



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Raymond Cattonar
Complainant

Complaint No. 2011-230

v.

Township of Jackson Police Department (Ocean)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because Executive Order No. 26 (Gov. McGreevey, 2002) allows for an agency to apply another agency’s promulgated regulations exempting access to records in the possession of the receiving agency, the Custodian lawfully denied access to the responsive UCR reports pursuant to N.J.S.A. 47:1A-9.a. and N.J.A.C. 13:57-1.3(d). N.J.S.A. 47:1A-6.
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the responsive records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Raymond Cattonar¹
Complainant**

GRC Complaint No. 2011-230

v.

**Township of Jackson, Police Department (Ocean)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Summary annual schedule of the Township of Jackson Police Department's ("TJPD") Uniform Crime Report ("UCR") monthly crime reports for 2008, 2009, 2010 and 2011 through July.
2. Summary annual schedule for the monthly operations crime report.³

Request Made: July 4, 2011

Response Made: July 6, 2011

Custodian: Ann Marie Eden

GRC Complaint Filed: July 6, 2011⁴

Background

July 4, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

July 5, 2011

E-mail from Chief Matthew D. Kunz ("Chief Kunz") to the Complainant. Chief Kunz states that he has reviewed the Appellate Division's decision in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div., 2009) and believes that it is not on point with the Complainant's OPRA request seeking UCR work sheets. Chief Kunz states that O'Shea, supra, refers to the disclosure of a specific record, a "Use of Force" report generated contemporaneously to an arrest where criminal charges are filed.

¹ Bobby D. Connor, Esq., of the American Civil Liberties Union of New Jersey (Newark, NJ) represented the Complainant until December 15, 2011. Thereafter, Mr. Connor left the organization and thus the Complainant is currently represented by Ms. Jeanne LoCicero, Esq., and Mr. Edward Barocas, Esq.

² Represented by Jean L. Cipriani, Esq., of Gilmore & Monahan, P.A. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

July 5, 2011

E-mail from the Complainant to Chief Kunz. The Complainant states that Chief Kunz correctly characterized the Court's holding in O'Shea, *supra*. The Complainant notes that plaintiff in O'Shea sought specific records while the Complainant is seeking general data. The Complainant states that the Appellate Division noted that under OPRA, all government records shall be readily accessible and that any limitation on the right of access shall be construed in favor of the public's right to access. N.J.S.A. 47:1A-1.

The Complainant states that he has contacted the American Civil Liberties Union ("ACLU") to gauge their interest in representing him should the Township deny access to the requested records.⁵

July 6, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request.⁶ The Custodian states that access to the requested UCR reports is denied pursuant to *N.J.A.C. 13:57-1.3(d)*. The Custodian further states that access to an operation crime report is also denied as no record responsive exists.

July 6, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁷

- Complainant's OPRA request dated July 4, 2011.
- E-mail from Chief Kunz to the Complainant dated July 5, 2011.
- E-mail from the Complainant to Chief Kunz dated July 5, 2011.
- E-mail from the Custodian to the Complainant dated July 6, 2011.

The Complainant states that he submitted an OPRA request to the Township on July 4, 2011 seeking generalized crime statistics to include UCR reports and operation crime reports. The Complainant states that the Custodian responded in writing on July 6, 2011 denying access to his OPRA request pursuant to *N.J.A.C. 13:57-1.3(d)*.

The Complainant states that the Township of Jackson Police Department ("TJPD") budget accounts for over 30% of the municipal budget. The Complainant states that he has been researching spending for each division in the Township. The Complainant states that the citizens of the Township have no idea of what the Township's crime rate is and the New Jersey State Police ("NJSP") website only shows statistics by county.

The Complainant agrees to mediate this complaint.

⁵ Chief Kunz responded to the Complainant's e-mail on July 6, 2011; however, his response contains no information relevant to this complaint.

⁶ The Custodian certifies in the SOI that she received the Complainant's OPRA request on July 5, 2011.

⁷ The Complainant submitted additional material that is not relevant to the adjudication of this complaint. Raymond Cattonar v. Township of Jackson, Police Department (Ocean), 2011-230 – Findings and Recommendations of the Executive Director

July 8, 2011

Custodian's supplemental response to the OPRA request. The Custodian states that this letter shall serve as her formal response to the Complainant's OPRA request.

