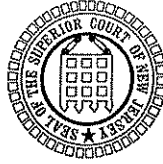


SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE



MIDDLESEX COUNTY COURTHOUSE  
P.O. BOX 964  
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

October 22, 2008

Kevin D. Kelly, Esquire  
Kelly, Ward & Laemers, LLC  
93 Spring Street, 4<sup>th</sup> floor  
Post Office Box 887  
Newton, New Jersey 07860

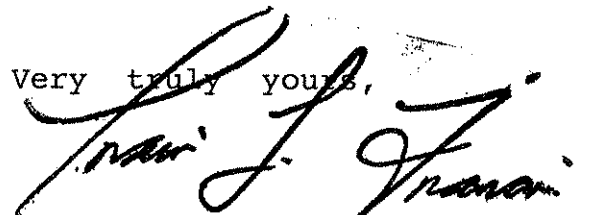
James P. Lidon, Esquire  
McElroy, Deutsch, Mulvaney  
& Carpenter, LLP  
1300 Mount Kemble Avenue  
Post Office Box 2075  
Morristown, New Jersey 07962

Re: Sussex Commons Associates, LLC, and Howard Buerkle v.  
Rutgers, The State University, Rutgers Environmental Law  
Clinic, and Rutgers University Custodian of Records  
Docket No. L-8465-06

Dear Counsel:

Enclosed herein please find my October 7, 2008, Decision regarding the above-captioned case and the accompanying Order. Also enclosed please find the Order denying Plaintiff's subsequent motion.

Very truly yours,

  
TRAVIS L. FRANCIS, AJSC

TLF:eca

Enc.

cc: John C. Maloney, Esquire, Day Pitney, LLC  
Richard Webster, Esquire  
✓ Professor Frank Askin  
Edward L. Lloyd, Esquire



If you require any accommodations as a result of a disability, please call 732-519-3638

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Attorneys for Defendants Rutgers, The State University  
and Rutgers University Custodian of Records

SUSSEX COMMONS ASSOCIATES, LLC,  
a limited liability company of the State of  
New Jersey, and HOWARD BUERKLE,

Plaintiffs,

vs.

RUTGERS, THE STATE UNIVERSITY,  
RUTGERS ENVIRONMENTAL LAW  
CLINIC, and RUTGERS UNIVERSITY  
CUSTODIAN OF RECORDS,

Defendants.

**FILED**

OCT 07 2008

TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE  
MIDDLESEX VICINAGE

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY  
DOCKET NO.: MID-L-8465-06

Civil Action

**ORDER**

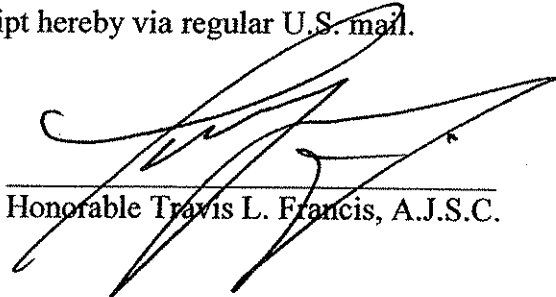
THIS MATTER being opened to the Court by Kelly, Ward & Laemers, LLC, as attorneys for plaintiffs Sussex Commons Associates, LLC and Howard Buerkle; and the Court having reviewed the submissions of the parties and *amici curiae* and having heard the oral argument of counsel for the parties and *amici curiae*; and the Court having concluded that defendant Rutgers Environmental Law Clinic is exempt from the requirements of the Open Public Records Act, N.J.S.A. 47:1A-1.1, *et seq.*; and for the reasons stated on the record on August 4, 2008; and for good cause shown;

It is on this 7<sup>th</sup> day of October, 2008:

ORDERED that the Order to Show Cause hereby is discharged; and IT IS

FURTHER ORDERED that plaintiffs' claims relating to OPRA Request Nos. 1 through 18 be and the same hereby are dismissed in their entirety, with prejudice; and IT IS

FURTHER ORDERED that a copy of this Order be served upon all counsel of record within seven (7) days of defendants' counsel's receipt hereby via regular U.S. mail.



---

Honorable Travis L. Francis, A.J.S.C.

Opposed

Unopposed

*noted*  
KELLY, WARD & LAEMERS, LLC  
93 Spring Street, 4<sup>th</sup> Floor  
P.O. Box 887  
Newton, NJ 07860  
Telephone: (973) 579-6250  
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Attorneys for Plaintiffs

**FILED**

OCT 07 2008

TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE  
MIDDLESEX VICINAGE

SUSSEX COMMONS ASSOCIATES, LLC,  
a limited liability company of the State of  
New Jersey, and HOWARD BUERKLE,

Plaintiffs,

vs.

RUTGERS, THE STATE UNIVERSITY,  
RUTGERS ENVIRONMENTAL LAW  
CLINIC, and RUTGERS UNIVERSITY  
CUSTODIAN OF RECORDS,

Defendants.

