



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**July 26, 2022 Government Records Council Meeting**

Cheri Wong (o/b/o Coriander Way  
Condominium Association)  
Complainant

Complaint No. 2021-6

v.  
City of Englewood (Bergen)  
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 19, 2022 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active Public Health Emergency at the time of the request, the Custodian failed to provide any evidence that she made a “reasonable effort” to provide a response from January 2021 through May 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that she responded on May 6, 2021 as part of the Statement of Information.
2. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant’s November 12, 2020 OPRA request since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant’s request on May 6, 2021 as part of the Statement of Information. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



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 26<sup>th</sup> Day of July 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 28, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 26, 2022 Council Meeting**

**Cheri Wong (On behalf of  
Coriander Way Condominium Association)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-6**

v.

**City of Englewood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: “Corway Corp File #87-11376 including any maps, Chain of Title, Developer agreement between Corway Corp, City of Englewood [“City”)], planning board dated June 1987.

All records for Corway Corp regarding Coriander Way Condominium Association [“the Association”] 1986-1989.”

**Custodian of Record:** Yancy Wazirmas  
**Request Received by Custodian:** November 12, 2020  
**Response Made by Custodian:** November 30, 2020  
**GRC Complaint Received:** January 7, 2021

**Background<sup>3</sup>**

**Request and Response:**

On November 11, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 30, 2020, the Custodian responded in writing stating that the City Clerk’s Office missed the statutory deadline due to herself and her staff contracting COVID-19. The Custodian stated that the infection has significantly slowed the operations of her office. The Custodian also stated that the March 20, 2020 amendment to OPRA signed by Governor Murphy permitted the City to extend the deadline to respond to OPRA requests during a declared state of emergency. The Custodian further stated that it would take an additional four (4) weeks to provide the requested information, and that the City would work diligently to provide responsive records as soon as reasonably possible.

---

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

<sup>2</sup> Represented by Levi J. Kool, Esq., of Huntington Bailey, LLP (Westwood, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Cheri Wong (On Behalf of Coriander Way Condominium Association) v. City of Englewood (Bergen), 2021-6 – Findings and Recommendations of the Executive Director

#### Denial of Access Complaint:<sup>4</sup>

On January 7, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she has not received a response from the Custodian after receiving the November 30, 2020 correspondence requesting an extension of time to respond.

The Complainant asserted that the City has not provided the Association with municipal services in violation of the Municipal Services Act of 1989. The Complainant asserted that previous Association members and its counsel have reached out to the City several times about the matter without response. The Complainant argued that the Custodian improperly refused to grant access to records she was entitled to.

#### Statement of Information:<sup>5</sup>

On May 6, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 12, 2020. The Custodian certified that her search included locating the street address and the block and lot designation of the property in question upon the advice of counsel. The Custodian certified that she forwarded the request as well as the additional qualifiers to every department in the City to see if any responsive records could be located. The Custodian certified that she did not respond to the Complainant before receiving the Denial of Access Complaint.

The Custodian first argued that she did not unlawfully deny access to the request since she certified that no responsive records exist. The Custodian asserted that the GRC has repeatedly held in support of this assertion: Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Paff v. Twp. of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010); Akers v. Buena Vista Twp., GRC Complaint No. 2014-190 (November 2014); Pavlenko v. Twp. of Delran, GRC Complaint No. 2010-325 (March 2010).

The Custodian also argued that the request was overbroad and failed to seek specific, identifiable records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005). The Custodian asserted that the request sought “any and all” documents or requested a type of document without sufficient explanation of the specific document. The Custodian stated that while the City conducted a thorough search of its files, there was no ability to identify which documents, if any, would have been responsive.

---

<sup>4</sup> The Complainant subsequently included additional information regarding discussions between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

<sup>5</sup> The complaint was referred to mediation on January 25, 2021. The complaint was referred back from mediation on April 1, 2021.

Cheri Wong (On Behalf of Coriander Way Condominium Association) v. City of Englewood (Bergen), 2021-6 – Findings and Recommendations of the Executive Director

The Custodian next asserted that its response was timely. The Custodian noted that in accordance with N.J.S.A. 47:1A-5(i)(2), the seven (7) business day period no longer applied since the State was under a public health emergency (“PHE”) at the time of the request. The Custodian asserted that she received the OPRA request on November 12, 2020, and that on November 16, 2020, an employee at tested positive for COVID-19, which then spread to the rest of the Clerk’s Office, including the Custodian. The Custodian argued that she notified the Complainant that she had missed the seven (7) business day deadline to respond due to herself and employees at the City Clerk’s Office contracting COVID-19. The Custodian asserted that she and the other employees were also forced to quarantine for a minimum of two (2) weeks and she was not able to return to the office until December 1, 2020. The Custodian also asserted that she provided with the Complainant with a defined extension of four (4) weeks to provide a response, in accordance with N.J.S.A. 47:1A-5(i)(2).

