.

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

**REPLY BRIEF**

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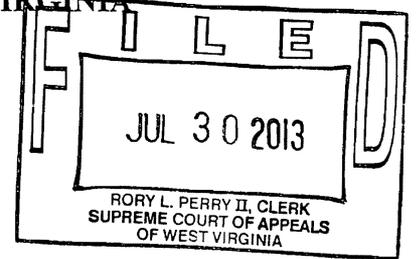
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This case is not about medical records or nursing home stays. It is not about personal or commercial tax returns. It is not about trade secrets. It is not about homeland security. It is not about providing the keys to entering homes to thieves or pedophiles, as the Intervener Kanawha County Assessor (hereinafter “KCA”) has been wont to argue. Rather, this case is about public access to public records containing data about the composition of **real property** that, by statute, must be gathered by county assessors and provided to and kept by the State Tax Department (hereinafter “STD”) for real property appraisal purposes. No reported decision from any jurisdiction holds an individual has a privacy interest in the composition of real property.

Respondents disingenuous denial of the limited scope of the FOIA request (and this appeal) forces Petitioners to start again at the beginning. Try as respondents may to mischaracterize the FOIA request as something it is not, Petitioners’ specific FOIA request at issue in this appeal is limited as follows:

“[T]he CAMA files for all **real property** in all counties. . . . Attached are the **file layouts** as we understood they existed in 2009. . . . **the layouts are submitted as a means of identifying the records sought**.”

[App. 24] (emphasis added). The file layouts are set out in the Appendix at 25-30. The file layouts identify the specific “fields” of “real property” data in the CAMA system that were requested. Thus, if information in a CAMA data field is not “real property” (such as “nursing home stays,” “disabilities,” “profit and loss statements for commercial properties,” and “who is at home during the day”) it clearly and unequivocally never was requested, and is not in issue. And if information is in a different field in the CAMA system than those in the attached file layout, it likewise was not

requested.<sup>1</sup>

None of the fields in the file layout attached to the FOIA request, specifically identifying the requested records, includes (nor has the STD or KCA (together “Respondents”) ever submitted any evidence showing any such field includes) any of the kinds of information relied on by Respondents for their privacy exemption assertion (see STD Br. at 17, and KCA Br. at 4, 5, 8, 11, 12, 19-20, 23), such as “nursing home stays,” “disabilities,” “photos,” “drawings,” “blueprints,” “profit and loss statements for commercial properties,” and “who is at home during the day.” Contrary to the ridiculous, repetitive and entirely disingenuous assertions of both Respondents, Petitioners never requested the *entirety* of the CAMA database, only “real property” information in the fields in the file layout attached to the FOIA request. [App. at 24].

Thus, when the STD responded to the FOIA request, it properly did not assert any of the requested information was exempt. [App at 32-33]. Of course, under FOIA (*W.Va. Code* § 29B-1-3(4)(c)), the STD had the affirmative obligation to “state in writing the reasons for the denial,” and the fact that no exemption was asserted is *prima facie* evidence the STD clearly understood the limited nature of the FOIA request, and that none of the limited records specifically requested were exempt.<sup>2</sup> The only reason the STD provided for denying the request was the STD’s contradictory assertion that while it is the custodian of “assessment files” for all counties, and while it is in possession of the records requested, it somehow is not the “custodian” of the real property CAMA

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<sup>1</sup>The limited nature of the fields of real property data requested also was discussed on the record at the summary judgment hearing. [App at 807].

<sup>2</sup>Petitioners’ request to the STD to reconsider its denial pointed out that no exemption was asserted. [App at 63]. In response, the STD a *second* time did not cite any FOIA exemption as a basis for its denial. [App at 65].

data. Not only was the STD's offer of the assessment files a clear contradiction of its "custodianship" rationale,<sup>3</sup> it directly contravened this Court's then-recent holding in *Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010): "**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." (Emphasis added).

To be clear, it is undisputed the STD has possession of the requested CAMA records. It therefore is the "custodian" of those records requested per *Shepherdstown Observer*.<sup>4</sup> The STD clearly understood its duty to assert an exemption under FOIA, but at the time of the denial it did not do so *because it knew the records requested are not exempt*. After the denial, and this became a lawsuit rather than a mere FOIA request, the STD changed course, obviously realizing it could not continue to get away with the custodianship argument in light of *Shepherdstown Observer*, and it began raising straw man arguments<sup>5</sup> about information and records the Petitioners never requested, in a transparent attempt to create from whole cloth a justification for asserting for the first time a FOIA privacy exemption (*W.Va. Code* § 29B-1-4(a)(2)) and the property "tax return" secrecy provision in *W.Va. Code* § 11-1A-23(a) as reasons for nondisclosure. What followed, for apparently

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<sup>3</sup>The assessment files the STD agreed to produce come from the county assessors just as the CAMA records do, so there is no basis to distinguish them in terms of custodianship.

<sup>4</sup>Indeed, in its Answer, the STD admits its possession as follows: "these records are accessible on a computer system, the hardware of which is selected and maintained by the State Tax Department." [App at 171]. At oral argument, STD counsel explicitly admitted, "We have possession of it[.]" [App at 788].