Request Item No. 1:

The Custodian states that UCR monthly reports are exempt from disclosure pursuant to *N.J.A.C. 13:57-1.3(d)*, which provides that "[t]he [UCR] forms identified and described in *N.J.A.C. 13:57-1.2* and *1.3* shall be used by the Uniform Crime Reporting Unit of the [NJSP] for the purposes of compliance with the provisions of *N.J.S.A. 52:17B-1* et seq. and such working documents shall be maintained as confidential by the [NJSP] and are not public records." *Id.*

Request Item No. 2:

The Custodian states that this request item is unclear and thus invalid. The Custodian requests that the Complainant resubmit this request item to seek specific, identifiable government records.

The Custodian states that OPRA "... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination' N.J.S.A. 47:1A-1.1." *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian states that the Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." *Id.* at 549.

The Custodian further states that a requestor must specifically identify the record sought. *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005) ("As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.").

The Custodian finally states that if a request is complex or would substantially disrupt agency operations, a custodian may deny access to said request after attempting to reach a reasonable solution with the requestor. *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian states that proof of substantiality of disruption may be the agency's need to generate new records in order to respond to the request.

July 19, 2011

Offer of Mediation sent to both parties.

July 27, 2011

The Custodian agrees to mediate this complaint.

July 27, 2011

Complaint referred to mediation.

October 28, 2011

Complaint referred back from mediation.

October 31, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information ("SOI") from the Custodian. The GRC states that the Complainant's response is due by close of business on November 7, 2011.⁸

November 9, 2011

Request for the SOI sent to the Custodian.

November 15, 2011

Custodian's SOI with the following attachments:⁹

- Complainant's OPRA request dated July 4, 2011.
- E-mail from Chief Kunz to the Complainant dated July 5, 2011.
- E-mail from the Complainant to Chief Kunz dated July 5, 2011.
- E-mail from the Custodian to the Complainant dated July 6, 2011.
- Letter from the Custodian to the Complainant dated July 8, 2011.

The Custodian certifies that no search for the responsive records was undertaken. The Custodian certifies that upon receipt of the Complainant's OPRA request, she forwarded same to the TJPd for processing. The Custodian certifies that the TJPd noted that the records were exempt from disclosure pursuant to *N.J.A.C. 13:57-1.2* and *1.3*. The Custodian certifies that she verbally confirmed the TJPd's advice with the Custodian's Counsel. The Custodian certifies that her actions and response were consistent with how she has responded to OPRA requests for similar records in the past.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable. The Custodian certifies that UCR reports have a record retention schedule of three (3) years.

The Custodian certifies that she received the Complainant's OPRA request on July 5, 2011. The Custodian certifies that she formally responded on July 8, 2011

⁸ The Complainant's Counsel e-mailed the GRC inquiring whether a letter submitted during mediation would be considered. The GRC informed Counsel that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., the GRC would not be able to consider any submissions made during mediation. Counsel responded noting that he did not know whether the fact that mediation did not settle the matter meant that the Act no longer applied. Counsel noted that he would amend the Complainant's Denial of Access Complaint; however, the GRC never received an amended complaint.

⁹ The Complainant submitted additional material that is not relevant to the adjudication of this complaint. Raymond Cattonar v. Township of Jackson, Police Department (Ocean), 2011-230 – Findings and Recommendations of the Executive Director

denying access to the requested UCR reports at issue herein pursuant to *N.J.A.C.* 13:57-1.3(d), which is a recognized exemption under OPRA. N.J.S.A. 47:1A-9.a.

The Custodian's Counsel submits a letter brief in support of the Township's position. Counsel recapitulates the facts of the instant complaint. Counsel states that UCR reports are government records as defined under OPRA because they are required to be made in the course of the TJPD's official business. N.J.S.A. 47:1A-1.1. Counsel states that under OPRA, a government record is subject to access "unless exempt from such access by [OPRA], any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order ..." N.J.S.A. 47:1A-1.