: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION  
: MIDDLESEX COUNTY  
: DOCKET NO. MID-L-8465-06

Civil Action

ORDER

**RECEIVED**

JUL 22 2008

TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE  
MIDDLESEX VICINAGE

THIS MATTER having been opened to the Court on application by Kelly, Ward & Laemers, LLC, and the Court having reviewed the parties' submissions; and having heard the oral argument of counsel, if any, and good cause having been shown;

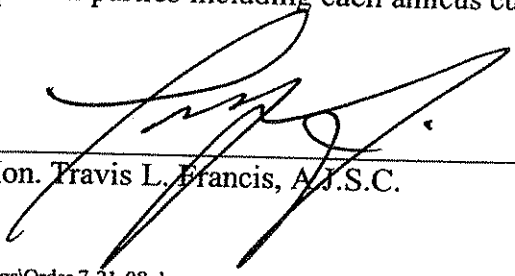
IT IS on this 7<sup>th</sup> day of October, 2008

ORDERED as follows:

1. Plaintiffs' application to supplement the record is ~~granted~~ <sup>DENIED</sup> with respect to Exhibits A through N attached to the Certification of Kevin D. Kelly, Esq.
2. Oral argument shall be heard on \_\_\_\_\_, 2008 limited to the responses, documents and information produced by the Defendants since the oral argument on June 3, 2008.
3. Plaintiffs may propose the Rutgers Custodian and/or a designated representative of the University with knowledge of the financial

information requested by Plaintiffs' OPRA and common law requests  
within \_\_\_\_\_ days of the entry of this Order.

A copy of this Order shall be served upon all parties including each amicus curiae  
within seven (7) days of receipt hereof.



---

Hon. Travis L. Francis, A.J.S.C.

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NOT FOR PUBLICATION  
WITHOUT APPROVAL OF THE COURT

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SUSSEX COMMONS ASSOCIATES, LLC, a : SUPERIOR COURT of NEW JERSEY  
limited liability company of the  
State of New Jersey, and HOWARD : MIDDLESEX COUNTY  
BUERKLE, : LAW DIVISION  
Plaintiff, : DOCKET NO: L-8465-06  
v. :  
RUTGERS, THE STATE UNIVERSITY, :  
Rutgers Environmental Law Clinic, :  
and Rutgers University Custodian :  
of Records, :  
Defendant. : DECISION

---

Decided: October 7, 2008

Kevin D. Kelly for plaintiff (Kelly, Ward & Laemers, LLC, attorneys).

James P. Lidon for defendant (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys).

John C. Maloney argued the cause for amicus curiae Chelsea Property Group, Inc., and Chelsea Property Group Partners, L.P. (Day Pitney, L.L.C., attorneys; Mr. Maloney and Donald A. Soutar, on the brief).

Richard Webster argued the cause for amicus curiae Citizens for Responsible Development at Ross' Corner and Coalition to Protect Our Land, Lakes and Watershed, Weissman and Mintz, LLC (Mr. Webster, attorney; Mr. Webster and Julia A. LeMense, on the brief).

Professor Frank Askin argued the cause for amicus curiae Rutgers Law School/Newark Clinical Program (Constitutional Litigation Clinic, Center for Law and Justice, Rutgers, The State University of New Jersey, attorneys; Professor Askin and Professor Jon Dubin, on the brief).

Edward L. Lloyd argued the cause for amicus curiae Clinical Legal Education Association (Mr. Lloyd, attorney; Mr.

Lloyd, Professor Robert Kuehn, Professor Peter Joy, and Professor Bridget McCormack, on the brief).

Judge: FRANCIS, T.L., AJSC

The context and nub of the issue before the court raised in an Order to Show Cause, is whether or not the Rutgers Environmental Law Clinic at Rutgers School of Law- Newark (RELC) is subject to the Open Public Records Act (OPRA) requests, pursuant to N.J.S.A. 47:1A-1 et seq.

#### **Background**

Plaintiff Sussex Commons filed an application for the development of a commercial shopping mall at Ross' Corner in Frankford Township. The mall was opposed by Citizens for Responsible Development at Ross' Corner (CRDRC), represented by the Rutgers Environmental Law Clinic of the Rutgers School of Law- Newark. CRDRC was granted leave to intervene in March 2005, and remained an active participant until the final dismissal of its counterclaim in August 2006.

During the course of this opposition, Plaintiff alleged that CRDRC solicited, obtained, and used funds from CPG Holdings, LLC and CPG Partners, L.P. (Chelsea), who shared a common interest with CRDRC in blocking Plaintiff's application. Plaintiff contends that Chelsea opposed the Sussex Commons project, because Chelsea had made significant investments in its shopping centers The Crossings in Tannersville, Pennsylvania and Woodbury Commons in Central Valley, New York and wanted exclusivity in the market.

On May 11, 2006, Sussex Commons requested specific documents from Rutgers the State University under the Open Public Records Act (OPRA), which were limited to the University's involvement in the project and its opposition to the project.