<sup>5</sup>*Black's Law Dictionary* (7th ed. 1999) appropriately defines a "straw man argument" as "a tenuous and exaggerated counterargument that an advocate puts forward for the sole purpose of disproving it."

political reasons,<sup>6</sup> has been a most extraordinary effort by both the STD and KCA to obfuscate the simple issues in this case by means of a wholesale re-characterization of the actual FOIA request in order to construct a “straw man” privacy argument where none exists.

As shown below, both the Circuit Court’s summary judgment order and the Respondents’ arguments are built upon nothing more than a false premise of what is in issue, as well as a hodgepodge of inadmissible hearsay and conclusory affidavit statements. This case is and should be a simple one—summary judgment was warranted, but for the Petitioners, not the Respondents.

### III. REPLY TO RESPONDENTS’ “STRAW MAN” ASSERTIONS

The straw man arguments raised by Respondents are numerous, but because they are “straw men,” they are addressed easily:

- Without any legal citation, the STD suggests the straw man argument that a records requestor must (a) own property in West Virginia to have standing to make a FOIA request [STD Br. at 1], or (b) have a business registration certificate [*id* at 2], or (c) have a West Virginia real estate or real estate appraiser license [*id*]. The STD Br. at 12, 17, 23, and 25 suggests FOIA applies only to instate citizen taxpayers or businesses who must prove they are seeking to hold government accountable for something.<sup>7</sup> This argument is ludicrous. Our FOIA statute unequivocally and appropriately gives the right to receive “full and complete information” to government records to “all persons.” *W.Va. Code* § 29B-1-1. Simply stated, there is no residency, citizenship, instate taxpayer or business, property ownership or licence requirement.<sup>8</sup> The STD’s “standing” assertion, without citation to any authority, is meritless.

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<sup>6</sup>A rather obvious explanation why the KCA and STD may want to conceal these records has to do with public criticism of their role in appraisal process and the rising property tax amounts. It is beyond cavil that the public has a strong interest in such matters. See <http://wvgazette.com/News/201301200149>.

<sup>7</sup>The Circuit Court never made any such standing finding, and the STD did not cross-appeal. Therefore, regardless of its clear lack of merit, this argument is not appropriate on appeal.

<sup>8</sup>It clearly is the law that the business or purpose of a records requestor is not relevant to whether a record is subject to an exemption. These requested records are not exempt, and thus the business of Petitioners is irrelevant. However, for the information of this Court, the predominant use of the requested data by Petitioners in their business is in the prevention and apprehension of mortgage fraud through the automated verification of appraisal data. Unlike the many other third parties to whom both the STD and KCA admit they have disclosed the same CAMA data requested here, Petitioners do not make such data

- Both respondents argue Petitioners must accept different records instead of the requested CAMA records, and cite the STD's offer to disclose different, "assessment records" and "county land books," that are not the subject of this lawsuit. It is admitted by the KCA that, "CAMA data is not the same as tax assessment lists" or "assessment records." KCA Br. at 15, 25 and 34. Nevertheless, it is argued that this "offer" of different records is sufficient for the STD to comply with its obligations under FOIA. STD Br. at 3; KCA Br. at 5-6. No law is cited for this novel suggestion, and FOIA is to the contrary. *W.Va. Code* § 29B-1-1 (The Public does "not give their public servants the right to decide what is good for the people to know and what is not good for the people to know."). Moreover, FOIA is unequivocal that the records must be produced in the form they are kept: "If the records requested exist in magnetic, electronic or computer form, the custodian of records **shall** make such copies available on magnetic or electronic media, if so requested." *W.Va. Code* § 29B-1-3(3).
- Both respondents rely on vague hearsay affidavit testimony purporting to recount how unnamed, "field representatives" hired by the KCA allegedly "record" CAMA information. STD Br. at 4; KCA Br. at 6, 8, and 23. It is hornbook law that "[c]ourts cannot consider inadmissible hearsay in an affidavit when ruling on a summary judgment motion. *North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1283 (6th Cir.1997). Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Fed.R.Evid. 801(c)." *Giles v. Univ. of Toledo*, 241 F.R.D. 466, 471 (N.D. Ohio 2007). Remarkably, the KCA argues this brief, speculative hearsay affidavit assertion ("Different field representatives record private information<sup>9</sup> in different fields, *i.e.*, one representative might record data about a security system in one field whereas another might record somewhere else.") about what these independent contractors hired by the KCA "might" do somehow is sufficient to make the extraordinary leap to support a summary judgment conclusion that all **statewide** CAMA data can not be redacted because exempt information is so intertwined with non-exempt information because of the burden of doing so. Indeed, even if one were to assume *arguendo* the affidavit was admissible, it provides only vague, general information, and fails to show any mistake occurred in any of the limited fields of data specifically requested by Petitioners.
- The STD Br. at 27 shockingly asserts the Circuit Court, "found that the affidavits [] were asserting facts and opinions based on training and experience, and coupled with lack of counter affidavits, supported summary judgment." That statement is flat-out false. In fact, the Circuit Court never even addressed the arguments concerning the sufficiency of the affidavits or whether they constitute hearsay, the Order does not remotely discuss any affiants' training or experience, and never mentions any "counter affidavits" or lack thereof.