Counsel states that the Uniform Crime Reporting System ("System") was established "... under the direction, control and supervision of the Attorney General [{"AG"}] in the Department of Law and Public Safety." N.J.S.A. 52:17B-5.1. Counsel states that the AG is authorized to formulate rules and regulations for the collection of crime reporting data and to designate the NJSP as the agency responsible for collection, gathering, assembly and collation of such information. N.J.S.A. 52:17B-5.2. Counsel states that the purpose of the System is to provide the AG with sufficient information "... in order to present a proper classification and analysis of the volume and nature of crime and the administration of criminal justice within this State." N.J.S.A. 52:17B-5.4(a).

Counsel states that *N.J.A.C.* 13:57-1.1. et seq. governs the collection of data. Counsel states that the various reporting requirements for municipal full time police departments are found at *N.J.A.C.* 13:57-1.2(a). Counsel states that *N.J.A.C.* 13:57-1.3(d)-(f) entitled "Exceptions" explicitly states that the data collected by the NJSP from municipal police departments is exempt from public access:

"The [UCR] forms identified and described in *N.J.A.C.* 13:57-1.2 and 1.3 shall be used by the Uniform Crime Reporting Unit of the [NJSP] for purposes of compliance with the provisions of N.J.S.A. 52:17B-1 et seq., and such working documents *shall be maintained as confidential by the [NJSP] and are not public records.* Nothing in these regulations shall preclude the [AG] or [NJSP] for requiring the submission or deletion of any information that may be deemed necessary to maintain a viable and current [UCR] system. The [AG] or the [NJSP] shall have the right to choose the manner in which this information will be reported and submitted to the Uniform Crime Reporting Unit." (Emphasis added.) *Id.*

Counsel states that UCR reports are submitted by each law enforcement agency to the NJSP for the AG who subsequently collates and verifies the information prior to publication. Counsel states that the annual UCR report made available by the AG each year provides a summary of the verification process:

"The uniformity and accuracy of data gathered from contributors must be safeguarded through various ways. Although guidelines and instructions

are provided to each contributor, they are not the panaceas for the accuracy being sought.

The reports received by the Uniform Crime Reporting Unit are recorded and examined for mathematical accuracy and reasonableness of the interpretation of the offense classifications. Improper classifications, changes in reporting procedures, or actual change are identified in this manner. Errors of a minor nature are corrected by direct telephone contact with the contributors, while all other errors are resolved through a personal visit by a field representative to the reporting agency.

Further verification is accomplished through the analysis of statistical data accrued from the reports submitted. Fluctuations in crime rates noted from previous submissions are verified by the field representatives through their municipal counterpart.” 2010 Uniform Crime Report (“Report”), Section 1, Synopsis Uniform Crime Reporting Program, at pg. 4.

Counsel states that the UCR information compiled by municipal police departments for submission to the NJSP is essentially raw data that must go through a verification process by the NJSP and AG’s office. Counsel states that only then can the UCR information be considered a UCR report in relation to all other crime data throughout the State. Counsel states that although municipalities are required to submit monthly UCR reports, the NJSP and AG’s office spend significantly more time verifying the data. Counsel states that as noted in the 2010 Report, this process includes telephone and in-person visits with field representatives to review files, verify and correct accurate classification of the offenses listed in the UCR returns. Counsel further notes that although UCR returns were timely submitted for the reporting year 2010, the 2010 Report was not released until November 10, 2011 due to the lengthy verification process.

Counsel states that the verification process is the essence of the uniformity to the System, in that municipalities may improperly classify data or that data may simply be inaccurate. Counsel states that a municipal UCR report is a working document of the larger Report created by the AG for dissemination to the public.

Counsel states that OPRA provides that:

“The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant ... any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute* or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

Counsel states that regulations are “... customarily afforded a rebuttable presumption of validity and findings of *ultra vires* administrative agency action are disfavored.” Southern New Jersey Newspapers, Inc. v. Township of Mount Laurel, 275 N.J. Super. 465 (App. Div. 1994). Counsel states that the Legislature has recognized the importance of

maintaining the confidentiality of internal reporting procedures and the resulting reports. Counsel states that the Legislature established the System, which mandates the monthly submission of statistical reports to be used by the AG as baseline data for the compilation of an annual statewide study. N.J.S.A. 52:17B-5.1 et seq. Counsel states that the System further requires municipal law enforcement agencies to report certain statistical information to the AG including the number of criminal offenses per month, the age, sex, race and ethnic origin of persons arrested (both over and under 18 years of age), information regarding assaults upon police officers and information regarding criminal offenses involving firearms. *N.J.A.C. 13:57-1.2.*