Lastly, the Custodian argued that even if the GRC found that the City’s response was untimely, the violation did not rise to the level of a knowing and willful violation under OPRA. The Custodian noted that the GRC has repeatedly held that a “deemed” denial of access did not rise to a knowing and willful violation. See Lopez v. City of Newark (Essex), GRC Complaint No. 2019-217 (August 2020).

Additional Submissions:

On May 6, 2021, the Complainant e-mailed Custodian’s Counsel in response to the SOI. The Complainant asserted that there should be tax maps in the City’s possession and that the search was insufficient.

On May 13, 2021, the Complainant submitted a formal response to the SOI. The Complainant asserted that she was able to obtain the master deed for the Association’s building from Bergen County. The Complainant asserted that the master deed presents credible evidence that the requested records exist because it referenced records she requested from the City.

The Complainant also asserted that her OPRA request identified specific government records and included names, dates, and document types. The Complainant therefore argued that the request was not “open-ended.” MAG, 375 N.J. Super. at 546.

The Complainant further argued that the request was not timely, notwithstanding the delays caused by COVID-19. The Complainant asserted that she did not hear from the Custodian well after January 2021 and was not kept informed. The Complainant further argued that this violation of OPRA was a knowing and willful given the history between the parties. The Complainant also noted that Custodian’s Counsel included e-mail correspondence between the Complainant and the Association’s counsel in violation of the Rules of Professional Conduct.<sup>6</sup>

---

<sup>6</sup> The Complainant included additional arguments and statements regarding the City and the Association that are outside the GRC’s jurisdiction.  
Cheri Wong (On Behalf of Coriander Way Condominium Association) v. City of Englewood (Bergen), 2021-6 – Findings and Recommendations of the Executive Director

## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i)(2) now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, *provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.*

[Id. (Emphasis added).]

Although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and could not provide a response until the fifth (5<sup>th</sup>) business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

Here, the Complainant's November 12, 2020 OPRA request sought a number of records pertaining to the Association's building and relationship with the City. At the time of the request the State was under a PHE due to the COVID-19 pandemic, and the Custodian asserted that on November 16, 2020, she and her staff at the City Clerk's office contracted COVID-19. The Custodian asserted that this resulted in her and her staff being quarantined for at least two (2)

---

<sup>7</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.  
Cheri Wong (On Behalf of Coriander Way Condominium Association) v. City of Englewood (Bergen), 2021-6 – Findings and Recommendations of the Executive Director

weeks, and would not contact the Complainant until November 30, 2020, requesting a 4-week extension of time to respond to her OPRA request.

A review of the evidence demonstrates that the Custodian violated N.J.S.A. 47:1A-5(i). Although the OPRA request was made while a PHE was in effect, and thus the language under N.J.S.A. 47:1A-5(i)(2) applied, the statute still required a “reasonable effort” to provide a response to an OPRA request within the allotted period. While the Custodian certified to the substantial hardships faced due to the pandemic which caused the delay in requesting an extension of time to respond, the Custodian did not respond within the allotted extension, nor did she provide any response until May 6, 2021, the date of the SOI. Furthermore, the Custodian failed to show the reasonable efforts made to respond to the request “as soon as possible . . .” N.J.S.A. 47:1A-5(i)(2).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide any evidence that she made a “reasonable effort” to provide a response from January 2021 through May 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that she responded on May 6, 2021 as part of the SOI.

### **Unlawful Denial of Access**

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the instant matter, the Custodian certified that no records exist in response to the Complainant’s OPRA request seeking records related to the Association and its building, and its relationship with the City. In response, the Complainant asserted that she was able to locate the 1987 master deed for the Association’s building from Bergen County, and therein referenced agreements between the City and Corway Corp. However, the reference to the agreement is insufficient to show that the City in fact possessed responsive records at the time of the request, given the date of the master deed. Furthermore, the Custodian certified in the SOI that she conducted a thorough search of City records and forwarded to each City Department not only the OPRA request, but the street address and block and lot designation of the building to ensure the search was comprehensive.

Accordingly, notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant’s November 12, 2020 OPRA request since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

## **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant’s request on May 6, 2021 as part of the SOI. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active Public Health Emergency at the time of the request, the Custodian failed to provide any evidence that she made a “reasonable effort” to provide a response from January 2021 through May 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s



request since the evidence of record demonstrates that she responded on May 6, 2021 as part of the Statement of Information.

2. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's November 12, 2020 OPRA request since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant's request on May 6, 2021 as part of the Statement of Information. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

July 19, 2022