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available publically or for resale.

<sup>9</sup>The term "private information" in the affidavit is conclusory. There is no indication what information, if anything, the affiant considers to be "private information."

- Both Respondents rely on unspecific hearsay affidavit testimony, *see Giles, supra*, purporting to recount what some unnamed Kanawha County resident(s) allegedly say about confidentiality. STD Br. at 4; KCA Br. at 4. It is hearsay, and it is inadmissible.
- Both Respondents rely on the short affidavit of Ms. Starek, who states in conclusory fashion that she considers some unspecified information about her property to be private. STD Br. at 4; KCA Br. at 27. Based on this record, Ms. Starek is the only person in West Virginia that Respondents can identify who apparently has some kind of privacy concern over the release of any CAMA information. Unsurprisingly, her affidavit is so vague that it does not tie her alleged concern to any specific real property information requested by Petitioners, let alone the limited and specific fields of data requested in Petitioners' request.
- The STD relies on affidavit testimony from a Kanawha County deputy assessor about information in the CAMA database that was not requested. STD Br. at 4-5. Records not requested are irrelevant.
- The STD relies on hearsay affidavit testimony, *see Giles, supra*, from a Tax Department employee purporting to recount what unnamed county assessors release, and the reasons why the unnamed county assessors release what they release. STD Br. at 6. This is more inadmissible hearsay.
- The STD Br. at 11-12 admits, "some of the information in the CAMA file is not exempt[.]" To justify nondisclosure, the STD and KCA rely on a conclusory and limited affidavit statement regarding the alleged "cost" of "**withholding information deemed confidential by the county assessors.**" Citing [App. at 322-23]. This affidavit is not tied in any way to the actual FOIA request, or the fields of data identified in the request. It does not identify any specific "information deemed confidential" nor does it identify any county assessor who deems anything confidential. It certainly does not stand for the proposition that any field of data actually requested by Petitioners would (1) have to be redacted, or (2) would be burdensome or expensive to do. Indeed, **this alleged and highly speculative cost and burden is not tied to any actual privacy interest of any individual**, but instead this alleged and clearly speculative "cost," even if true, is related only to redacting data to conform to the some *unstated* view or views by one or more *unnamed* county assessors, which constitutes more inadmissible hearsay. *Giles, supra*. There also is a clear and obvious genuine issue of material fact whether it is costly and burdensome to provide CAMA information considering the STD admits it routinely has disclosed CAMA records to third parties when requested by a county assessor. The STD never explains why it was not too costly to release the CAMA records it has released in the past, but all of a sudden now it is too costly – this clearly creates a genuine issue of material fact precluding summary judgment on whether exempt information (assuming *arguendo* there is any such information in the fields of data actually requested by Petitioners, which there is not) can be disclosed as it always has been.
- The STD Br. at 12 argues that the custodianship of public records is a matter of "first

impression.” It is not. “Custodian” is clearly and unambiguously defined in the statute. *W.Va. Code* § 29B-1-2(1). This Court’s holding in *Shepherdstown Observer, supra*, clearly explained that an agency that possesses records is the custodian of those records, and the STD admits it possesses the records. There is no custodianship question, let alone an issue of “first impression.”

- The STD repeatedly cites to industrial and natural resource data in the CAMA system. STD Br. at 12 and 18 (n.15). This information is not in the fields of data identified in the Petitioners’ FOIA request, and is irrelevant.
- The STD Br. at 5 cites to the “criminal penalties” that may be imposed for releasing confidential tax return information. This citation **strongly** contradicts the STD’s argument. In light of this criminal penalty statute, the fact that the STD for many years has released the fields of data requested by Petitioners shows it has **never** considered the information in those fields of data to be covered by the confidentiality provision of the statute. Regardless of the custodianship issue, surely the STD would not have regularly exposed itself to criminal penalties if it believed that information to be protected by statute simply because an assessor so requested. This again creates a genuine issue of material fact precluding summary judgment for the STD and KCA, and warranting summary judgment for Petitioners..
- It should be noted that the STD Br. at 15 does not deny the CAMA fields of data requested all consist of the itemized description of real property as that term is used in *W.Va Code* § 11-1A-23(a).
- The STD Br. at 17 (n.13) suggests a FOIA records requestor should have to produce 20 years of tax returns as part of a determination of whether a public record is exempt. No court anywhere has ever suggested the tax returns of any records requestor are relevant to a FOIA request. This was obvious harassment in an attempt to discourage a FOIA request.
- The primary straw man argument of the Respondents is the citation of categories of information Petitioners never requested, and then arguing that the unrequested information justifies nondisclosure of the information actually requested. The categories of unrequested information they cite are (1) nursing home stays; (2) medical disabilities; (3) photos; (4) drawings; (5) blueprints; (6) profit and loss statements for commercial properties; and (7) whether a person is home when a field rep visits.<sup>10</sup> STD Br. at 17; KCA Br. at 4, 5, 8, 11, 12, 19-20, and 23. Respondents have never stated, let alone offered evidence to show, that any of these categories of information are within the fields of data specifically requested by Petitioners. All of these “straw men” categories are irrelevant – the Court need not address any privacy interest in those categories because they are not in issue.

