
SUPREME COURT OF NEW JERSEY

Docket No. 067232

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

Plaintiffs-Respondents,

v.

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

Defendants-Petitioners.

Civil Action

ON PETITION FOR CERTIFICATION
FROM A FINAL JUDGEMENT OF THE NEW
JERSEY SUPERIOR COURT APPELLATE
DIVISION

Appellate Division:

Docket No. A-1567-08T3

Hon. Jose L. Fuentes

Hon. William P. Gilroy

Hon. Marie P. Simonelli

Law Division:

Docket No. L-8465-06

Hon. T.L. Francis

PETITION FOR CERTIFICATION AND APPENDIX OF DEFENDANTS-
PETITIONERS, RUTGERS, THE STATE UNIVERSITY; RUTGERS
ENVIRONMENTAL LAW CLINIC; and RUTGERS UNIVERSITY CUSTODIAN
OF RECORDS.

McELROY, DEUTSCH, MULVANEY &
CARPENTER, LLP

1300 Mt. Kemble Avenue

Morristown, NJ 07962-2075

(973) 993-8100

Attorneys for Defendants-
Petitioners.

Of Counsel and On the Brief:

John J. Peirano, Esq.

On the Brief:

James P. Lidon, Esq.

David Alberts, Esq.

TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX TO ABBREVIATIONS	ii
TABLE OF CONTENTS TO APPENDIX	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE MATTER INVOLVED	1
A. Overview.....	2
B. The Present Litigation	4
QUESTION PRESENTED	7
THE ERRORS COMPLAINED OF	7
REASONS WHY CERTIFICATION SHOULD BE GRANTED AND COMMENTS ON THE APPELLATE DIVISION'S DECISION	8
A. The Appellate Division's blanket rule that the RELC is a state agency misapplies prior precedent	8
B. The Appellate Division's construction of OPRA creates disharmony with Rutgers' enabling statute and the RPC.....	13
C. The public is harmed by this ruling.....	16
CONCLUSION	20

INDEX TO ABBREVIATIONS

DPa Appendix in support of Petition for Certification
of Defendants-Petitioners.

Pb Appellate brief of Defendants-Petitioners.

Pa Appellate appendix of Defendants-Petitioners.

TABLE OF CONTENTS TO APPENDIX

Notice of Petition for CertificationPca1

Sussex Commons Assoc., LLC v. Rutgers, the State
University, ___ N.J. Super. ___ (App. Div. Oct. 25,
2010) (slip op.)Pca6

Trial court oral decisionPca33

Trial court written decisionPca43

TABLE OF AUTHORITIES

Cases

<u>Bosland v. Warnock Dodge, Inc.,</u> 197 N.J. 543 (2009)	19
<u>Briscoe v. Rutgers,</u> 130 N.J. Super. 493 (Law Div. 1974)	12
<u>Brown v. Newark,</u> 202 N.J. Super. 1 (Law Div. 1985)	4, 11
<u>Coronado Police Officers Association v. Carroll,</u> 131 Cal Repr. 2d 553 (2001)	15
<u>Cosmair, Inc. v. Director, N.J. Div. of Tax.,</u> 109 N.J. 562 (1988)	19
<u>Fair Share Hous. Ctr. v. N.J. League of Muns.,</u> 413 N.J. Super. 423 (App. Div. 2010)	14
<u>Fellerman v. Bradley,</u> 99 N.J. 493 (1985)	16
<u>Gerena v. Puerto Rico Legal Services, Inc.,</u> 697 F.2d 447 (1st Cir. 1983)	15
<u>In re Determination of Executive Comm'n on Ethical Standards re: Appearance of Rutgers Attorneys Before the Council on Affordable Housing on Behalf of the Civic League,</u> 116 N.J. 216 (1989)	2, 8, 9, 11, 12
<u>Keddie v. Rutgers,</u> 148 N.J. 36 (1st Cir. 1983)	4
<u>Kight v. Dugger,</u> 574 So.2d 1066 (Fla. 1990)	15
<u>Kovats v. Rutgers, Inc.,</u> 822 F.2d 1303 (3 rd Cir. 1987)	12