Counsel states that the regulations promulgated by the AG for the administration of the System explicitly provides that all UCR information submitted to the AG shall remain confidential. *N.J.A.C. 13:57-1.3(d).* Counsel notes that although the regulation specifically refers to UCR data maintained by the NJSP, the intent of the exemption is defeated if the transmitting agency is required to disclose the same records already exempt by the NJSP.

Moreover, Counsel contends that the Complainant erroneously relies on N.J.S.A. 52:17B-5.4(a) in arguing that the AG's regulation and its authorizing statute conflict regarding the confidentiality of UCR reports. Counsel states that N.J.S.A. 52:17B-5.4(a) specifically contains a requirement for quarterly reports of gang-related incidents:

“The [AG] shall maintain a central repository for the collection and analysis of information collected pursuant to [N.J.S.A. 52:17B-5.3]. Information in the repository shall be made available to the public. The [AG] may designate the [NJSP] ... to be the agency to maintain the repository and provide information from the repository to the public.” *Id.*

Counsel asserts that the report referred to above is different from UCR reports, although the data included in the gang-related incident reports was eventually included in the UCR report. *See* N.J.S.A. 52:17B-5.3(b). Counsel further notes that N.J.S.A. 17:52B-5.4(a) requires the AG to maintain a repository and make the gang-related incident information available to the public. Counsel notes that the gang-related incident data, after collected and verified, is maintained by the AG and is a public record; however, the statute does not pertain to municipalities or municipally collected UCR data.

Counsel summarizes that the statutes establishing the System are silent on the issue of confidentiality of UCR reports; however, *N.J.A.C. 13:57-1.3* is clear that municipally-created UCR reports are confidential and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9.a. Counsel further contends that UCR reports submitted to the NJSP are draft documents: this fact is confirmed by the Report statement that UCR reports submitted by municipalities are “... not the panaceas for the accuracy being sought.” *Id.* at pg. 4. Counsel asserts that UCR reports require a thorough examination for

accuracy and interpretation prior to becoming a finalized statistic representative of crime trends throughout the State.¹⁰

November 15, 2011

E-mail from the Complainant's Counsel to the GRC. Counsel states that he has reviewed the SOI and is requesting an extension of time until December 2, 2011 to submit a reply.

November 17, 2011

E-mail from the GRC to the Complainant's Counsel. The GRC states that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly afford a response to the SOI, and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence that was not available at the time of the Complainant's first submission.

The GRC thus states that if Counsel wishes to submit a rebuttal to the SOI which provides new information or proof such as evidence or certifications, he may do so at this time.

November 17, 2011

E-mail from the Complainant's Counsel to the GRC. Counsel notes that he has received the GRC's e-mail and will be filing a response shortly.

November 17, 2011¹¹

E-mail from the Custodian's Counsel to the GRC. Counsel notes that as the GRC recognized in its e-mail to the Complainant's Counsel on this date, the GRC's regulations set forth in *N.J.A.C. 5:105-2.3* provide that a complainant's denial of access complaint should include any "... information, issues, and arguments that the complainant wishes to bring before the Council's attention for consideration in the adjudication of the complaint." *Id.* Counsel notes that the Complainant had the opportunity to amend his complaint after the complaint was referred back to the GRC from mediation and prior to the submission of the SOI. Counsel contends that any additional legal arguments should have been submitted as part of the original or amended Denial of Access Complaint. Counsel thus contends that the GRC's regulations do not afford the Complainant an opportunity to submit a rebuttal to the SOI. Counsel asserts that the Township has complied with the rules of general application in this matter and requests that the GRC require the Complainant to adhere to same.

¹⁰ Custodian's Counsel referred to a concession made during the mediation process. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., the GRC may not consider any concessions made during mediation.