Rutgers the State University's, Custodian of Records on May 13, 2006 issued a blanket denial of the requests based on its interpretation of MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Plaintiff moved before this court to compel production of those documents. *Amicus curiae* briefs were submitted by Rutgers School of Law- Newark Clinical Program, the Clinical Legal Education Association, CPG Holdings, LLC and CPG Partners, L.P. (Chelsea), and Citizens for Responsible Development at Ross' Corner (CRDRC), Coalition to Protect our Land, Lakes and Watersheds, and Weissman and Mintz, LLC.

Plaintiff believes that because the Rutgers Environmental Law Clinic is a public institution, its records should be accessible through OPRA. Defendants and the several *amici* briefs all raise concerns about the public policy effects of allowing access to legal clinic files.

The arguments vacillated between whether or not the Clinic itself was subject to OPRA, or whether simply the requested documents and files were subject to OPRA. This court finds that both questions can be answered by addressing the nature of the legal clinics at Rutgers School of Law and making a determination as to the necessity of their compliance with OPRA requests.

The court finds that the clinical programs of Rutgers School of Law are unique hybrid institutions and therefore exempt from OPRA requirements.

### **Arguments**

Plaintiff contends that its OPRA requests were appropriate as they related to one matter and would not require onerous or even additional research.

Defendants responded to the Order to Show Cause, resting their opposition in large part on the same cases which they had used to initially deny the requests, MAG, supra, 375 N.J. Super. 534 and Bent v. Township of



Stafford Police Dept., Custodian of Records, 381 N.J. Super. 30 (App. Div. 2005), asserting that the requests seek broad categories of documents, rather than specific documents described with reasonable peculiarity. Specifically, Defendants contend that while OPRA permits requests for records, it does not allow requests for information. Bent, supra, 381 N.J. Super. at 37. In addition, an OPRA request cannot be used to replace or supplant the discovery process. MAG, supra, 375 N.J. Super. at 545. It is Defendants' contention that a proper OPRA request must reasonably identify a record, and may not generally request data, information or statistics. Bent, supra, 381 N.J. Super. at 37. Wholesale requests for general information are not encompassed by OPRA. MAG, supra, 375 N.J. Super. at 549. Documents must be identified with specificity and peculiarity. Ibid.

Defendants further contend that the attorney-client and attorney work product privileges protect disclosure of the documents in Plaintiff's OPRA requests.

Defendants' opposition also addresses public policy, whereby Defendants contend that Plaintiff's OPRA requests represent an attempt by Plaintiff to chill the protected First Amendment activities of the Clinic's clients.

Defendants further assert that the common law right of access is not critical to this analysis, however, it provides a more complete picture of how the case has progressed. Defendants' argument is that Plaintiff's common law claim of access fails because Plaintiff never requested access to the documents in question.

Defendants provide that the common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure. S. Jersey Pub. Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); Higg-A-

Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). One seeking access to such records must establish that its interest in disclosure outweighs the public interest in maintaining confidentiality. Home News v. Dep't of Health, 144 N.J. 446, 454 (1996). The balancing process is concretely focused upon the relative interests of the parties in relation to specific materials. McClain v. College Hospital, 99 N.J. 346, 361 (1985).

Plaintiff asserts that the purpose behind N.J.S.A. 47:1A-1 is to provide the citizens of New Jersey with ready access to government records. Particular importance is placed on financial information and public funds. The Legislature has provided that "immediate access . . . shall be granted to budgets, bills vouchers, contracts . . ." and other records of public expenditures. N.J.S.A. 47:1A-5. The documents requested are government records as defined by N.J.S.A. 47:1A-1.1 and the common law because they have been received, maintained or kept on file in the course of official business.

Plaintiff contends that its OPRA requests reasonably identify specific government records and that the words "any," "all," "each," and "every" do not, in and of themselves, contemplate "wholesale requests for general information to be analyzed, collated and compiled by the responding government entity." MAG, supra, 375 N.J. Super. at 547. It is Plaintiff's contention that Defendants behaved unethically when they failed to provide access to government records in accordance with the common law right of access. Plaintiffs relied on N.J.S.A. 47:1A-8: "[n]othing in OPRA shall be construed as limiting the common law right of access to a government record."

Plaintiff further contends that OPRA grants broader access to public records than the common law provides. Under the common law right of access to public records, three requirements must be met: 1. the records must be common law public documents; 2. the person seeking access must establish an interest in the subject matter of the material; 3. the right of access must be balanced against the interest in preventing disclosure. North Jersey Media

Group Inc. v. Dept. of Personnel, 389 N.J. Super. 527, 538 (Law Div. 2006).

Plaintiff asserts that it has advanced both public and private purposes which require the University's disclosure of all requested documents. Plaintiff also contends that the public has a right of access to all University documents with respect to the expenditure of public funds. Home News, supra, 144 N.J. at 454. Plaintiff further asserts that there is also a right to access based on the University's participation in opposing the application for development which was the subject of ten public hearings.

Plaintiff concludes that the Rutgers Clinics are subject to OPRA, the common law and the same rules as all other attorneys and law firms. In addition, Plaintiff points conclusively to the New Jersey Supreme Court's ruling in Keddie v. Rutgers, 148 N.J. 36 (1997), which determined that Rutgers the State University was subject to OPRA's predecessor statute (the Right-to-Know Law, N.J.S.A. 47:1a-1 to -4 and the common law).