Krebs v. Rutgers,
797 F. Supp. 1246 (D.N.J. 1992)4

Lefcourt v. Legal Aid Society,
445 F.2d 1150 (2d Cir. 1971)15

Marino v. Marino,
200 N.J. 315 (2009)13

Multnomah Legal Serv. Wkrs. U. v. Legal Servs. Corp.,
936 F.2d 1547 (9th Cir. 1991)16

Newman v. Legal Servs. Corp.,
628 F. Supp. 535 (D.D.C. 1986)15

Polk County v. Dodson,
454 U.S. 312 (1981)15

Rutgers v. Piluso,
60 N.J. 142 (1972)9

St. Peter's Univ. Hosp. v. Lacy,
185 N.J. 1 (2005)13

Times of Trenton Publishing Corp. v. Lafayette Yard
Community Dev. Corp.,
183 N.J. 519 (2005)13, 14

Trustees of Rutgers College v. Richman,
41 N.J. Super 259 (Ch. Div. 1956)2

Rules

New Jersey Court Rule 1:21-3(b)3

New Jersey Rule of Professional Conduct 1.63, 16

New Jersey Rule of Professional Conduct 1.33

Treatises

2B Norman J. Singer, Sutherland Statutory Construction §
21.03 (5th ed. 1993)13

STATEMENT OF THE MATTER INVOLVED

The Appellate Division holds that the Environmental Law Clinic at Rutgers University Law School ("RELC" or "Clinic") is a government agency within the meaning of New Jersey's Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1.1, and thus that documents created, maintained or received by the Clinic in its ordinary course of business are "government records" open to unfettered public access. This decision ignores controlling precedent and reaches the wrong conclusion. Moreover, this ruling has dramatic negative consequences for the legal profession, unnecessarily intrudes on Rutgers' statutorily-preserved educational autonomy, and harms the public by impairing the Clinic's ability to provide quality representation to underserved communities and individuals. Uncorrected, this decision creates an unnecessary and harmful dichotomy between public and private law school clinical programs; permits partisan groups to effectively control the Clinic's operations by requiring the Clinic to spend precious resources responding to OPRA requests; and dramatically affects the Clinic's ability to function as a "real-life" educational training opportunity and as a legal services provider to indigent and underserved clients, who will be justifiably resistant to open discussion with Clinic

counsel for fear of public disclosure of any information they share.

This Court's assistance is needed to reaffirm the legal standards previously set forth in In re Determination of Executive Comm'n on Ethical Standards re: Appearance of Rutgers Attorneys Before the Council on Affordable Housing on Behalf of the Civic League, 116 N.J. 216 (1989), and to follow the Court's admonition that "the fact that there is State involvement in education should never be a disadvantage." Id. at 223.

A. Overview

This action arises out of a request pursuant to OPRA, N.J.S.A. 47:1A-1.1, by a private developer, Sussex Commons Associates, LLC and Howard Buerkle (collectively "Sussex") to Rutgers University ("Rutgers"), the RELC, and Rutgers Custodian of Records for records allegedly maintained by the RELC.

It is undisputed that Rutgers is a state-funded institution of higher education with a unique "hybrid" status, recognized as "at one and the same time private and public." Executive Comm'n on Ethical Standards, supra, 116 N.J. at 223 (quoting Trustees of Rutgers College v. Richman, 41 N.J. Super. 259, 289-90 (Ch. Div. 1956)). Independent for approximately 190 years until 1956, the

legislation that enabled Rutgers to reorganize as a State University expressly provides: "the corporation and the university shall be and continue to be given a high degree of self-government and that the government and conduct of the corporation and the university shall be free of partisanship." N.J.S.A. 18A:65-27 (I)(a).

The RELC is one of eight legal clinics offered by Rutgers Law School-Newark (Pa2). It has been in existence since 1985 and its mission is to offer students an introduction to environmental law practice through the provision of legal services to persons or entities who generally cannot otherwise afford private counsel (Pa2). The legal services the RELC provides range from consultation to litigation (Pa2). The RELC operates pursuant to New Jersey Court Rule 1:21-3(b), and its attorneys and students are subject to the same ethics rules and duties as other lawyers, including the duties of confidentiality, see New Jersey Rule of Professional Conduct ("RPC") 1.6, and zealous advocacy, see RPC 1.3.

