



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**June 25, 2013 Government Records Council Meeting**

Charles F. Hendricks  
Complainant

Complaint No. 2011-338

v.

City of Cape May (Cape May)  
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 Supplemental 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 this complaint be dismissed because the Complainant withdrew the complaint via letter dated May 24, 2013. Therefore, no further adjudication is required.

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 25<sup>th</sup> Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair  
Government Records Council

**Decision Distribution Date: June 27, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 25, 2013 Council Meeting**

**Charles F. Hendricks<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-338**

v.

**City of Cape May (Cape May)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** The formula for the allocation of expenses among the three jurisdictions subject to the Cape May Police Department Police Sharing Agreement: Cape May City, West Cape May, and Cape May Point.<sup>3</sup>

**Request Made:** August 21, 2011

**Response Made:** September 8, 2011

**GRC Complaint Filed:** November 3, 2011<sup>4</sup>

**Background**

**September 25, 2012 Council Meeting:**

At its September 25, 2012 public meeting, the Council considered the September 18, 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, found that based on the inadequate and conflicting evidence in this matter, the GRC is unable to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian unlawfully denied access to the requested record. Therefore, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian lawfully denied access to the requested record or unlawfully denied access to the requested record, and if the latter, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Diane L. Weldon, Custodian of Records. Represented by Anthony P. Monzo, Esq., of Monzo Catanese, P.C. (Cape May Court House, NJ).

<sup>3</sup> The records requested are described differently in the Denial of Access Complaint than they are in the original request. In the complaint, the Complainant described the records denied as “‘Cost sharing formula’ that is the basis for two multiyear Interlocal Police Cost Sharing Agreements between the City of Cape May and West Cape May and Cape May Point respectively from January 2009 to December 2015.” Also, there were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

Procedural History:

On September 26, 2012, the Council distributed its Interim Order to all parties. On April 30, 2013, the Complaint was transmitted to OAL. On June 11, 2013, OAL transmitted this complaint back to the GRC because the Complainant withdrew the complaint in writing to the OAL and the GRC on May 24, 2013.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew the complaint via letter dated May 24, 2013. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.  
Executive Director

June 18, 2013



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**INTERIM ORDER**

**September 25, 2012 Government Records Council Meeting**

Charles F. Hendricks  
Complainant

Complaint No. 2011-338

v.

City of Cape May (Cape May)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 based on the inadequate and conflicting evidence in this matter, the GRC is unable to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian unlawfully denied access to the requested record. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian lawfully denied access to the requested record or unlawfully denied access to the requested record, and if the latter, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 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: September 26, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

**Charles F. Hendricks<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-338**

v.

**City of Cape May (Cape May)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** The formula for the allocation of expenses among the three jurisdictions subject to the Cape May Police Department Police Sharing Agreement: Cape May City, West Cape May, and Cape May Point.<sup>3</sup>

**Request Made:** August 21, 2011

**Response Made:** September 8, 2011

**Custodian:** Diane L. Weldon, Clerk

**GRC Complaint Filed:** November 3, 2011<sup>4</sup>

**Background**

**August 21, 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 FOIA.<sup>5</sup> The Complainant also states that he will make the request in person at the Cape May City Hall on August 22, 2011.<sup>6</sup>

**September 8, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the eleventh (11<sup>th</sup>) business day following receipt of such request.<sup>7</sup> The Custodian states that the record was requested on September 1, 2011.<sup>8</sup> The Custodian states that access to the requested record is denied

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Anthony P. Monzo, Esq., of Monzo Catanese, P.C. (Cape May Court House, NJ).

<sup>3</sup> The records requested are described differently in the Denial of Access Complaint than they are in the original request. In the complaint, the Complainant described the records denied as "'Cost sharing formula' that is the basis for two multiyear Interlocal Police Cost Sharing Agreements between the City of Cape May and West Cape May and Cape May Point respectively from January 2009 to December 2015." Also, there were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> FOIA is an acronym for the (federal) Freedom of Information Act. The e-mail request referenced the FOIA and did not reference OPRA.