Defendants contend that the University has been concerned from the outset that Plaintiff's use of the OPRA was destructive to the Rutgers Environmental Law Clinic's ability to achieve its educational objectives and simultaneously satisfy the expectation of effective legal representation upon which clients of the RELC necessarily rely on in entrusting their legal matters to the RELC.

Defendants contend that the application of OPRA to permit public access to the RELC client files at issue would impermissibly chill the First Amendment rights of those clients. If OPRA is construed to require the University to compel the RELC and other legal clinics to provide public access to client files, the result would be devastating not only to the interests of the private clients represented by the clinics, but also to the educational programs of the clinics themselves. The trust relationship would be broken and the educational experience would be thwarted.

In addition, Defendants assert that Plaintiff's OPRA requests fall

within an exclusion from the definition of "government records" set forth in N.J.S.A. 47:1A-1.1: "pedagogical, scholarly and/or academic research records" are excluded from the definition of "government records." It is Defendants' position that client files are pedagogical materials. Students work on and contribute to those files in the course of discharging clinical course assignments. Such work aids in the representation of the clients and results in a grade for the students. Without supervising attorneys contributing their work product to the representation and maintaining ultimate responsibility for the files, there can be no clinical program.

Defendant Rutgers the State University and *amici* assert that the broad public records requests seek to distort the operations of the clinic, particularly respecting its ability to operate like other law offices, and compromise the core of the attorney-client relationship. Defendants and *amici* contend that time spent replying to public record requests is time taken away from the purpose and goals of the clinic, which is detrimental to both the students and their clients. They conclude that there is a danger that clinics will be chilled from taking certain cases and clients will be chilled away from clinics if they are open to excessive examination through OPRA.

#### **Amicus Curiae**

Because of the public policy implications of declaring whether or not a law school's clinical program is subject to OPRA requests, the court granted leave for the submission of *amicus curiae* briefs.

#### Amicus Curiae Brief of the Rutgers School of Law/Newark Clinical Program

Similar to the arguments in the various *amicus curiae* briefs, the Rutgers School of Law/Newark Clinical Program brief addresses public policy concerns. They assert that a determination that such clinical programs are

state agencies under OPRA could deprive an already under-served and disadvantaged section of society. They contend that such a determination will leave this segment of society, which may have no other means of obtaining representation, from benefiting from the legal services such clinical programs provide. Additionally, the Rutgers School of Law/Newark Clinical Program assert that their classification as a state agency pursuant to OPRA would undermine their duty as members of the legal profession to advance the undivided interest of their clients.

The Rutgers School of Law/Newark Clinical Program contend that the United States Supreme Court has held that where Rutgers University would be considered a state agency for some purposes, it does not follow that a discrete entity of the institution is a state agency for all purposes. This is evidenced in those cases where the clinics represent clients adverse to the State.

In one such case, the Court held:

In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client.

[Polk County v. Dodson, 454 U.S. 312, 318-319 (1981)].

In another case, the Court noted that a public defender is not a typical state actor because his professional responsibilities are the same as if he was a private attorney, requiring his "professional independence" from the state. West v. Atkins, 487 U.S. 42, 50 (1988). (citing Polk, supra, 454

U.S. at 325).

Rutgers School of Law/Newark Clinical Program are concerned that representation would be impaired if documents that typically would not be discoverable became discoverable- for instance, materials given by the clinic to the client.

In addition, the Rutgers School of Law/Newark Clinical Program assert that a determination that clinical programs are state agencies subject to OPRA would infringe on the mandated educational purpose of legal clinics. Such a determination would impose a disparate educational disadvantage on students in law schools at state universities, distinguished from law students in private universities, because they would be hindered by OPRA and common law rights of access requests.

Rutgers School of Law/Newark Clinical Program conclude that a categorical exclusion written into OPRA is needed to protect the clinics. Law clinics serve a vital educational function in preparing law students for practice by involving them in every level of actual litigation. Hope Babcock, Environmental Legal Clinics: Visible Models of Justice, 14 Stan. Envtl. L.J. 3, 24 (1995). Rutgers School of Law/Newark Clinical Program assert in conclusion that legal clinics bridge the gap between case-oriented learning and the more comprehensive and complex work undertaken by practicing attorneys and, therefore, legal clinics should be excluded from OPRA and free from outside interference that potentially infringes on academic freedom.

Amicus Curiae Brief of Clinical Legal Education Association (CLEA)

Similar to the Rutgers School of Law/Newark Clinical Program, CLEA directs the court's attention to the impact requiring law school clinics to comply with OPRA has on legal education.

