

## Appeals Court Weighs Public Access to Rutgers Law Clinic Records By Mary Pat Gallagher

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Law school clinics usually labor in the shadows of the cases they undertake, but an appeal heard Tuesday puts Rutgers University's eight law clinics on center stage and, potentially, their files in the limelight.

In *Sussex Commons Associates v. Rutgers University*, A-1567-08, a developer is challenging a Middlesex County judge's 2008 ruling that although the clinics are part of the state university, their files are not subject to the Open Public Records Act.

Rutgers' Environmental Law Clinic represented a citizens' group that opposed *Sussex Commons Associates'* plan to build a Frankford Township outlet mall. *Sussex* won its approvals but claims the opposition was partly bankrolled by a competitor, Chelsea Property Group.

In 2006, *Sussex* asked for documents showing the clinic's funding, records of time and money spent on the case, staff meeting minutes, communications with the citizens' group before the clinic took on the case and any documents received from Chelsea Property or Day Pitney of Florham Park, which is defending Chelsea in a related suit by *Sussex*.

At Tuesday's arguments, Appellate Division Judge Jose Fuentes seemed to think the panel would not have to reach the issue of whether OPRA applied. He repeatedly asserted that Rutgers had complied with some items from the request, especially the first item concerning the source of the clinic's funding, and that *Sussex* had waived the rest.

No one disputed that the financial information should be available to the public. But Fuentes thought the university had done all it had to when it informed *Sussex* that it paid the \$80,000-plus salary of the clinic's director and that the rest of the clinic's funding came from restricted grants. It also told *Sussex* that certain other types of requested clinic records - time sheets and minutes of staff and board meetings - did not exist.

Fuentes referred to various documents from the court below describing information Rutgers provided to *Sussex's* lawyer Kevin Kelly about the clinic, concessions from Kelly that Rutgers had complied with some requests and Kelly's agreement not to pursue 11 of the 18 categories *Sussex* requested.

At one point, Fuentes wondered why Middlesex County Judge Travis Francis had to reach the issue of whether OPRA applied, asking "why is this case here?"

Kelly told Fuentes and Judges William Gilroy and Marie Simonelli, who heard the case at Rutgers Law School-Newark, that he never meant to abandon the rest of the OPRA request. In his view, the case got sidetracked when the other Rutgers-Newark

law clinics and the Clinical Legal Education Association, a national group with about 700 members at 140 law schools, came into the case as amici.

At that point, the focus shifted from dealing with the specific requests at hand to whether OPRA applied at all and led to the ruling by Francis that it did not, said Kelly, of Kelly & Ward in Newton.

Kelly attempted to distinguish a 1989 New Jersey Supreme Court decision that Rutgers law professors who teach in the clinics are not state employees for purposes of conflicts-of-interest law. The Court split 4-3 in the case, *In re Determination of Executive Commission on Ethical Standards re: Appearance of Rutgers Attorneys Before the Council on Affordable Housing*, 116 N.J. 216.

Kelly argued the earlier case could be distinguished because it raised issues not in the current case, including who may teach, what may be taught and how it may be taught.

He said the current appeal was not a referendum on law school clinical education and emphasized that Sussex was not anti-clinic. "We're in this OPRA mess, and I'd like to find a sensible way out of it, finally," he said.

Jon Lidon, representing Rutgers, wanted the judges to tackle Francis' ruling head on, agreeing with Kelly that the other requests had not been abandoned and would come back into play if the case were sent back to Francis. The appeals court thus needed to decide the overarching issue of whether OPRA applied, argued Lidon, of McElroy, Deutsch, Mulvaney & Carpenter in Morristown.

Rutgers had fully answered the financial question, while the other requests fell within OPRA's attorney-client privilege and pedagogical exemptions, he contended.

He also said clinic records must be exempt because "the Legislature could not have intended that client files be subject to probing by litigation adversaries."

Lidon warned that if the court did not decide the issue but left it to case-by-case analysis, it would create uncertainty and hardship for the clinics, which would have to litigate it again and again.

Fuentes did not see the risk but Lidon warned that OPRA requests for clinic records could increase, in part because of this case, saying "people wouldn't have thought they could use public access laws to invade client files." He invited the court to take judicial notice of recent efforts around the country targeting law school clinics.

Gilroy suggested the issue might be better addressed by the Legislature, which has carved out more than 20 exemptions to OPRA.

Yes, the Legislature could act, but the case "cries out for judicial intervention," responded Lidon.

Gilroy wanted to know whether the case had to go back to Francis on Sussex's claim for the records under the common law right of access.

Lidon said no because, though Francis did not apply the common law balancing test, there was enough in the record for the appeals court to decide that the interests of the clinic clients and students outweighed those of Sussex. "It's really no contest," he proclaimed.

Weighing in for the other Rutgers law school clinics as amici was John Farmer Jr., the former New Jersey attorney general and now the Rutgers-Newark law dean.

If the court leaves the question of access to law school clinic files to be decided case by case, the clinic would be "disadvantaged uniquely" and forced to advise every client that his or her files might be open to public inspection, Farmer told the panel.

Other than the similar clinics at Rutgers Law School-Camden, "no other legal entity representing private clients in the state would be subject to that type of invasion of the file," noted Farmer.

He also accused Kelly of using OPRA to obtain documents he could not get in discovery.

On rebuttal, Kelly denied that, saying he did not need discovery because the underlying land-use dispute ended in 2006.

Fuentes asked Kelly why clients should have to worry about exposure of their case files when they were represented by a law clinic at Rutgers, rather than one at Seton Hall University School of Law.

Different rules apply to government, answered Kelly.

The Clinical Legal Education Association, the Society of American Law Teachers and the American Association of University Professors were also amici in the appeal, represented by Professor Edward Lloyd of Columbia University Law School.