<sup>6</sup> There is no evidence in the record to indicate that the Complainant made the request at any other time.

<sup>7</sup> The Custodian certifies in the SOI that she received the Complainant's OPRA request on August 23, 2011.

<sup>8</sup> The evidence of record does not support this statement.

because it constitutes inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material.

**September 13, 2011**

Letter from the Complainant to the Custodian. The Complainant objects to the denial of his records request. The Complainant states that the requested record cannot be exempt as ACD material because the Mayor made a public statement on August 21, 2011 wherein he said that the three municipalities sharing services under the 2009-2015 interlocal agreement rely on the requested record for cost sharing and as such it is presently in active use. The Complainant further informs the Custodian that she has an obligation to follow the law with respect to disclosure of public records and should not be guided by the whims and biases of elected officials. The Complainant informs the Custodian that he has recourse under OPRA to file a complaint if the Custodian unlawfully denies him access to the requested record. The Complainant asks the Custodian to review the Complainant’s record request and obtain an opinion from the City Solicitor with respect to the request.

**September 14, 2011**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that she is not guided by the whims and biases of elected officials. The Custodian further informs the Complainant that she sent the Complainant’s request to the City Manager, Mayor and Chief Financial Officer and was thereafter informed by the Custodian’s Counsel that the requested record is not disclosable.

**September 14, 2011**

E-mail from the Custodian’s Counsel to the Complainant. Counsel references an earlier telephone conversation with the Complainant wherein Counsel states that the Complainant believes that there is a document that contains a formula that was used by the Cape May City Council in reaching its decision to approve the Interlocal Agreements for police services with West Cape May and Cape May Point. Counsel states that he told the Complainant that the pre-decisional documents that were utilized by the City Council in approving the Interlocal Agreements fall within the deliberative process exception under OPRA. Counsel states that he attached a copy of a 2010 Appellate Division case captioned McGee v. Township of East Amwell which contains the standards for the deliberative process privilege.<sup>9</sup> Counsel further informs the Complainant that he will review the file with the City Clerk and advise her which records are not subject to the deliberative process privilege so that those records may be made available for inspection by the Complainant.

**September 15, 2011**

E-mail from the Complainant to the Custodian’s Counsel. The Complainant thanks Counsel for sending him a copy of the court’s decision in McGee; however the Complainant informs Counsel that the decision is not applicable to his request because the facts in McGee differ from the facts in his request. The Complainant also informs Counsel that his request is for a written document that contains a formula upon which the cost sharing of the three communities sharing services under the interlocal agreements is

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<sup>9</sup> The full citation for this case is McGee v. Township of East Amwell, 416 N.J. Super. 602 (App. Div. 2010).

based. The Complainant states that he knows this because the Mayor told the public that such a formula was used. The Complainant informs Counsel that present cost sharing under the interlocal agreements is based upon the requested formula; therefore it is a post-decisional, not pre-decisional record.

**September 16, 2011**

E-mail from the Custodian's Counsel to the Complainant. Counsel summarizes McGee v. Township of East Amwell. Counsel also informs the Complainant that he agrees with the Complainant's assertion that any document that is required to be attached to an Interlocal Agreement is a public record.

**September 26, 2011**

E-mail from the Complainant to the Custodian's Counsel. The Complainant states that Counsel informed him on September 14, 2011 that Counsel would research the City's file and advise the Custodian whether she should fulfill the Complainant's OPRA request; however, on September 16, 2011, the Complainant states that Counsel instead instructed him on the application of the deliberative process privilege. The Complainant informs Counsel that he wants to know the outcome of Counsel's instruction to the Custodian regarding the Complainant's record request. The Complainant states the he is recapping his position.<sup>10</sup>

The Complainant states that if he does not receive a responsive answer to his OPRA request by October 10, 2011, he intends to file a Denial of Access Complainant.

**September 26, 2011**

E-mail from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that he will review the file on September 27, 2011, and advise the Custodian as to which documents are privileged. Counsel states that, thereafter, the Custodian will provide the Complainant with a privilege log.