CLEA contends that requiring production of the disputed records will harm legal education and that permitting record requests aimed at client

representation will burden law clinics and divert them from their dual missions of education and client representation. CLEA suggests that record requests will become adversarial tools aimed at clinical law offices and hence undermine the authentic practice of law within those clinical offices. Moreover, CLEA argues that the value of clinical programs is reflected in the ABA accreditation requirement that a law school must offer "substantial opportunities" for "live-client or other real-life practice experiences." ABA Standards and Rules of Procedure for Approval of Law Sch. No. 302(b) (1) (2007). Live-client clinics have been widely recognized to have exceptional value in teaching professional responsibility and ethical skills. See, e.g., Joan L. O'Sullivan et al., Ethical Decision Making and Ethic Instruction in Clinical Law Practice, 3 Clinical L. Rev. 109 (1996).

CLEA contends that there is a recognized principle that it is the client, not the attorney, who controls the waiver of a privilege and that the client should not be punished for being represented by a lawyer compensated with public funds. See Restatement (Third) of The Law Governing Lawyers § 78 cmt. b (2000). Therefore, Clinics should be provided the same protection as public defenders that are not subject to such OPRA requests.

CLEA asserts that requiring production will infringe on the First Amendment rights of clinic clients to be free from intrusive inquiries into their operations and restrictions on their access to an association with legal representatives. The Supreme Court in NAACP v. Alabama ex. rel. Patterson determined that there must be a compelling interest in infringing on the relationship between citizens and the organization or their attorneys. 357 U.S. 449, 463 (1958). Continuing along the line of First Amendment arguments, CLEA citing NAACP v. Button, 371 U.S. 415, 430 (1963) notes that the Supreme Court struck down a state law on First Amendment grounds that had the effect of infringing on a lawyer's ability to communicate openly with persons seeking legal assistance.

CLEA contends that Plaintiff must show a compelling reason that OPRA should be interpreted to infringe on the First Amendment interests of clinic clients. CLEA insists Plaintiff has offered no viable justification for claiming an absolute right to the clinic's internal records and persisting in this case, especially after having its two lawsuits challenging Franklin Township's actions toward the development of Ross' Corner dismissed with prejudice. CLEA notes that in Legal Services Corp. v. Velazquez, 531 U.S. 533, 546 (2001), the Supreme Court noted that restrictions on First Amendment rights relating to legal representation are even more problematic where the result may be that citizens are unlikely to find other legal counsel not encumbered by the restriction. In this case, New Jersey citizens may be driven away from associating with law clinics, which will result in a lack of legal representation.

In conclusion, CLEA argues that since the implications of compelling production are so great, Plaintiff's justification for an interpretation or application of state law that intrudes into clinic records must be even more compelling than a typical analysis.

Amicus Curiae Brief of CPG Holdings, LLC and CPG Partners, L.P. (Chelsea)

This brief is particularly relevant to Document Request No. 13: All documents received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP. Chelsea maintains that these documents have been determined by Special Discovery Master Politan and Judge Farber to constitute protected attorney work product in a lawsuit brought by Sussex Commons Outlets, LLC, an entity related to Sussex Commons Associates, LLC., and are, therefore, exempt from production under OPRA.

Chelsea argues that Pitney-RELC communications are not government records as defined under OPRA, which specifically excludes from the scope of "government records" "information which is to be kept confidential pursuant



to court order." Chelsea points out that Judge Farber made a determination that Pitney-RELC records are protected as attorney work product.

Therefore, Chelsea asserts that Sussex should be collaterally estopped from seeking review or reconsideration of Judge Farber's determination of attorney work product protection. Chelsea maintains that a party is precluded by collateral estoppel from relitigating matters or facts which the party already litigated and which were decided in a prior action, involving a different claim or cause of action, and which were directly in issue between the parties. Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 93 (App. Div. 1986). Sussex was denied access to the same communications in the Chelsea/Sussex lawsuit through Special Discovery Master Politan's May 18, 2006 Discovery Scheduling Order. Therefore, they should not be allowed to access communications in this case.

Amicus Curiae Brief of Citizens for Responsible Development at Ross' Corner (CRDRC), Coalition to Protect Our Land, Lakes and Watersheds, and Weissman and Mintz, LLC.

CRDRC initially asserts that private parties represented by clinic attorneys are entitled to all of the same protections, safeguards and ethical considerations as private clients represented by purely private attorneys. CRDRC further asserts that to require the RELC to release the requested confidential files is anathema to the purposes of OPRA and the common law.

CRDRC argues that simply because the RELC is housed at Rutgers School of Law- Newark, a unit of Rutgers the State University, location does not alter the fundamental fact that a vast majority of the materials requested by Plaintiff belong to the clients. Therefore, these materials- files belonging to or having anything to do with the representation of *amici* by the Clinic- can be removed from the RELC at any time. CRDRC further asserts that the files are private files outside the scope of OPRA and the common law. Clinic

lawyers representing private clients are not public officials and clinic offices are not public offices. Arguendo, if the records were considered public, the common law requires that the requester establish: (1) its interest in the subject matter of the documents, and (2) the interest in disclosure outweighs the State's interest in preventing disclosure. Keddie, supra, 148 N.J. at 50.

CRDRC posits that the aforementioned criteria have not been met by Plaintiff. The interest in preventing disclosure of client documents in the possession of Clinic Lawyers serving in a purely private capacity far outweighs any interest of the developer. CRDRC contends that to allow Plaintiff to use public records access laws to retrieve information from private citizens groups, who sought Clinic lawyers' legal assistance to engage in the public process, would wholly violate the spirit and intent of these laws.