The RELC and other legal clinics at Rutgers Law Schools operate similar to a law firm (Pa2). They maintain offices that separate from Rutgers' classrooms and faculty offices, and have a dedicated computer server which is

accessible only to Clinic personnel (Pa2). Although the RELC receives funding from Rutgers, the Clinic is also supported by other sources, including court-awarded fees in cases prosecuted pursuant to fee-shifting statutes. Brown v. Newark, 202 N.J. Super. 1 (Law. Div. 1985).

New Jersey's public records statute or OPRA applies to "government records", N.J.S.A. 47:1A-1, and the statute makes clear that its purpose is to insure ready access to all records relating to the operation of the government. N.J.S.A. 47:1A-1.1.¹ For purposes of this Petition, there is no dispute that Rutgers is subject to OPRA.²

B. The Present Litigation

Sussex's interest in RELC documents arises out of the RELC's prior representation of two community groups, the Coalition to Protect our Land, Lakes and Watersheds ("Coalition") and the Citizens for Responsible Development

¹ The statute defines a "government record" as any document "that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof . . . or that has been received in the course of his or its official business by any such officer, commission, agency or authority of the State or of any political subdivision thereof," excluding inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.

² Cf. Keddie v. Rutgers, 148 N.J. 36 (1997) (treating Rutgers as a "public body" subject to New Jersey's Right to Know Law, the predecessor statute to OPRA); but see Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992) (holding that Rutgers is not "a State or local government agency," within the meaning of the federal Privacy Act as it does not possess the requisite government control to meet that definition).

at Ross' Corner ("CRDRC"), in their efforts to block Sussex from developing a commercial mall in Frankford Township (Pa2-Pa5; Pa21). Although Sussex obtained permission to build the mall, it asserts that the Coalition and CRDRC had conspired with one of its competitors, the Chelsea Property Group ("CPG"), to tortiously interfere with its development project, and in a related litigation sought discovery of, among other things, communications between CPG's counsel and the RELC (Pa7-Pa10). The court in that litigation denied that discovery request on the ground that the communications were privileged (Pa116-Pa117). Not to be deterred, Sussex served Rutgers Custodian of Records with a lengthy OPRA request, demanding vast amounts of information concerning the RELC, including records relating to the RELC's representation of the Coalition and CRDRC (Pa10-Pa16). When Sussex did not find the information it sought in the extensive records provided by Rutgers, it filed an action in lieu of prerogative writs in the Law Division, seeking relief under OPRA and New Jersey's common law right of access.³

By decision dated October 7, 2008 the Law Division

³ To the best of Petitioner's knowledge, with the exception of this action, all litigations involving Sussex and the Coalition, CRDRC and the CPG are now concluded.

ruled that OPRA does not apply to the RELC and dismissed Sussex's complaint (Pca42). In so holding, the court recognized that although Rutgers is subject to OPRA, the status of the RELC is qualitatively different from Rutgers and its functions are very distinct from those of a governmental agency (Pca65-Pca66). The court expressly observed that it was necessary to provide the RELC with "exempt" status to insure there was no unnecessary interference in the operations of the Clinic or that the Clinic expend scarce resources analyzing the applicability of OPRA request by request (Pca67).⁴

By decision dated October 25, 2010, the Appellate Division reversed, holding OPRA applies to the RELC just as it applies to other government entities. Sussex Commons Assoc., LLC v. Rutgers, the State University, supra, ____ N.J. Super. ____ (slip op. at 18-19) (Pca24). The Appellate Division applied a bright line rule: because Rutgers is a subdivision of the State and because the RELC is "an instrumentality created by" Rutgers, the RELC meets the definition of a public agency within the scope of OPRA. Id.

⁴ Notably, the court also observed that exempt status was particularly appropriate on the facts of this case, as 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 (Pca38).

The court reasoned that Rutgers receives State funds, the Law School is part of Rutgers, and the Law School, in turn, at least partially funds the Clinic; therefore, OPRA applies to the Clinic. Id. at ____ (slip op. at 17, 19) (Pca23; Pca25). The matter was remanded to the Law Division to determine whether the RELC could rely on the exemptions set forth in OPRA to preserve their clients' confidentiality.