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<sup>10</sup>Because these categories of information were not requested, whether they might be exempt if they had been requested is hypothetical and not appropriate for consideration here because a ruling thereon would constitute an advisory opinion.

- The KCA Br. at 25 falsely argues that Petitioners requested *non* real property information, when in fact, the request is limited to real property information only, not nursing home stays, when a homeowner is home during the day, etc. Incredibly, the KCA mischaracterizes Petitioners' response to these straw men arguments—reaffirming the requests are limited to CAMA real property data in the fields requested in the FOIA request—as some kind of “moving target.” It is the KCA's repetitive straw man arguments, and not Petitioners' response, that have caused these phony issues to be raised. Again, the KCA's reliance on the brief conclusory hearsay affidavit statement of Mr. Duffield, *see Giles, supra*, does not change the fact that there is *nothing* in the record cited in the KCA Br. at 25 to support the expansive statement that, “the private data about property owners and their real property, both commercial and residential, is intermingled with nonexempt data in different fields.” The fact that the KCA itself admits it released nonexempt CAMA data files for years to Spec-Print, who continues to make it available online today, creates a genuine issue of material fact whether the limited fields of data actually requested by Petitioners can be easily disclosed without redaction.
- The STD Br. at 18 suggests real property descriptors, such as square footage of a house, or the number of rooms in a house, is personal and private and its disclosure would or even could amount to a substantial invasion of privacy. There is no caselaw anywhere that is cited for this proposition. Real property descriptors are not medical records. They are not personnel work records. They do not pertain to a person, they pertain to real property. Thus, the fields of data requested, containing real property information, can not do not fall within FOIA's privacy exemption.
- The KCA Br. at 6 asserts its CAMA data today differs from prior years when it disclosed the data to Spec-Print. For this proposition, the KCA cites [App. at 704-705]. Neither that cite, nor anything else in the record, remotely supports the KCA's assertion. In fact, the fields of data requested in the FOIA request are the same non-exempt fields of data the KCA disclosed in prior years to Spec-Print, who makes them available online today. There is no evidence the fields of data have changed. This too supports summary judgment for Petitioners, and denial of summary judgment for Respondents.

#### **IV. ASSIGNMENT OF ERROR NO. 2 – THE THRESHOLD FOIA PRIVACY EXEMPTION TEST – THE REQUESTED RECORDS ARE NOT DETAILED GOVERNMENT RECORDS ON AN INDIVIDUAL**

Prior to this appeal, neither Respondent, nor the Circuit Court, ever addressed the threshold test for the FOIA privacy exemption. The privacy exemption applies only to, “information of a personal nature such as that kept in personal, medical or similar file[.]” *W. Va. Code* § 29B-1-4(2). The threshold question for application of the privacy exemption to public records, “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) (emphasis added). The CAMA files requested are public records **on real property**, not records on an *individual*. That a person’s name or address is associated with a parcel of real property in a CAMA file because they own it does change the non-personal character of the records requested. Indeed, it is undisputed that the name and address of every owner of real property in West Virginia public, and by law always has been available in every records room in every county in the State. *See generally W.Va. Code* § 11-22-6.

Without explanation, both Respondents and the Circuit Court wholly ignored this threshold test below. It is perhaps unsurprising then that the STD again on appeal completely ignores and omits any response or discussion of Assignment of Error No. 2 and this threshold inquiry in its brief. Its omission speaks volumes. Pursuant to *W. Va. R. App. P.* 10(d), the STD’s wholesale failure to respond to Assignment of Error No. 2 means the Court must assume, as it should, that it agrees with Petitioners’ view (“If the respondent’s brief fails to respond to an assignment of error, the court will assume the respondent agrees with the petitioner’s view of the issue.”). Simply put, the only explanation why the STD has *never*, throughout the course of this case, addressed the threshold privacy exemption test is that the records are *real property* records, not detailed government records on an *individual*. The STD’s abject failure to respond is dispositive of this case, warrants reversal of summary judgment, and remand for entry of summary judgment for Petitioners.