Furthermore, CRDRC argues that the files requested are not subject to records requests because they are neither public records nor government records. The Clinic is not subject to public records and government records requests because its attorneys are not state officials and do not act under color of state law. CRDRC analogizes the RELC to a public defender- a public office providing legal services to private clients- whose case-related files are simply not government or public records. N.J.S.A. 47:1A-5(k). The requested documents are protected by attorney-client, work product and common interest privileges, and are confidential.

CRDRC also relies on the language of the OPRA statute to support its position that the official business of the Clinic is to educate students and train them to become lawyers by working on actual cases. In light of this goal, virtually all of the materials are excluded from OPRA, because they are kept for pedagogical purposes. N.J.S.A. 47:1A-1.

## Analysis

### The History of Rutgers University

The court's analysis begins with a necessary examination of Rutgers University's evolution as a public institution.

The early history from 1776 to 1956 of the University is provided in Trustees of Rutgers College v. Richman, 41 N.J. Super. 259, 265-275 (Ch. Div. 1956).

Rutgers University has its origin in Queen's-College, chartered by George III of Great Britain in 1766 in response to a petition of Dutch settlers of New York and New Jersey. It was organized under an amended charter dated March 20, 1770, and instruction commenced in 1771, at New Brunswick.

.....

Rutgers is today a university, "an instrumentality of the state for providing public higher education," and its property and educational facilities are impressed with a "public trust for higher education of the people of the State." L. 1945, c. 49, secs. 1, 2; N.J.S.A. 18:22-15.1; 15.2; L. 1956, c. 61, sec. 3, approved June 1, 1956, entitled "Rutgers, The State University Act of 1956."

.....

On the specialized advance level, instruction is offered by Rutgers in law (including the South Jersey Division), library service, social work,

banking, management and labor relations, sales management and retailing.

. . . .

Internal control of the University by the Board of Trustees is subject to certain public supervision by the State Board of Education "to examine into its manner of conducting its affairs and to enforce an observance of its laws and regulations and the laws of the State." L. 1945, c. 49, sec. 8; N.J.S.A. 18:22-15.8; in addition, the property of the State which the Board of Trustees holds at the University is subject to the visitorial power, Ibid., sec. 9; N.J.S.A. 18:22-15.9 . . . .

[Id. at 265-275.]

From 1956 forward, the idea of Rutgers as a hybrid institution was present in the language of the jurisprudence, although it referred to the University as a whole rather than a component of the law school.

In 1956 the Legislature created "an entirely different kind of entity and arrangement" when it enacted the "Rutgers, the state university law." Id. at 154-55, 286 A.2d 697; N.J.S.A. 18A:65-1 to -73 (the Rutgers Law). The Rutgers Law defined the university as an "instrumentality of the state for the purpose of operating the state university." N.J.S.A. 18A:65-2. The Rutgers Law's provisions were to be "liberally construed to effectuate the purposes

and intent thereof." N.J.S.A. 18A:65-9. Since the Rutgers Law's enactment, Rutgers has been described as "a hybrid institution--at one and the same time private and public, with the State being granted a major voice in management, and the designation 'State University'; and the institution being granted private autonomy and control of physical properties and assets." *Trustees of Rutgers College, supra*, 41 N.J. Super. at 289-90, 125 A.2d 10.

[Fine v. Rutgers, 163 N.J. 464, 467-68 (2000). (emphasis added).]

The State of New Jersey, then, through the Board of Governors, controls, operates and administers Rutgers. To the extent the private Board of Trustees, because of reserved powers, acts in concert or in partnership with the State in this endeavor, it is a very limited partner with very limited inconsequential leverage. In short, Rutgers' merger into the State and its assumption of state agency or state alter ego status is undisturbed thereby. That the Board of Trustees retains a partial private character is not denied.

The limited supervisory powers of the State Board of Education (now the Board of Higher Education) were continued (N.J.S.A. 18A:65-7) but were not extended.

[Rutgers v. Kugler, 110 N.J. Super. 424, 427-28 (Law Div. 1970).]

As a result of the University's history, this court concludes that the Rutgers Environmental Law Clinic is a unique hybrid institution which sets it apart from other agencies and entities related to the state.

The idea of Rutgers the State University as a hybrid educational institution emerged as early as 1956 when the court said "we find here created a hybrid institution . . . at one and the same time private and public . . . ." Trustees of Rutgers College, supra, 41 N.J. Super. at 289. But the sort of hybrid institution referenced here is something apart from the hybrid institution the legal clinic represents.

There is historical and legal precedent addressing the nature of Rutgers the State University. However, the law school and particularly the clinics have received very little judicial scrutiny through the years. Several cases suggest the nature of Rutgers the State University legal clinics is something separate from the nature of other public institutions, but none do so explicitly.