¹¹ In a brief exchange between counsel for the parties, Complainant's Counsel acknowledged that the GRC already granted the Complainant's request to submit a rebuttal, thus negating the need to respond to the Custodian's Counsel. Custodian's Counsel responded to the Complainant's Counsel noting that the GRC granted an additional submission founded on the basis of "new factual information or proof."

Counsel further notes that both the Complainant and Complainant's Counsel were aware of the regulation the Custodian relied on to deny the Complainant access to the UCR reports on June 8, 2011. Counsel thus requests that the GRC not consider any additional legal arguments that do not refer to new evidence not available at the time of the filing of this complaint.

November 30, 2011

Letter from the Complainant's Counsel to the GRC with the following attachments:¹²

- Assembly Bill No. 245 dated January 31, 1966.
- "Statement of Governor Richard J. Hughes on the Signing of the Uniform Crime Reporting Bill" dated May 17, 1966.
- Purchase Order No. 0030095 (contract payment to Enforsys for services) dated July 7, 2005.
- Enforsys training manual dated July 15, 2005.
- Amendment to N.J.S.A. 52:17B-5.3 (Senate No. 2125 adding gang-related crimes to UCR reports) approved January 12, 2006.
- Amendment to N.J.S.A. 2C:16-1 (Senate No. 2975 adding bullying crimes to UCR reports) approved January 31, 2008.
- Complainant's Denial of Access Complaint dated July 6, 2011.
- Township's "Monthly Report of Crimes" statistics for July 2011.

Counsel recapitulates the facts of this complaint and further notes that the Complainant is a member of the Mayor's fiscal responsibility board that has made efforts to reduce government spending in the Township. Counsel states that the Complainant sought UCR reports for 2008 through the first half of 2011 because on May 12, 2011, TJPDP representatives reported at a public meeting that crime in the Township had increased from previous years as justification for a \$12 million increase in the TJPDP's annual budget.

Counsel states that subsequent to the Custodian's informal denial of access on July 6, 2011, the ACLU contacted the Township in an attempt to resolve the situation without litigation. Counsel states that at this time, the ACLU informed the Township that *N.J.A.C. 13:57-1.3*, although codified, is contrary to the authorizing statute that requires UCR reports to be submitted by local and county law enforcement agencies to a central repository maintained by the NJSP. Counsel further notes that another statutory provision requires that the information in the repository "... shall be made available to the public ..." N.J.S.A. 52:17B-5.4(a). Counsel states that the Township did not change its position on UCR reports or any crime statistics.

Counsel argues that the requested UCR reports are public records pursuant to N.J.S.A. 52:17B-5.4(a). Counsel states that the Township denied access to the records pursuant to *N.J.A.C. 13:57-1.3(d)*. Counsel contends that although the regulation is

¹² The Complainant's Counsel submitted additional correspondence that occurred during the mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., the GRC may not consider any submissions made during mediation.

current, it is in direct conflict with N.J.S.A. 52:17B-5.4(a). Counsel contends that because of this conflict, N.J.A.C. 13:57-1.3(d) is invalid. Counsel notes that the ACLU has already contacted the AG's office in an effort to have the regulation repealed. *See In Re: Adopted Amendments to N.J.A.C. 7:7A-2.4*, 365 N.J. Super. 255, 265 (App. Div. 2003)(noting that regulations can be set aside if "arbitrary or capricious, *plainly transgresses the statute it purports to effectuate*, or alters the terms of the statute and frustrates the policy embodied in it" (Emphasis added.)).

Counsel contends that there is no question that the "information" required to be maintained in the central repository per N.J.S.A. 52:17B-5.4(a) refers to UCR reports and the statistical information provided therein. Counsel notes that the statute establishes the central repository for information "... collected pursuant to ... (N.J.S.A. 52:17-5.3)" Counsel asserts that more specifically, N.J.S.A. 52:17-5.3 is the specific statute that requires law enforcement agencies to submit UCR reports.¹³ Counsel states that the UCR bill, passed in 1966, had a stated purpose of collecting crime data to assist law enforcement and specialists analyzing the causes and frequency of certain crimes to help them develop a multitude of programs to improve criminal justice in the State. *See* "Statement of Governor Richard J. Hughes on the Signing of the Uniform Crime Reporting Bill" dated May 17, 1966. Counsel asserts that similar to the purpose of the UCR bill, the Complainant seeks the responsive records to evaluate the TJPD and suggest cost savings measures that may be available to the Township.