QUESTIONS PRESENTED

1. Did the Appellate Division err by ignoring controlling precedent and applying a categorical rule that the RELC is subject to OPRA because it is a subdivision of Rutgers?
2. Can the Appellate Division's construction of OPRA be reconciled with Rutgers' enabling statute or New Jersey's RPC?
3. Does the Appellate Division decision create an untenable dichotomy between public and private university legal clinics that violates this Court's admonition that "the fact that there is State involvement in education should never be a disadvantage?"

ERRORS COMPLAINED OF

1. The Appellate Division failed to apply the required factual and legal analysis outlined in Executive Comm'n on

Ethical Standards and mistakenly concluded that OPRA applies to law clinics at Rutgers.

2. The Appellate Division neglected to construe OPRA in harmony with Rutgers' enabling statute and the RPC.

3. The Appellate Division disregarded the burden its ruling will have on the availability of qualified legal services for indigent clients; the negative impact its ruling will have on the RELC's ability to provide "real-world" training to its law students; the chill effect that the ruling will create on communications between the RELC and its clients, thereby limiting the RELC's ability to provide zealous advocacy; and the harm to the public caused by allowing private interests with ample financial resources to tie up the resources and impede the operations of a non-partisan *pro bono* provider of legal services.

4. The Appellate Division erred in that it created a dichotomy between law clinics at public and private universities wherein the public law clinics are directly disadvantaged by state involvement in education.

REASONS WHY CERTIFICATION SHOULD BE GRANTED AND
COMMENTS ON THE APPELLATE DIVISION'S DECISION

The Appellate Division ignored controlling precedent by concluding that documents made, maintained, kept on file

or received by the RELC are "government records" subject to public disclosure upon the mere filing of a request under OPRA. Its decision also impedes the operations of Rutgers' law school clinics, is contrary to OPRA's legislative intent, and is inimical to the public good. This cannot be the law.

A. The Appellate Division's blanket rule that the RELC is a state agency misapplies prior precedent.

It is well settled that because Rutgers holds a unique "hybrid" status, it is not to be treated as a government agency or an alter ego of the state for all purposes. Executive Comm'n on Ethical Standards, supra, 116 N.J. at 221, 223; Rutgers v. Piluso, 60 N.J. 142, 157-58 (1972). There is no blanket rule for determining when Rutgers is a state agent, but rather this Court has repeatedly ruled that the question of whether or not a state statute applies to Rutgers (or its subdivisions) is to be determined on a case by case basis, mindful of the legislature's overriding concern for the academic freedom of one of the nation's oldest and greatest universities. Executive Comm'n on Ethical Standards, supra, 116 N.J. at 222-224; see Piluso, supra, 60 N.J. at 152, 157-58.

In Executive Comm'n on Ethical Standards, this Court

had the opportunity to examine the very Clinic at issue here, the RELC, and decide whether an RELC professor was a "state employee" with respect to New Jersey's Conflict of Interest Law, N.J.S.A. 52:13D-12 to 27 ("COIL"), such that he would be barred from appearing in front of a state agency on behalf of a client. Despite the fact that a literal reading of COIL would appear to include the RELC within its scope,⁵ the Court concluded that the purpose of COIL -- to avoid the appearance of impropriety resulting from State government officials representing the government before agencies of the very same government -- was not present with respect to an RELC professor. Id. at 222-23. This Court concluded that "to characterize one of these scholars, for all purposes, as the equivalent of a 'state employee'" would be absurd and it declined to impose the requirements of COIL on the RELC. Id. at 224. In reaching its conclusion, this Court expressly observed that clinical training is one of the most significant developments in legal education, providing law students with hands-on experience in representing clients, and that preserving the

⁵ COIL defined "State officer or employee" unambiguously, as "any person, other than a special State officer or employee (1) holding an office or employment in a State agency, excluding an interstate agency, other than a member of the Legislature or (2) appointed as a New Jersey member to an interstate agency." N.J.S.A. 52:13D-13.

academic freedom of Rutgers had been and was an "overriding concern" for the legislature. Id. at 223, 234.