While inexplicably and wrongly referring to the threshold question articulated in *Hechler*, *supra*, as *dicta*, the KCA Br. at 11-14 for the first time, on appeal, appears to at least acknowledge

the basic threshold privacy question exists. While continuing to intersperse illegitimate straw man assertions about non-requested records, the KCA now obliquely suggests (for the first time) that the following requested kinds of data that are actually included in Petitioners' FOIA request fall within the privacy exemption: construction materials [KCA Br. at 11]; number of bedrooms; number of bathrooms; finishes and floor coverings; kitchen; basement; and garage. [KCA Br. at 12].<sup>11</sup> (The KCA Br. at 8 argues the date of renovations, or whether a basement is finished, or a house has a fireplace or an outbuilding is "highly confidential."). Nevertheless, rather than offering any legal analysis or factual basis whatsoever as to how the foregoing **real property** records possibly could (let alone should) be considered "detailed Government records **on an individual**," the KCA ignores the actual test and argues, in typically conclusory fashion, not that the records are detailed government records "on an individual," but that the Court should simply take her word for it that such information is "private, and if disclosed to the wrong person, could risk not only resulting in a substantial invasion of privacy, but could present a significant risk of harm to the private citizens who occupy that property." KCA Br. at 13. Rather than address the issue of how real property descriptors could be considered detailed records "on an individual," the KCA instead makes the reprehensible, prejudicial, inflammatory, completely unsupported and entirely inadmissible assertion that FOIA disclosure of real property characteristics somehow would lead to pedophile attacks on small children. *Id.*

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<sup>11</sup>The KCA's repetitive "straw man" assertions rely on reference to "photographs and drawing of the inside and outside of private citizen's homes and businesses." "blueprints." "profit and loss statements for commercial properties" [KCA Br. at 11] "location" of bedrooms and bathrooms. "photographs of the inside of a private home, and whether the home is left unoccupied during the work day" [KCA Br. at 12]. None of these items were requested in the fields of data identified in the Petitioner's FOIA request, and are entirely irrelevant to this case.

It is worth repeating here that this case is about public records describing **real property**. It is not about detailed public records on *individuals*. The requested records include numerical data divided into specific fields describing parcels of real property, not people. Not all fields in the database were requested, and only those relating to *real property*. The record is clear that the fields of data can, and routinely have been easily sorted and disclosed to third parties by both the STD and the KCA many times in the past. Even today, private vendors who received that information from the STD and KCA make these same non-exempt fields of West Virginia real property CAMA data publically available for almost half of West Virginia's counties. The limited and specific fields of data requested never have included any field for nursing home stays, trade secrets, or anyone's medical or disability records. They include *only* descriptors of **real property**.

It is beyond cavil that the party claiming a FOIA exemption has the burden of showing the *express applicability* of such exemption to the material requested. *See, e.g., Syl. Pt. 2, Daily Gazette Co. v. W. Va. Dev. Office*, 198 W. Va. 563, 573, 482 S.E.2d 180, 190 (1996). The KCA's wild arguments in regard to the threshold privacy question completely avoid the issue of how the records sought could be considered "detailed government records on an individual," and fail to even approach the high standard of showing the "express applicability" of the exemption. The KCA's argument cites no record evidence, and is not based on any facts, record or law. Indeed, the record itself shows precisely the opposite, that the KCA (like almost half the counties in West Virginia and other jurisdictions around the Country), has disclosed the same kinds of real property data requested here for years, and yet, the KCA can not point to a single incidence of a "harm" or alleged "invasion of privacy" that **ever** has resulted from such disclosures. If anything, the KCA's inability to support its argument with any record evidence, facts or law, in light of the lengthy history of disclosure of

this kind of data (including by the KCA herself), completely disproves its unsupported assertion of a “risk of harm.”

The **only** case cited by the KCA in support of her argument on the threshold question is *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988). In that case, this Court found that the requested public records were subject to the privacy exemption under FOIA because, “[t]he microfiche contain sensitive information related to prior injuries to various body parts. Moreover, the appellant concedes that the records may contain information related to psychiatric diagnoses and treatment.” *Id.*, 180 W. Va. at 30-31, 375 S.E.2d at 208-09. Disingenuously, the KCA ties her threshold privacy argument directly to her “straw man” arguments, asserting (again in conclusory fashion) that, “like the injuries contained in the Workers Compensation records, revealing the information regarding the interior of homes, nursing home stays, and physical disabilities . . . would be a “substantial and potentially serious invasion of privacy.” KCA Br. at 14. Petitioners have not requested any field of data that includes “nursing home stays” or “disabilities,” so the KCA’s straw man argument is irrelevant and completely misleading. The fields of data requested describe the characteristics of real property, not anything about any individual. It should go without saying that, contrary to the KCA’s contrived argument, characteristics of real property are not remotely similar to individual medical records such as, “sensitive information related to prior injuries to various body parts,” or “information related to psychiatric diagnoses and treatment” that in *Robinson* clearly met the threshold privacy exemption test because they are records “on an individual.” *Hechler, supra*.

The STD’s refusal to respond to Assignment of Error No. 2 constitutes an admission the records sought are not exempt under FOIA’s privacy exemption because they do not meet the threshold test. The KCA’s assertion, resting as it does on avoiding the threshold question of whether

real property characteristics are “detailed records on an individual” and straw men assertions about unrequested records, likewise fails. But for their tremendous obfuscation, this is a simple and uncomplicated case, and this Court should cut through Respondents’ smoke and mirrors, reverse the decision of the lower court and remand with instructions to enter summary judgment for Petitioners.