Counsel argues that even though the Township has already responded to the Complainant's OPRA request, it now suggests that the Complainant has misinterpreted N.J.S.A. 52:17B-5.4(a), which is titled "Central repository for reports of gang-related incidents."¹⁴ Counsel further asserts that the Township claims that crime reports or information referred to same are different from UCR reports. Counsel contends that the Township's argument should be rejected because the UCR statute requires law enforcement agencies to submit UCR reports.

Counsel asserts that in giving the Township the benefit of the doubt, it may have been misled by the inaccurate title of N.J.S.A. 52:17B-5.4(a) concerning the central repository. Counsel notes that pursuant to its brief legislative history, in 2005, the Legislature amended N.J.S.A. 52:17B-5.3 to expand UCR reporting to include information related to gangs. *See* Amendment to N.J.S.A. 52:17B-5.3 (Senate No. 2125) approved January 12, 2006. Counsel states that the Legislature further amended the statute in 2007 to include bullying crimes information. *See* Amendment to N.J.S.A. 2C:16-1 (Senate No. 2975) approved January 31, 2008. Counsel states that the Legislature simultaneously established the central repository for UCRs and directed all information required by N.J.S.A. 52:17B-5.3. to be made available to the public. N.J.S.A. 52:17B-5.4(a).¹⁵ Counsel states that prior to 2007, no repository for UCR reports existed despite the fact that the NJSP were collecting and maintaining same since 1966.

¹³ The statute actually refers to N.J.S.A. 52:17B-5.3, which requires law enforcement to collect and report statistics related to criminal street gang activities.

¹⁴ The most recent copy of N.J.S.A. 52:17B-5.4(a) does not contain this heading.

¹⁵ Counsel notes that the Department of Law & Public Safety readopted UCR regulations in April 2010 that exempted UCR reports from access as confidential working documents. Counsel asserts that these Raymond Cattonar v. Township of Jackson, Police Department (Ocean), 2011-230 – Findings and Recommendations of the 10 Executive Director

Counsel asserts that the title of N.J.S.A. 52:17B-5.4, which refers to “gang-related incidents,” is incorrect given that the section (and thus the repository itself) was created by P.L. 2007, c303, a law regarding bullying in schools and not gang activities. Counsel notes that P.L. 2007, c303 makes no reference to “gangs.”¹⁶ Counsel asserts that it appears the title was improperly carried over even in light of the amendments made thereto. Counsel asserts that the Legislature had the opportunity to limit what UCR information would be available to the public, but made no such distinctions. Counsel thus argues that the Township’s argument should be rejected and the GRC should order disclosure of the responsive records.

Moreover, Counsel states that the Township carefully detailed the NJSP verification process. Counsel asserts that the Township’s argument insinuates that reports should be exempt from disclosure because they are incomplete or unverified and thus are subject to the deliberative exemption under OPRA. Counsel states that agencies are only allowed to withhold from access records that reflect opinions, recommendations and deliberations submitted as part of a process by which government policy are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Counsel states that purely factual material is generally not entitled to protection under the exemption. In Re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000). *But see* Education Law Center v. New Jersey Department of Education, 198 N.J. 274, 280 (2009)(holding that factual components are entitled to the deliberative exemption when used in the decision making process and when disclosure would reveal deliberations that occurred during the process). Counsel contends that the responsive UCR reports are not draft documents subject to the inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) exemption. Counsel asserts that the Township’s argument should be rejected.

Counsel asserts that although the NJSP compiles the information provided by local and county law enforcement agencies and offers some assistance to same, the NJSP’s verification process in practice is limited to correcting mathematical errors in the UCR reports and/or questioning reported fluctuations in crime that differ greatly from previous crime rates. Counsel asserts that the statute puts the onus on local and county agencies to report crime in their jurisdictions as directed. N.J.S.A. 52:17B-5.3. Counsel thus contends that the NJSP would presumably not take action unless there is a mathematical error or drastic difference in the submitted information. Counsel further asserts that the NJSP could also become involved if the Township were to contact the Crime Reporting Unit to ask questions about a classification or request training. Counsel contends that simply put, the NJSP does not contact every individual agency to verify monthly numbers.