It is uncontested that that OPRA does not apply to public agencies or subdivisions thereof. Furthermore, it was conceded during arguments that the Rutgers Environmental Law Clinic is a subdivision of Rutgers School of law, which is a subdivision of Rutgers the State University, a public institution. As the court has previously held, "Rutgers Law School and its Woman's Rights Litigation Clinic are subdivisions of the State, not separate entities as are legal services corporations." Right to Choose v. Byrne, 173 N.J. Super. 66, 72 (Ch. Div. 1980), rev'd on other grounds, 91 N.J. 287 (1982). This court reaches a similar conclusion with regard to all of the Rutgers School of Law Clinics.

The unique academic mission of Rutgers the State University separates it from other state agencies whose functions are more traditionally governmental. But despite its hybrid nature, Rutgers is still subject to

OPRA requests. Rutgers the State University recognizes this and has even appointed a custodian specifically to handle OPRA requests.<sup>1</sup>

The Rutgers School of Law legal clinics are hybrid institutions and are subdivisions of yet another hybrid institution, Rutgers the State University of New Jersey. While the parent organization is subject to OPRA requests, the clinics are not.

The courts have consistently carved out exceptions for the law clinics. As demonstrated in In re Determination of Executive Com. on Ethical Standards, 116 N.J. 216, 229 (1989), law clinic professors cannot be considered "state employees" for the purposes of New Jersey Conflict of Interest Laws. The Court reasoned that it did not believe the Legislature intended to disable a clinical education program at the State University through its enactment of the Conflicts of Interest Law. Ibid. Clearly clinic professors are state employees, as the only moneys allocated from Rutgers the State University to the law clinics, through the law school, pay for their professors' salaries. Notwithstanding, they are considered exempt as to Conflict of Interest Laws. In that case, the Court carved out an exception to the hard and fast rule that Rutgers the State University and its subdivisions constitute a strictly public entity. In fact, the Court stated that Rutgers the State University is a unique body within state government, noting that it is a hybrid institution, at one and the same time private and public. Id. at 223.

Further demonstrative of the difference between Rutgers' legal clinics and other public institutions is the court's holding that it is not inappropriate for the clinics to collect legal fees from the state when they

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<sup>1</sup> Rutgers, The State University of New Jersey, provides access to government records in compliance with applicable federal and state laws. The New Jersey Public Access to Government Records Law, effective July 7, 2002, extends to Rutgers University. (The Public Access to Government Records Law is sometimes called the Open Public Records Act or OPRA.) Rutgers has appointed a University Custodian of Records who is responsible for implementing the duties and responsibilities provided by this law.

appear before other state agencies. The court reasoned that, "The State is not shielded from an attorney's fee award against it because of the circumstance that one subdivision of the State would benefit at the expense of another subdivision or of the general treasury." Right to Choose, supra, 173 N.J. Super. at 72. Courts have found "no impediment to the award of an attorney's fee under 42 U.S.C.A. § 1988 to Rutgers Urban Legal Clinic, an arm of the State," Brown v. Newark, 202 N.J. Super. 1, 10 (App. Div. 1985). The court stated:

Rutgers Law School and its Woman's Rights Litigation Clinic are subdivisions of the State, not separate entities as are legal services corporations. Law school expenditures are pursuant to and limited by legislative appropriations in accordance with the State Constitution, Art. VIII, § II, par. 2. The law school in turn allocates funds to the clinic.

. . . .

The broad legislative intent of § 1988 is to promote enforcement of civil rights. Upon an attorney's fee award to the Woman's Rights Litigation Clinic, the clinic would have an incentive to pursue further civil rights enforcement litigation. . . . The Civil Rights Attorneys' Fees Awards Act of 1976 is paramount over conflicting state constitutional limitations under the Supremacy Clause.

[Ibid. (quoting Right to Choose, supra, 173 N.J. Super. at 72-73).]

In permitting the law clinic to receive attorney's fees from the State,

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[available at <http://records.rutgers.edu/>, retrieved June 29, 2008.]



the court again carved out another exception to the law clinic's public status as a subdivision of Rutgers, which enlarges the base of case law that justifies a broad exception for the Rutgers Environmental Law Clinic being a hybrid institution.

These decisions, which in effect establish the clinic as a subdivision of the state that is not subject to many of the normal restrictions, are again evidence of the clinic's unique hybrid nature as a state subdivision, an academic institution, and as a practicing legal entity which represents clients.

Furthermore, the Conflicts of Interest Law cannot apply to the clinics because it would restrict a major part of the legal practice field. "A clinical teaching program at a privately-chartered institution of legal education undoubtedly would be able to appear before State courts and State agencies. We do not believe that the Legislature ever would have intended to disable a clinical education program at our State University." In re Determination of Executive Com. on Ethical Standards, supra, 116 N.J. at 218. Moreover, the Court emphasized that "[t]he Rutgers Environmental Law Clinic's mission is to provide students with an introduction to the nature of environmental law practice. To do so, it must interact with the Department of Environmental Protection as well as other State administrative agencies." Id. at 219.

The Court also summarized various circumstances in which it has held that clinics, although subdivisions of the state, were not subject to certain requirements which were incumbent on other agencies and subdivisions.