**V. *W. Va Code* § 11-1A-23(a)**

Relying on different grounds than those espoused by the lower court in its Order, both Respondents attempt to recast the language of *W. Va. Code* § 11-1A-23(a) to fall within the FOIA exemption contained in *W. Va. Code* § 29B-1-4(a)(5), that exempts “[i]nformation specifically exempted from disclosure by statute.” The Circuit Court based its conclusion that the CAMA data is exempt from disclosure under § 29B-1-4(a)(5) on the fact the data requested “contain[ed] information about burglar alarms and similar security systems” and information obtained from property owners’ tax returns, information that is considered confidential pursuant to *West Virginia Code* § 11-1A-23(a). *Final Order* ¶ 56 [App. at 834]. However, the lower court’s holding wholly ignored the critical portion of *W. Va. Code* § 11-1A-23(a), which states “[t]hat 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.” Recognizing the lower court’s avoidance of this portion of § 11-1A-23(a), the STD now attempts to explain away this exception to confidentiality in order to avoid its disclosure obligations under FOIA.<sup>12</sup>

The STD cites *Daily Gazette Company, Inc. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989),

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<sup>12</sup>The “itemized description” of property would not include information on whether a property owner is home during the day, nursing home stays, disability of owners, whether the property is vacant, and those fields of data were not and are not requested as they are not real property details. The fields that hold such non-real property information can simply be left out of the disclosure, as the STD has done in its many past disclosures to other third parties.

wherein this Court examined the FOIA privacy exemption within the context of a different statutory scheme than the one at issue in the instant case. At issue in *Caryl* was the confidentiality of tax compromise information, governed by *W.Va. Code* § 11-10-1, *et seq.* In other words, personal financial information, for which there is a well-recognized privacy interest. This Court concluded § 11-10-5q exempted tax compromises from disclosure under FOIA because the tax commissioner’s report to the Legislature summarizing these compromises, required under § 11-10-5q(e), must “be made in such a manner so as to preserve the confidentiality of the taxpayer involved in the compromise.” *Caryl*, 181 W. Va. at 45, 380 S.E.2d at 212. This Court concluded that in order for this provision “to have any force and effect, then . . . [the statute] must also be read to require the confidentiality of the taxpayer’s identity.” *Id.* Thus, even though § 11-10-5d(a), the general confidentiality provision under the Tax Procedure and Administration Act, allowed for exceptions the tax compromise records might meet, this Court concluded the provision contained in § 11-10-5q controlled and barred the information from being disclosed under FOIA. *Id.*

Any review of the statutory framework at issue here shows it is completely different from that presented in *Caryl*. Here, *W.Va. Code* § 11-1A-23(a) provides for the confidentiality of property tax returns and return information filed or supplied pursuant to Articles 1A, 3, 4, 5, and 6. The only data that is exempt pursuant to this statute are property tax returns and return information generally; in fact, the title of this statute is “Confidentiality and disclosure of ***property tax returns and return information***; offenses; penalties”. *W. Va. Code* § 11-1A-23. However, not all information contained in the CAMA files is derived from tax returns. *See, e.g.*, Duffield Aff. ¶¶ 2–4 (detailing the data **gathered by field representatives** during site visits); *compare with id.* ¶ 5 (describing yearly tax returns required to include information about all real estate owned and all improvements

or changes valued at \$1,000.00 or more in the previous twelve months). [App. 395-396]. Accordingly, the information inputted into the CAMA files by the *field representatives*, which is the data actually requested by Petitioners here, does not fall within the scope of the confidentiality provision.<sup>13</sup> And the separate provision that addresses the creation of the electronic data processing system network, which is the CAMA database, does **not** make any of the requested data confidential. *W. Va. Code* § 11-1A-21. The only mention of confidentiality is in § 11-1A-23, and is further limited solely to that information collated from “tax returns.” Section 11-1A-23 therefore does not apply to all the information contained in the CAMA files. *W. Va. Code* § 11-1A-23. Wholly unlike in *Caryl*, there is no specific provision that addresses the information requested by Petitioners that overrides the general confidentiality provision contained in § 11-1A-23. Thus, this provision does not apply to the information requested by Petitioners.

Moreover, the significance of the confidentiality statute is that it contains an explicit exception for items that describe real property, which includes every field of data requested by Petitioners. Thus, the proviso (which did not exist in *Caryl*) shows clearly the Legislature never considered such information to be confidential: “*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(a). Regardless of whether the CAMA data requested originated from a field representative (as appears from Mr.

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<sup>13</sup>Respondents provide no evidence to relate any information gathered from a tax return to the specific fields of information Petitioners have requested. They wholly fail to meet their burden, “to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.” *Mead Data Cent., Inc. v. United States*, 566 F.2d 242, 261 (D.C. Cir. 1977).” *Farley v. Worley*, 215 W. Va. 412, 423, 599 S.E.2d 835, 846 (2004). If the Court is unable to conclude the CAMA information should be disclosed based on this record, then the Court should remand the case back to the circuit court to allow discovery as required by *Farley*.