This Court reasoned further that to apply COIL to the RELC would have crippled the RELC's ability to function, and that such an outcome could not have been intended by the legislature:

[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. In order to accept the Commission's ruling, we would have to assume that an environmental law clinic at a State University (unlike one at a privately funded university) would not be able to interact with any of the agencies essential to such practice. . . . We cannot attribute such an intention to the Legislature.

[Id. at 219.]

Until the Appellate Division's decision below, the lower courts had uniformly recognized the unique nature of Rutgers when considering the application of various statutes to the University and its subparts. See, e.g., Brown v. Newark, supra, 202 N.J. Super. at 9-11 (holding the Rutgers' Women's Rights Litigation Clinic should be entitled to an award of attorney's fees under 42 U.S.C.A. § 1988 because although the clinic was a "subdivision of the State," its status as such should not disqualify it from

recovering attorneys' fees under § 1988); Kovats v. Rutgers, 822 F.2d 1303 (3rd Cir. 1987) (declining to allow Rutgers to invoke Eleventh Amendment immunity); Briscoe v. Rutgers, 130 N.J. Super. 493 (Law Div. 1974) (holding New Jersey's Contractual Liability Act, N.J.S.A. 59:13-1, does not apply to Rutgers).

Each of these decisions makes clear that it is the legislative purpose of the statute at issue that governs whether or not Rutgers or its clinics should be subject to their provision, not the mere fact that Rutgers and/or its clinics can be characterized as State subdivisions. Executive Comm'n on Ethical Standards, 116 N.J. at 221.

In direct conflict with this precedent, the Appellate Division here failed to do this type of fact specific analysis. Instead, it categorically concluded the RELC is a state actor simply because it is a subdivision of Rutgers and indirectly receives some public funding. This is not and was never the law, and this Court's intervention is necessary to ensure that lower courts do not follow the Appellate Division's lead, and perfunctorily apply statutes to the detriment of one of our nation's oldest and greatest universities.

B. The Appellate Division's construction of OPRA creates disharmony with Rutgers' enabling statute and the RPC.

Statutes in apparent conflict must be construed to be in harmony if reasonably possible. 2B Norman J. Singer, Sutherland Statutory Construction § 21.03 (5th ed. 1993); cf. Marino v. Marino, 200 N.J. 315, 330 (2009) (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005)). Here, the Appellate Division's decision does the opposite; it creates unnecessary disharmony between OPRA, Rutgers' enabling statute, and the RPC.

The purpose of OPRA "is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Times of Trenton Publishing Corp. v. Lafayette Yard Community Dev. Corp., 183 N.J. 519, 535 (2005) (citation omitted). To effectuate that purpose, OPRA defines "government records" broadly as including any document made, maintained, kept on file or received by an "officer, commission, agency or authority of the State or of any political subdivision thereof" in the course of his or its official business. N.J.S.A. 47:1A-1.1 (emphasis supplied).

Manifestly, OPRA's underlying purpose is inapplicable

to entities that are not "public agencies." In determining whether an entity is a "public agency," subject to OPRA, courts have consistently evaluated whether the entity performs any public functions or is otherwise controlled by the State. For example, earlier this year in Fair Share Hous. Ctr. v. N.J. League of Muns., 413 N.J. Super. 423, 430-32 (App. Div. 2010), the Appellate Division ruled that the League of Municipalities was not a public agency subject to OPRA because -- although it served as a professional organization for municipalities and was funded in part by revenue from the municipalities -- it did not itself perform any governmental functions.⁶ Similarly in Lafayette Yard, this Court concluded that an otherwise "private" corporation was subject to OPRA where the facts demonstrated that it was performing government functions, including issuing tax-exempt bonds. 183 N.J. at 535-36.

Here, the underlying purpose of OPRA would not be furthered by applying the statute to the RELC because the

⁶ Specifically, the court concluded that "the League is a non-profit association organized for the purpose of advancing the interests of local government before the three branches of State government and providing educational and other services to its member municipalities...but does not perform any governmental functions." 413 N.J. Super. at 427-28. Notably, in reaching this conclusion, the court observed in dictum, that even if the League did fit within the definition of "combination of political subdivisions" used in OPRA, it would not apply the statute because functionally the League did not perform a governmental or public function. Id. at 431.