While [a law school clinic] has to some extent been regarded as a State agency for the purpose of immunity from local land-use regulations, and from property taxation, in other circumstances it has not been viewed as synonymous with the State. It is capable of being

sued and has the power to sue, and therefore it is not considered part of the State in regard to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to -10. Nor is it considered an arm of the State entitled to eleventh-amendment immunity from suit. Finally, in our most recent examination of the issue . . . it was not considered an alter-ego of the State but rather a "person" subject to liability for purposes of a federal action under 42 U.S.C.A. § 1983 . . . All of this independence accords with the idea of a university as guilds of scholars . . . responsible only to themselves . . . [W]e recogniz[e] the fundamental importance of academic freedom in our society . . . .

[Id. at 224 (citations and quotes omitted).]

The Court in that same case stated the premise even more succinctly when it said "[t]he fact that there is State involvement in education should never be a disadvantage." Id. at 223. This court might be tempted to stop its analysis with that. Defendants in this case argue that if law school clinics at a public university are subject to OPRA, this would put them at a distinct disadvantage with respect to not only private law school clinics, but to private law firms. It is likely that clients would be more hesitant to enlist the services of the clinic knowing that that their case files and/or their attorney's other files may be subject to non-discovery disclosure.

Given that two out of the three law schools in the state of New Jersey are affiliated with Rutgers, a public university, the case law on this issue is not extensive. But even looking beyond the borders of this state, the exact nature of a law school affiliated legal clinic has never been fully decided. There are other decisions, however, which seem to indicate parallel thought with this court.

In Loney v. Scurr, 494 F. Supp. 928, 929 (S.D. Iowa 1980) the court held that the plaintiff, and therefore the Prisoner Assistance Clinic, was entitled to reasonable attorney's fees. Plaintiff's attorney in this case was a member of the University of Iowa College of Law which is part of a publicly funded state university. Ibid. The court noted that in its role as a provider of legal services, the Clinic is functionally indistinguishable from any other publicly funded legal group. Id. at 930. Further, the court reasoned that a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plaintiff could not afford private counsel and thus a legal aid organization merits an attorney's fee as much as does the private attorney. Ibid. The clinic takes on both public and private characteristics. In addition, this court and others recognize that the client should not be disadvantaged by the nature of the entity that represents it.

Another case where the court saw fit to award legal fees to a legal clinic based on its position as a legal services provider was NAACP, Frederick County Chapter v. Thompson, 671 F. Supp. 1051, 1055 (D. Md. 1987). There the court held that attorney's fees may be paid to Plaintiff's attorney and, therefore, to the University of Maryland Legal Clinic. The legal clinic is part of the University of Maryland which is a publicly funded state institution. Id. at 1054. In this case, the court determined that §1988 awards are available to publicly funded legal service organizations. Ibid.

This case is significant because the court acknowledges a legal clinic located within a publicly funded institution has the ability to collect attorney's fees as would a private legal office. Thus, similar to the New Jersey cases and the Iowa case, the clinic takes on both public and private characteristics.

Although the jurisprudence is not extensive, some courts, including this one, have recognized the hybrid nature of legal clinics. The legal

clinics subject to scrutiny in this case simply cannot be treated in the same manner as other public institutions. Nor can they be treated as entirely private legal entities.

Furthermore, was this court to find that the clinics were subject to OPRA but allowed the normal exceptions, most of the requests by Plaintiff in this case would be protected regardless. The plain language of the statute states:

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential . . . any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege.

[N.J.S.A. 47:1A-1.1.]

Plaintiff in this case also requested any materials that pertained to how the clinic chooses its clients. Yet another plain-language exception states "[t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." Id. Moreover, turning to the educational nature of the clinics, Defendants may rely on the following exception:

[P]edagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey . . . except that a custodian may not deny inspection of a government record or part thereof that gives the

name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.

[Ibid.]

Furthermore, Plaintiffs requested information regarding clinic funding from donations. Exempt from OPRA are:

records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication.

[Ibid.]

The court finds that the clinics are subject to even higher protection than this. Rather than having various records of the clinics exempt, this court finds that the Clinics themselves are exempt from OPRA requests. Those who wish to know about the University's and the School of Law's allocations of funds to the clinics may request those records from Rutgers the State University and the School of Law. If any funds come from private anonymous donors, those amounts are protected from OPRA. Any remaining funds would presumably come from the legal fees the clinics have in the past won the right to collect, and those are a matter of public record.

Another argument presented to the court was that the very nature of the clients it chooses to represent should subject the RELC to scrutiny. Such an argument is without basis. No private law firm would find itself suddenly compelled to open its legal or business practices to the public simply because it chose to represent a high profile client. In sum, this court

finds that the unique hybrid nature of the Rutgers School of Law Clinics, as subdivisions of Rutgers the State University, entitles them to an exemption from OPRA, which is necessary to protect the unique and valuable function the law clinics provide in both education and jurisprudence.

Accordingly, Plaintiff's Order to Show Cause is hereby discharged and Plaintiff's claims relating to OPRA requests numbers one through eighteen are hereby dismissed in their entirety with prejudice.