**October 12, 2011**

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that she has reviewed the Complainant's request with Counsel and has concluded that the financial work papers maintained by the City Manager are exempt from disclosure because they constitute ACD material. The Custodian further informs the Complainant that the financial work papers contain information that, if disclosed, could adversely affect the City's collective bargaining negotiations with the Police Benevolent Association. The Custodian informs the Complainant that all of the documents concerning the interlocal agreements with West Cape May and Cape May Point are available for inspection in the Clerk's office. The Custodian also tells the Complainant to inform her if he wishes to inspect the records.

**October 14, 2011**

Letter from the Complainant to the City of Cape May Mayor, Deputy Mayor and Council. The Complainant informs the Mayor and Council members that the Custodian denied him access to the formula used for the determination of costs to be charged under

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<sup>10</sup> The Complainant repeats the argument he made in his e-mail to the Custodian's Counsel dated September 15, 2011.

the City's interlocal police service agreements. The Complainant requests that the Mayor and Council overrule the Custodian's denial of access and grant him access to the requested record. The Complainant states that if he is not granted access to the requested record he will file a Denial of Access Complaint.

### **October 24, 2011**

E-mail from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that there is no legal requirement for the City Council to take further action with respect to the Complainant's OPRA request. Counsel states that the Complainant's request was denied because the records constitute work product and are clearly within the deliberative process privilege. Counsel cites to passages within Education Law Center v. New Jersey Department of Labor, 198 N.J. 274 (2009) in support of the Custodian's decision to deny the Complainant access to the requested record.

### **November 3, 2011**

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

- Complainant's OPRA request dated August 21, 2011
- Custodian's response to the OPRA request dated September 8, 2011
- Letter from the Complainant to the Custodian dated September 13, 2011
- E-mail from the Custodian to the Complainant dated September 14, 2011
- E-mail from the Custodian's Counsel to the Complainant dated September 14, 2011
- E-mail from the Complainant to the Custodian's Counsel dated September 15, 2011
- E-mail from the Custodian's Counsel to the Complainant dated September 16, 2011
- E-mail from the Complainant to the Custodian's Counsel September 26, 2011
- E-mail from the Custodian's Counsel to the Complainant September 26, 2011
- Letter from the Custodian to the Complainant dated October 12, 2011
- Letter from the Complainant to the City of Cape May Mayor, Deputy Mayor and Council dated October 14, 2011
- E-mail from the Custodian's Counsel to the Complainant dated October 24, 2011<sup>11</sup>

The Complainant states that he provided his OPRA request to the Custodian on September 1, 2011 and that the Custodian denied his request on September 8, 2011.

The Complainant states that since 2002 the City of Cape May has shared services with the adjacent communities of West Cape May and Cape May Point. The Complainant further states that the City entered into an Interlocal Services Agreement with West Cape May on December 9, 2008 and with Cape May Point on December 11, 2008. The Complainant contends that the Mayor made a public statement on August 28, 2011 wherein he said that the charges to West Cape May and Cape May Point under the

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<sup>11</sup> Additional correspondence was attached to the Complainant's Denial of Access Complaint; however, such correspondence restates the facts/assertions already made in the listed correspondence.  
Charles Hendricks v. City of Cape May, 2011-338 – Findings and Recommendations of the Executive Director



agreements are based on a formula.<sup>12</sup> The Complainant states that he submitted his OPRA request for the formula, but access was denied because the Custodian asserted that the record was exempt from disclosure as ACD material and later as being subject to the collective negotiations exemption. The Complainant admits that he does not know the form of the record because the formula has never been produced.

The Complainant states that the Custodian's Counsel relied upon Education Law Center, *supra*, in support of the Custodian's decision to deny the Complainant access to the requested record; however, the Complainant asserts that the facts differ between those in Education Law Center and the underlying request in the instant complaint. The Complainant contends that the Custodian's Counsel knows that the facts in Education Law Center render it inapplicable to the instant complaint and that is why Counsel subsequently asserted the collective negotiations exemption as a lawful reason for denying the Custodian access to the requested record. The Complainant states that, in any event, the collective negotiations exemption is not applicable here because the requested record does not constitute "information generated on behalf of public employers or public employees in connection with collective negotiations."