Counsel asserts that for argument’s sake, had the Complainant requested a draft annual report from the AG, that record could arguably be exempt from disclosure as ACD material because the report can only be published after the AG fully analyzes the information collected throughout the year. Counsel asserts that this is not the issue here.

regulations may conflict with the Legislature’s creation of the repository. Counsel states that the ACLU is currently awaiting a response from the AG’s office concerning this apparent conflict.

¹⁶ P.L. 2007, c303 does refer to gang-related activities. In fact, the bill amends N.J.S.A. 52:17B-5.3 specific types of information that should be collected regarding street gangs. The bill further includes as a new section the repository legislation directly underneath of it.

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Counsel asserts that the Complainant did not request draft records consisting of the AG's unpublished findings or any ACD material: the Complainant is seeking UCR reports submitted by the TJPd reporting the crime that occurred in the Township. Counsel contends that these reports are not ACD material because the information is simply not deliberative. Counsel further argues that the crime statistics contained within the UCR reports cannot meet the standard set forth for factual components in ELC, *supra*, because they were not used in any decision-making process.

Counsel asserts that in light of the fact that the statistics were mentioned at a council meeting and the history of this complaint, the Complainant believes the Township's issue is one of transparency. Counsel contends that the Township has known about the discrepancies in reporting laws since July 2011 and has willfully chosen to deny the Complainant access to the responsive records.

Counsel contends that if the Township was truly concerned about the applicability of the NJSP's regulations to releasing unverified data, it could have disclosed unverified UCR reports indicating that such information has not been verified by the NJSP. Counsel further contends that the Township could have voluntarily released crime statistics for all of the requested time periods.

Counsel asserts that he has since discovered that the TJPd may be utilizing "Enforsys PoliSYS," which is a multi-media, browser-based software solution with capabilities to include crime analysis, National Incident-Based Reporting System ("NIBRS") interface and numerous other reporting functions including UCR reports. *See* Purchase Order No. 0030095 dated July 7, 2005. Counsel states that PoliSYS confirmed to him that its software has the advantage of easily compiling UCR reports and other crime reports. Counsel contends that if the Township is in fact using this software, its claim that a month would be needed to compile the relevant information is clearly erroneous. Counsel further asserts that the Township's requirement to produce monthly reports further casts suspicion on the Township's assertion.

Counsel thus argues that because the Township has repeatedly failed to produce the responsive records even after being advised about the conflicts between the UCR statute and regulations relied upon by the Township and further may have misled the Complainant, the GRC should determine that the Custodian knowingly and willfully violated OPRA in two (2) separate ways and should be fined \$3,500 accordingly. *See N.J.S.A.* 47:1A-11 (providing for a civil penalty of \$1,000 for the first (1st) violation and \$2,500 for the second (2nd) violation within 10 years of the initial violation).

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E-mail from the Custodian's Counsel to the GRC. Counsel states that she objects to Complainant Counsel's November 30, 2011 submission. Counsel contends that this submission is contrary to limited purpose of presenting new evidence that was not available at the time of the filing of this complaint. Counsel asserts that Complainant Counsel's submission disregards established GRC process. Counsel further asserts that the Complainant's Counsel did not submit any new evidence, information or certifications; rather, he submitted a legal brief with substantive arguments that should have been included as part of the Denial of Access Complaint. Counsel asserts that the

submission also presents legislative history and other materials outside the scope of the GRC's review.

Counsel thus requests that the GRC not consider Complainant Counsel's November 30, 2011 submission as it violates *N.J.A.C. 5:105-2.3*, which does not provide for a rebuttal to an SOI.

Analysis

Whether the Custodian unlawfully denied access to the requested UCRs?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that:

"The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant ... any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute* or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." (Emphasis added.) N.J.S.A. 47:1A-9.a.

