



**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**

**August 27, 2013 Government Records Council Meeting**

Herman Gaines  
Complainant

Complaint No. 2012-261

v.

New Jersey Office of the Public Defender  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 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 the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k). The Council should not address whether the Custodian provided the Complainant with the records sought because under OPRA all responsive records sought are exempt from disclosure.

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 27th Day of August, 2013

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: August 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 27, 2013 Council Meeting**

**Herman Gaines<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-261**

**v.**

**New Jersey Office of the Public Defender<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via U.S. mail of time cards for representation provided to the Complainant by the following attorneys:<sup>3</sup>

1. Richard Hurley (June, 2001 – December, 2001);
2. Gregory Jordan (December, 2001 – March, 2002).
3. Robert Sloan (September, 2002 – September, 2005).
4. Ingrid Yurchenco (September, 2005 – May, 2006).
5. Claire Drugach (May, 2006 – September, 2007).
6. Ronald Appleby (September, 2007 – August, 2011).
7. Michael Paul (August, 2011 – August, 2012).

**Custodian of Record:** Dale Jones

**Request Received by Custodian:** May 31, 2012

**Response Made by Custodian:** May 31, 2012

**GRC Complaint Received:** September 11, 2012

**Background<sup>4</sup>**

**Request and Response:**

On May 29, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On May 31, 2012, the Custodian responded in writing seeking clarification of the Complainant’s OPRA request. The Custodian stated that if the Complainant is seeking time sheets, he will have to retrieve same from the Complainant’s trial file. The Custodian further noted that no information relevant to Mr. Sloan will exist since he is an

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The time periods listed are the approximate periods for which these attorneys represented the Complainant.

<sup>4</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.

appellate staff attorney and the New Jersey Office of the Public Defender (“OPD”) does not bill appellate clients.

On June 26, 2012, the Complainant clarified his request to seek time sheets/cards for Indictment No. 00-06-00300-I. The Complainant further requested that he be provided records relating to the names of all people responsible for assigning him to the pool of attorneys that represented him. On July 3, 2012, the Custodian denied access to responsive records advising that the Complainant did not need to submit an OPRA request for his own records. The Custodian further advised that he would obtain certain files from storage and provide the Complainant with attorney time sheets but that he will not obtain certain files because no responsive records likely exist therein. On July 9, 2012, the Custodian provided time sheets for “Somerset File No. 1004022273” to the Complainant.

On August 1, 2012, the Complainant advised that he had not received any records. On the same day, the Custodian provided additional time sheets to the Complainant and advised that no other responsive records existed. On August 3, 2012, the Custodian stated that he sent time sheets from the Complainant’s resentencing file on July 9, 2012, and time sheets from the Complainant’s “ESOA” Resentence proceeding on August 1, 2012. On August 5, 2012, the Complainant stated that he was not provided with a single time sheet from the attorneys listed in his OPRA request. The Complainant further advised that, even though the Custodian said he didn’t need an OPRA request to obtain records from his file, the Complainant has waited over 60 days and received no records. On August 7, 2012, the Custodian advised that he retrieved five (5) banker’s boxes of records, searched through the records and provided all time sheets that he was able to locate.

#### Denial of Access Complaint:

On September 11, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the responsive records are not exempt from disclosure because he was billed for services rendered by the listed attorneys. The Complainant contends that the investigators’ time sheets and Herminia Moreira’s time sheets are not responsive to his request; however, they are examples of the records sought.<sup>5</sup> The Complainant further argues that he should be entitled to records of all people that assigned him to the attorneys.

#### Statement of Information:<sup>6</sup>

On January 16, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on May 31, 2012, and provided access to records on July 9, 2012 and August 1, 2012. The Custodian contends that he

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<sup>5</sup> The Complainant further asked that he be permitted to request documents pertaining to the amount of money the attorneys were paid by the State. This request is not part of the Complainant’s original OPRA request.

<sup>6</sup> On October 16, 2012, this complaint was referred to mediation. On November 26, 2012, the complaint was referred back to the GRC for adjudication. On August 20, 2012, the GRC received the Complainant’s Amended Denial of Access Complaint, which did not contain any new or relevant information necessary to the adjudication of this complaint.

lawfully denied access to the responsive records under OPRA. N.J.S.A. 47:1A-5(k). The Custodian certifies that notwithstanding his lawful denial of access, he located and provided records to the Complainant under NJ Court Rules requiring every law firm to fulfill its ethical obligation to a client. RPC 1.16(d).

### Analysis<sup>7</sup>

#### 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.

OPRA provides that “[t]he files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.” N.J.S.A. 47:1A-5(k).

Here, the Complainant sought time sheets for attorneys representing him on a previous matter. The Custodian denied access to the Complainant’s OPRA request, but undertook the task of providing records pursuant to the OPD’s obligation to fulfill its ethical obligation to clients. The GRC is satisfied that the Custodian’s denial of access was lawful because the plain language of N.J.S.A. 47:1A-5(k) exempts access to all OPD records and contains no exceptions for persons attempting to access their own files. Further, the Complainant has not provided any evidence of a law, court order or State Public Defender authorization that would allow him to access his records under OPRA.

Thus, the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k). The Council should not address whether the Custodian provided the Complainant with the records sought because under OPRA all responsive records sought are exempt from disclosure.

#### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k). The Council should not address whether the Custodian provided the Complainant with the records sought because under OPRA all responsive records sought are exempt from disclosure.

Prepared By: Frank F. Caruso  
Senior Case Manager  
August 20, 2013

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

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<sup>7</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.