The Complainant does not agree to mediate this complaint.

**November 10, 2011**

Request for the Statement of Information ("SOI") sent to the Custodian.

**November 17, 2011**

E-mail from the Custodian to the GRC. The Custodian asks for an extension of time to complete and submit the SOI to the GRC.

**November 17, 2011**

E-mail from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI. The GRC informs the Custodian that the SOI will be due on November 29, 2011.

**November 29, 2011<sup>13</sup>**

Custodian's SOI attaching the Complainant's Denial of Access Complaint dated November 3, 2011.

The Custodian certifies that the records that may have been responsive to the request were not destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that she received the Complainant's OPRA request on August 23, 2011, September 1, 2011, September 13, 2011, September 26, 2011 and October 14, 2011. The Custodian certifies that she responded to the Complainant's

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<sup>12</sup> The August 28, 2011 date here differs from the August 21, 2011 date the Complainant mentioned in his September 13, 2011 letter to the Custodian.

<sup>13</sup> The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant's OPRA request as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

OPRA request on August 29, 2011, September 8, 2011, September 14, 2011, October 12, 2011 and October 24, 2011.

The Custodian certifies that she determined that an Interlocal Service Agreement between the City of Cape May and the Borough of West Cape May totaling nine (9) pages, an Interlocal Service Agreement between the City of Cape May and the Borough of Cape May Point totaling nine (9) pages, and resolutions of the City of Cape May approving each Interlocal Service Agreement totaling two (2) pages constitute the records responsive to the Complainant's request and that she disclosed the records to the Complainant on September 1, 2011.<sup>14</sup>

The Custodian certifies that work papers that were prepared by the City Manager before the approval of the Interlocal Service Agreements which contain various financial, contractual and staffing assumptions that were formulated as work product in analyzing the feasibility of the Interlocal Service Agreements are pre-decisional and fall within the deliberative process privilege exception pursuant to the court's opinion in Education Law Center, *supra*. The Custodian certifies the records were therefore denied in their entirety pursuant to N.J.S.A. 47:1A-1.1 as inter-agency or intra-agency advisory, consultative or deliberative material.

#### **December 1, 2011<sup>15</sup>**

The Complainant's response to the Custodian's SOI with the following attachments:<sup>16</sup>

- Custodian's response to the OPRA request dated September 8, 2011
- E-mail from the Custodian to the Complainant dated September 14, 2011
- Letter from the Custodian to the Complainant dated October 12, 2011

The Complainant states that he is making this submission after reviewing the Custodian's Statement of Information dated November 29, 2011. The Complainant states that the Custodian's certified statements in the SOI are directly at odds with, not only public disclosures made by City officials, but also the Mayor's statement that the charges detailed in the intralocal cost sharing agreements were based upon formulas. The Complainant further states that the Custodian in her SOI did not address the requested record, but rather "conveniently labeled [the requested record] as work papers." The Complainant states that because the Custodian reclassified the record responsive to his request from the formula for the allocation of expenses to work papers, he is now being denied records for a request that he never made. The Complainant contends that he never requested to see the City Manager's work papers which are alleged to contain various financial, contractual and staffing assumptions. The Complainant states that he can produce witnesses to testify about the requested record.

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<sup>14</sup> There is nothing in the evidence of record to support the Custodian's certified statement. The Custodian may be referring to disclosure of other records that are not relevant to this complaint.

<sup>15</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

<sup>16</sup> The Complainant submitted an Amended Denial of Access Complaint as the form of this submission; however, the Complainant did not amend or modify his original complaint. This submission is more in the nature of a response to the Custodian's SOI and will therefore be treated as such by the GRC.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested record?**

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...[t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“A government record shall not include...information generated by or on behalf of public employers or public employees in connection with...collective negotiations, including documents and statements of strategy or negotiating position” N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

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 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.

