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SUIT TESTS IF RUTGERS LAW CLINICS' FILES ARE SUBJECT TO DISCLOSURE UNDER OPRA

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Litigation over shopping mall construction has spawned a novel legal issue: whether case files at clinics at New Jersey's public law schools are subject to Open Public Records Act requests.

That question will be argued on June 3 in *Sussex Commons Associates v. Rutgers*, L-8465-06, in Middlesex County. The parties will be joined that day by amici --; including the Clinical Legal Education Association, a national association of clinical law professors, and the seven Rutgers University School of Law clinics --; which contend they will be adversely impacted if public access to the files is allowed.

From January 2005 until August 2006, the Rutgers Environmental Law Clinic represented two citizens groups challenging plans by developer *Sussex Commons Associates*, of Secaucus, to build an outlet mall in Frankford Township. The developer eventually won subdivision and site plan approvals but now contends that the opposition was bankrolled, at least in part, by *Chelsea Property Group*, a competitor.

Sussex Commons obtained evidence backing the charge in a separate unfair-competition suit, *Sussex Commons Outlets v. Chelsea Property Group*, SSX-L-554- 03, alleging that *Chelsea Property*, which owns outlet centers in Tannersville, Pa., and Central Valley, N.Y., threatened its tenants with non-renewal of their leases if they opened stores in *Sussex Commons*.

Sussex Commons lawyer Kevin Kelly says he has testimony and records of wire transfers showing that *Chelsea Property* paid the \$16,500 fee for Henry Ney, an engineer who was an expert for one of the citizens groups represented by the clinic, *Citizens for the Responsible Development of Ross Corner (CRDRC)*.

The OPRA request, filed with Rutgers University in May 2006, asks for 18 categories of records that might demonstrate financial and other ties among *Chelsea Property*, *CRDRC* and the environmental clinic. It encompassed documents showing how the clinic is funded, records of time and money spent on the case, staff meeting minutes, communications with *CRDRC* before the clinic took on the case and any documents received from *Chelsea Property* or *Day Pitney* of Florham Park, the defense counsel in the unfair-competition case.

Rutgers refused to provide the records, citing *MAG Entertainment, LLC v. Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005), which held OPRA requesters must clearly identify the documents sought rather than asking for all of a particular category.

Sussex Commons then sued Rutgers University, its custodian of records and the environmental clinic in September 2006 in Sussex County. The defendants obtained a change of venue to Middlesex, where the university is based.

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The complaint alleges that CRDRC 'solicited, obtained and used' funds from Chelsea Property. It also says the OPRA request was for specific documents limited to Rutgers' involvement in and opposition to the Frankford project.

Thus far, Kelly has received documents pertaining to two of the 18 categories, reflecting the university's funding of the clinic and billings sent by the clinic to CRDRC. The June 3 argument will help Assignment Judge Travis Francis decide what to do about the other 16.

Rutgers' lawyer, James Lidon of McElroy, Deutsch, Mulvaney & Carpenter in Morristown, declines comment but argued in a brief that most of those categories were not specific enough under MAG Entertainment, that much of the material sought was protected by privilege and that litigants cannot use OPRA as a substitute for discovery.

The clinic amici are relying on a 1989 state Supreme Court holding 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.

Professor Frank Askin, the head of the Rutgers Constitutional Litigation Clinic, who litigated that case, wrote to Judge Francis on March 19 and raised the argument that OPRA does not apply to the **Rutgers clinics**.

In an interview, Askin suggested the **Rutgers clinics** should be treated the same as those at Seton Hall University Law School, a private institution. A determination that they are subject to OPRA would have a chilling effect on clinic operations, he says. 'We would have to advise clients that any information you provide may be subject to an OPRA request. ... We would have to examine everything we're doing. I don't know how we would function.'

The Clinical Legal Education Association --; which has 700 members at about 140 law schools, including the three in New Jersey --; requested amicus status on April 23. Its counsel, Edward Lloyd, says law school clinics, which teach students how to be lawyers, are the equivalent of law offices and their client files should be treated the same way.

Lloyd, now a clinical professor of environmental law at Columbia University Law School, was the founding director of the Rutgers Environmental Law Clinic, from 1985 to 2000.

The other amici in the case are also siding with Rutgers and the environmental clinic in opposing disclosure.

They are Chelsea Property, CRDRC, the Coalition to Protect Our Land, Lakes and Watersheds (which the **Rutgers clinic** also represented in the mall dispute), and Weissman & Mintz of Somerset and New York. Firm partner David Mintz is the coalition's president.

Chelsea Property attorney Murray Laulicht, of Day Pitney, says an item in the OPRA request, for all documents received by the environmental clinic from his firm, was denied in the unfair-competition case. Superior Court Judge James Farber found such materials would fall under the attorney-client, work-product or common interest privilege, which shields communications between counsel whose clients have a common interest, he says.

The other amici will be represented by the Eastern Environmental Law Center, a public interest environmental law firm in Newark. The EELC's executive director is Julia LeMense, who represented CRDRC and the coalition as a staff attorney at the environmental clinic and left at the end of 2007, taking with her the clients as well as some of the files from the Sussex Commons litigation.

Rutgers' counsel Lidon wrote to Francis in February to say he had concerns about a potential conflict between Rutgers in complying with OPRA and the former clinic clients in protecting their files. The change in representation also

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'muddies the waters with respect to the propriety of a current, unilateral exercise of control over those former-client files,' wrote Lidon.

EELC Legal Director Richard Webster says the clients have asked the clinic to protect their files, but if it cannot do so, to give them back.

The files belong to the clients and are not government records subject to OPRA, because 'the clinic was not carrying out a governmental mandate, it was representing the clients,' says Webster. 'It seems to us this approach of trying to use OPRA to get at client files is really designed to harass both the client and the clinics, to chill clients going to the clinics and to use up time dealing with the OPRA request rather than substantive legal matters.'

On the other hand, Sussex Commons attorney Kelly says he wants to know 'who's funding Rutgers to come here and litigate claims against my clients. How do they decide to take those cases? What are the criteria? How did they decide to become involved here? Who approached them? Who's really objecting to us?'

Kelly, of Kelly Ward & Laemers in Newton, adds that what is available as discovery in litigation and what is available under OPRA are two different issues. He also noted that OPRA includes exemptions for material covered by attorney-client privilege and certain records of higher education institutions.

Sussex Commons Outlets is appealing the dismissal of the unfair competition case. Sussex County Superior Court Judge Thomas Critchley Jr. threw out the last piece of it, a claim for tortious interference with prospective economic advantage, on Feb. 25. Arthur Goldstein, of Wolff & Samson in West Orange, who is handling the case for Sussex Commons Outlets, was on vacation and could not be reached for comment.

Chelsea Property is a subsidiary of the Simon Property Group, one of the nation's largest public real estate management companies, whose holdings include the Mall at Short Hills. It is based in Indianapolis.

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