Duffield's Affidavit) or a property tax return, however, all the records requested by Petitioners fall within this exception, as it is undisputed that the fields of data in the CAMA fields requested by Petitioners are, "the itemized description of the property listed" and are in fact used to determine whether all property was listed for appraisal.

## VI. THE VAUGHAN INDEX REQUIREMENT

In order to assert a FOIA exemption, a government agency must create and provide a *Vaughan Index*. As this Court held in *Syllabus* Point 6, in part, of *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004), the agency,

**"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[.]"

(emphasis added).

Neither respondent ever complied with their *Vaughan Index* obligation, and frankly after all this wasted time this Court should hold them accountable and find they have waived their right to assert any exemptions. Their blatant omission and disregard for the FOIA law's requirements has provided them the room to engage in extreme obfuscation, raising straw man arguments and red herrings, instead of actually addressing the specific records requested by Petitioners. They never have met the legal requirement of "specifically identifying" a single field of data identified by Petitioners in their request to any record they assert is exempt. If they did so, it would have been

obvious long ago none of the records sought are exempt, and this case would have been over.<sup>14</sup>

## VII. REDACTION

Like their failure to meet their clear obligation to produce a *Vaughan Index*, both respondents belatedly assert a burden of redacting without complying with the law that clearly required them to produce, at the outset of this case, “a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds.” *Syl. Pt. 5, in part, Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004). Obviously, the issue of redaction would arise only if there was a showing that the requested records included information that was exempt. Because the requested records are real property records, not detailed government records “on an individual,” redaction should not even be an issue in this case. Nevertheless, even assuming *arguendo* Mr. Duffield’s vague hearsay affidavit statements might make some issue that could raise the issue of redaction, Respondents have not come close to meeting their burden of providing a sufficiently detailed justification for not redacting.

The STD, who failed to comply with the requirements of *Farley, supra*, waited until well into this lawsuit to provide its redaction “explanation” in an affidavit. That explanation does not give

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<sup>14</sup>To the extent the STD argues its failure to produce a *Vaughan Index* does not matter because it cites to the straw man arguments about records Petitioners never requested, it proves the point of why the *Vaughan Index* is necessary. Without a *Vaughan Index*, a government agency can do exactly what Respondents are doing here, obfuscating by misdirection. The reason they have not produced a *Vaughan Index* is because they can not **specifically identify** any field of data requested by Petitioners that contains any exempt information. The purpose of the *Vaughan Index* is not as argued by the STD Br. at 24 to vaguely suggest some record in the entire database might be exempt, but to specifically identify those records so a response can be made. To allow the STD argument to stand would eviscerate the *Vaughan Index* requirement which is recognized nationwide.

The KCA’s argument, that it is entitled to intervene as a party to assert an exemption, but that it doesn’t have a party’s *Vaughan Index* obligation, is legally unjustified, and shows why it should never have been allowed to intervene. If it asserts an exemption in this FOIA litigation, it has a *Vaughan Index* obligation. Since it refuses, it should be removed as an Intervener.

any detail, let alone specific details, sufficient to justify its assertion of burden. The STD never identifies any specific field of data requested by Petitioners that includes allegedly exempt records; it never denies it can easily produce every field with non-exempt data; indeed, it never identifies any specific record at all that would have to be redacted that would cause it an undue burden. Instead, it asserts **only** that it might be burdensome *generally* to redact *unspecified* CAMA records if the STD had to follow *differing* views of *all* county assessors as to each assessor's view of privacy (as opposed to addressing whether it would be burdensome simply to follow the law, which is the proper standard). STD Br. at 25, citing Pinkerton Aff. [App at 322]. The vague testimony referenced hardly satisfies the STD's legal burden under *Farley, supra*, to produce a "written response that is **sufficiently detailed to justify** refusal to honor the FOIA request on these grounds." Perhaps even more egregiously, both Respondents cite to Mr. Duffield's brief *unspecific* hearsay statement (applicable only to Kanawha County, if at all), that "[d]ifferent field representatives record private information in different fields, *i.e.*, one representative might record data about a security system<sup>15</sup> in one field whereas another might record somewhere else[,]” as somehow supporting a conclusion that all CAMA records “are co-mingled such that private information can exist in any of the files.” STD Br. at 25. Like its argument that the Court should allow them to violate its *Vaughan* Index obligations, this Court should hold these government officials to their legal responsibilities. To do otherwise not only would be clearly wrong, but will serve only to eviscerate FOIA and encourage other public officials to disregard their legal duties in other cases.

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<sup>15</sup>Moreover, under *W. Va. Code* § 11-1A-23(a), the existence of a security system is *not* confidential, *only* the “specific description” of such a system is confidential. Mr. Duffield's vague, *unspecific* affidavit appears to refer only to the existence of a security system, but doesn't even give sufficient detail to discern for certain.