The AG's regulations provide that:

"The [UCR] forms identified and described in *N.J.A.C. 13:57-1.2* and 1.3 shall be used by the Uniform Crime Reporting Unit of the [NJSP] for purposes of compliance with the provisions of N.J.S.A. 52:17B-1 et seq., and such working documents *shall be maintained as confidential by the*

[NJSP] and are not public records.” (Emphasis added.) *N.J.A.C. 13:57-1.3(d)*

Additionally, Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”) provides that:

“The following records shall not be considered to be government records subject to public access pursuant to [OPRA] ... [r]ecords of a department or agency *in the possession of another department or agency* when those records are *made confidential by a regulation of that department or agency* adopted pursuant to [OPRA] and Executive Order No. 9 (Hughes 1963), or *pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.*” *Id.*

Applicable statute further provides that:

“The [AG] shall maintain a central repository for the collection and analysis of information collected pursuant N.J.S.A. 52:17B-5.3. Information in the repository shall be made available to the public. The [AG] may designate the [NJSP] ... to be the agency to maintain the repository and provide information from the repository to the public.” N.J.S.A. 52:17B-5.4(a)

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this instance, the Township denied access to UCR reports pursuant to *N.J.A.C. 13:57-1.3(d)*, which provides that “... UCR forms ... are not public records.” *Id.* In the SOI, the Custodian’s Counsel argued that although the regulation applies to UCR information maintained by the NJSP, the intent of the exemption would be defeated if the transmitting agency was required to disclose same.

The Complainant’s Counsel submitted a letter on November 30, 2011 in which he argued that *N.J.A.C. 13:57-1.3(d)* was in conflict with a statutory mandate to keep UCR information in a central repository that is available to the public. N.J.S.A. 52:17B-5.4(a). Counsel argued that the Township further erroneously narrowed its interpretation of the statute to apply only to gang related information.

The GRC must address whether the Township can lawfully rely on a State regulation to exempt access to its own records.

N.J.S.A. 47:1A-9.a. provides that OPRA “... shall not abrogate ...” any exemptions contained in other statutes, executive orders and regulations. Here, the Custodian relies on the NJSP’s exemption found at *N.J.A.C. 13:57-1.3(d)*. The issue on

its face begs the question of whether a municipality can rely on a regulation promulgated for use by a State agency. This question is answered by EO 26, which allows for records of an agency held by another agency that have a specific regulation exempting same from access: to wit, an agency can rely on another agency's regulation exempting access to records.

Here, the Custodian's Counsel notes that the exemption afforded UCR reports under *N.J.A.C.* 13:57-1.3(d) would be abrogated if the Township was required to disclose same even though these records would be exempt if requested from the NJSP. EO 26 stands for this proposition by allowing an agency to exempt access to records required to be provided and maintained by another agency that promulgating regulations exempting access to same.

Therefore, because EO 26 allows for an agency to apply another agency's promulgated regulations exempting access to records in the possession of the receiving agency, the Custodian lawfully denied access to the responsive UCR reports pursuant to N.J.S.A. 47:1A-9.a. and *N.J.A.C.* 13:57-1.3(d). N.J.S.A. 47:1A-6.

The Complainant's Counsel argued in his November 30, 2011 letter that the AG's office promulgated a regulation that is contrary to N.J.S.A. 52:17B-5.4(a). The GRC does not have the authority to make a determination that a conflict in fact does exist. N.J.S.A. 47:1A-7. The GRC will further not address whether the Complainant's OPRA request Item No. 2 is invalid because the records are exempt from access under OPRA.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

In the matter currently before the Council, the Complainant disputed the Custodian’s denial of access pursuant to N.J.A.C. 13:57-1.3(d). However, it has been

determined that the Custodian lawfully denied access to the responsive records pursuant to N.J.S.A. 47:1A-9.a., EO 26 and the relevant regulation. Therefore, the Complainant is not a prevailing party.

Pursuant to Teeters, *supra*, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the responsive records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Executive Order No. 26 (Gov. McGreevey, 2002) allows for an agency to apply another agency's promulgated regulations exempting access to records in the possession of the receiving agency, the Custodian lawfully denied access to the responsive UCR reports pursuant to N.J.S.A. 47:1A-9.a. and *N.J.A.C.* 13:57-1.3(d). N.J.S.A. 47:1A-6.
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian lawfully denied access to the responsive records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹⁷

¹⁷ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.
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