Here, the Complainant states that he provided his records request to the Custodian on September 1, 2011. The Custodian certified that she received the Complainant's OPRA request on August 23, 2011, September 1, 2011, September 13, 2011, September 26, 2011 and October 14, 2011.

The evidence of record reveals that the Complainant e-mailed to the Custodian a FOIA request for the record relevant to the complaint on August 21, 2011. The evidence of record further reveals that the Custodian acknowledged receiving from the Complainant a request for the record on August 23, 2011, among other dates. The Custodian certified that her first response to the Complainant's OPRA request was on August 29, 2011, but there is nothing in the evidence of record to support the Custodian's certified statement. Although the Custodian also certified that she received a request from the Complainant on September 1, 2011, and the Complainant stated that he made a request on that date, neither the Complainant nor the Custodian submitted a copy of the September 1, 2011 request to the GRC. Paragraph 6 of the SOI instructs the Custodian as follows: "[a]ttach a copy of the OPRA records request upon which this Complaint is based. Please mark this attachment 'Item 6.'" The Custodian attached as "Item 6" the Complainant's entire Denial of Access Complaint which contains numerous communications by and between the Complainant, the Custodian, and the Custodian's Counsel.

Given the statements made by the parties, as well as the evidence of record, the GRC cannot determine whether the Complainant's e-mail dated August 21, 2011 and referenced "FOIA Request" was properly rejected as an invalid OPRA request or was accepted by the Custodian as the Complainant's OPRA request. There is nothing in the evidence of record to reveal that the Custodian responded in writing to the Complainant's request until the Custodian responded by letter dated September 8, 2011 to an alleged records request dated September 1, 2011. In that response, the Custodian denied the Complainant's request by stating:

"The formula used for the allocation of expenses among the City of Cape May, West Cape May and Cape May Point for their interlocal agreements for police protection is not subject to disclosure. The formula is an 'inter-agency or intra-agency advisory, consultative or deliberative material' exemption."

At that time the Custodian clearly understood that the Complainant's request was for the "formula for the allocation of expenses" because she restated it in her response to the OPRA request.

The Complainant in his letter to the Custodian dated September 13, 2011, objected to the Custodian's denial of his records request. The Complainant stated that the requested record could not be exempt as ACD material because the Mayor made a public statement on August 21, 2011 in which he said that the three municipalities sharing services under the 2009-2015 interlocal agreements relied on the requested record for cost sharing. As such, the Complainant argued that the formula was presently in active use and not a pre-decisional record. Thereafter, in her SOI the Custodian certified that the records denied in their entirety as ACD material exempt from disclosure were "work

papers that were prepared by the City Manager before the approval of the Interlocal Service Agreements which contain various financial, contractual and staffing assumptions that were formulated as work product in analyzing the feasibility of the Interlocal Service Agreements.”

In his response to the Custodian’s SOI dated December 1, 2011, the Complainant objected to the Custodian’s reclassification of the records responsive to his request. The Complainant asserted that the Custodian “conveniently labeled [the requested record] as work papers” implying that the Custodian changed the form of the record she determined to be responsive to the request from an actively used formula to a pre-decisional working document in order to fit it into the ACD exemption. The Complainant stated that because the Custodian reclassified the record responsive to his request he is now being denied records for a request that he never made. The Complainant further stated that he can produce witnesses to testify about the requested record.

Given the conflicting evidence presented in this matter, the GRC is unable to determine whether the record responsive to the Complainant’s request is a singular formula used for the allocation of expenses among the communities subject to the interlocal agreements or a pre-decisional document identified by the Custodian as “work papers” which may or may not contain said formula.

Accordingly, based on the inadequate and conflicting evidence in this matter, the GRC is unable to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian unlawfully denied access to the requested record. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian lawfully denied access to the requested record or unlawfully denied access to the requested record, and if the latter, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that based on the inadequate and conflicting evidence in this matter, the GRC is unable to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian unlawfully denied access to the requested record. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Complainant submitted a valid OPRA request and, if so, whether the Custodian lawfully denied access to the requested record or unlawfully denied access to the requested record, and if the latter, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012