## **VIII. PROPERTY APPRAISAL RECORDS HISTORICALLY NEVER HAVE BEEN TREATED AS PRIVATE**

Both respondents miss the point of the cases cited from other jurisdictions. STD Br. at 20; KCA Br. at 16. The point is not that they address “CAMA” records, but that historically, the characteristics of real property in government records have been public, and never have been considered private. The fact that the real property information in the CAMA database has more detail as opposed to a paper assessment list does not change the fact that is the kind of information that never has been considered private. That fact, along with the common practice today in many West Virginia counties of disclosing such information on the Internet should support summary judgment for Petitioners. At the very least, it creates a genuine issue of material fact precluding summary judgment of respondents.

## **IX. THE TAX COMMISSIONER IS THE CUSTODIAN OF THE REQUESTED RECORDS**

Both Respondents continue the feeble assertion made at the outset of this case that the Tax Commissioner is not the custodian of the CAMA records in the STD’s possession. STD Br. at 28; KCA Br. at 31. They admit, as they must, that *Shepherdstown Observer* controls. STD Br. at 32. In what may be a first, the STD argues the overruled and abrogated decision in *Daily Gazette v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), which is contrary to *Shepherdstown Observer*, somehow supercedes. Such an argument is sophistry and nonsense, just as there is no legal basis for the STD’s statement that it may not allow one county assessor to “see” data entered by another county assessor. And to the extent the STD cites (for the first time) that “administrative rules” create some new basis for an exemption, the law is abundantly clear that administrative rules are

subservient to FOIA.<sup>16</sup>

## X. RULE 56(f)

This case can and should be resolved as a matter of law. The affidavits relied on by the lower court do not create a genuine issue of material fact supporting respondents. However, assuming *arguendo* some factual question might be raised, Petitioners clearly should be permitted remand and the opportunity to take discovery depositions and/or present testimony in open court. The lower court ruled at the January 11, 2012 hearing that the parties were **not** to engage in discovery depositions [App. at 161-68] so as to see if the case could be resolved **as a matter of law** on summary judgment. 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.” [App. at 164]. Because the Court stated that if it did not rule “strictly on the law” that Petitioners would have an opportunity to offer testimony and challenge respondents’ testimony “in court,” no Rule 56(f) affidavit was necessary as argued by the KCA Br. at 28-30. Simply put, the Court appears to have forgotten its ruling in this regard, and Petitioners should not be prejudiced for followed that ruling.

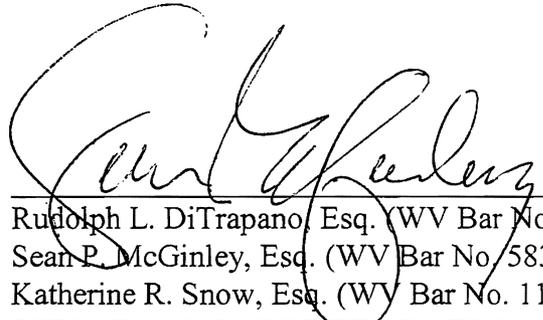
## XI. CONCLUSION

For all of the foregoing reasons, the summary judgment order of the lower court should be reversed and this case remanded with instructions to enter summary judgment for Petitioners.

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<sup>16</sup>This Court, as well as courts around the country, have held that administrative rules requiring confidentiality do not create an exemption under FOIA or Open Records laws. In *State ex rel. Billy Ray C. v. Skaff*, 194 W.Va. 178, 183, 459 S.E.2d 921, 926 (1995) this Court rightly held that, regardless of what the administrative regulations may say concerning public access to records generated in the investigation of complaints, public access to such records. “would be controlled by the West Virginia Freedom of Information Act, *W.Va. Code, 29B-1-1, et seq.* [.]” See *Anderson v. Health & Human Servs.*, 907 F.2d 936, 951 n. 19 (10th Cir. 1990); *Retired Railroad Workers Assoc. v. Railroad Retirement Board*, 830 F.2d 331, 334 (D.C. Cir. 1987).

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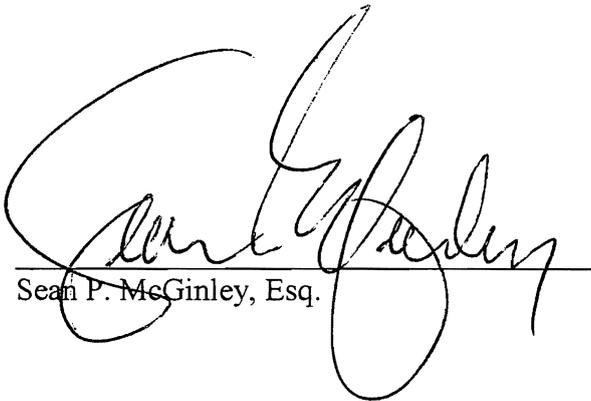
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## CERTIFICATE OF SERVICE

I, Sean P. McGinley, counsel for the Petitioners, do hereby certify that a true and accurate copy of the foregoing “**Petitioners Reply Brief**” was served upon counsel for respondents by placing in the U.S. Mail, postage prepaid, this 30<sup>th</sup> day of July, 2013, addressed as follows:

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