RELC does not perform any government functions. The RELC's role as educator or trainer of future attorneys is pursuant to Rutgers' charter which makes clear that the highest degree of autonomy in educational affairs is kept by Rutgers, not the State. Likewise the RELC's provision of legal services to indigent clients -- even when done with the assistance of public funding -- is not a government function.⁷ See Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447 (1st Cir. 1983) (civil legal assistance to indigent clients is not a public function); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971) (the activities of a Legal Aid Society do not constitute state action for purposes of a 1983 claim); Newman v. Legal Servs. Corp., 628 F. Supp. 535 (D.D.C. 1986) (legal aid society is not a government actor and therefore cannot be

⁷ In many ways, the RELC is similar to the Public Defender's office, in that it represents private clients who cannot otherwise afford legal counsel. See Polk County v. Dodson, 454 U.S. 312 (1981) (holding the office of the public defender is not a state agency within the meaning of 42 U.S.C. § 1983 because it "is not amenable to administrative direction in the same sense as other employees of the State"); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990) (holding the Florida Public Records Act did not require the disclosure of client files maintained by the public defender's office because "[t]o hold otherwise would subject the records of a defendant who is unable to retain private collateral representation to public disclosure while those of a defendant represented by private counsel would be immune from such disclosure"); Coronado Police Officers Association v. Carroll, 131 Cal Repr. 2d 553 (2001) (2003) (concluding the California Public Records Act did not require the public defender's office to disclose a database containing witness information).

sued for violating the federal constitution); see also Multnomah Legal Serv. Wkrs. U. v. Legal Servs. Corp., 936 F.2d 1547 (9th Cir. 1991).

On the other hand, the application of OPRA to the RELC would directly harm Rutgers and its students because it unquestionably would hinder the vital functions of the RELC in training attorneys and in providing free legal services to underprivileged individuals and underserved communities. Subjecting the RELC to the possibility of public records disclosure also would irretrievably undermine the relationship between the RELC and its clients, who would be justifiably concerned about revealing information to an entity that legally might be required to disclose it publicly. Fellerman v. Bradley, 99 N.J. 493, 502 (1985) ("[T]he public is well served by sound legal counsel based on full and candid communication between attorneys and their clients.") (quotation omitted); accord RPC 1.6. The legislature could not have intended this result.

C. The public is harmed by this ruling.

The Appellate Division's decision holding OPRA applicable to the RELC inflicts serious harm on both the legal profession and the public in terms of access to quality *pro bono* legal representation.

Under the Appellate Division's ruling, New Jersey will now have two qualitatively different training experiences for law students within the State: one for State school students and one for those in private schools. For State students, their clinical training will operate under the guise of government action, and their actions on behalf of the RELC as well as their communications with clients will be subject to the constant threat of public disclosure. This threat will not only negatively impact the manner in which they represent their clients but it also will make their training less like the "real" practice of law that is available to students in private law school clinics and to lawyers in private practice. Such an outcome directly disadvantages state school students, in contravention of the legislative intent codified in Rutgers' charter and the mandate that "the fact that there is State involment in education should never be a disadvantage."

This outcome also harms the public's access to quality legal services in a number of ways. First, prospective clients will be far less likely to retain the RELC because of the threat of disclosure, thereby reducing the availability of free public legal services, an important staple in our legal system. Second, the RELC's actual

clients will be less willing to be completely open and candid with their attorneys, which in turn will harm the the quality of the representation the RELC can provide. Fellermen, supra, 99 N.J. at 498. And, third, as this case demonstrates, private, self-interested and well-funded parties now will have the opportunity to inundate the RELC with OPRA requests to interfere with its proper functioning as a legal services provider.⁸

The Appellate Division discounted this reasoning in its decision because, in its view, all public record requests "may nevertheless be shielded from public scrutiny if the public interest in favor of confidentiality outweighs the private right of access." Sussex Commons Assoc., ___ N.J. Super. ___ (slip op. at 20). Furthermore, the court was persuaded that OPRA contains a number of exemptions which also would protect certain information

⁸ To that end, since 1997, the American Bar Association Legal Education Council has maintained a standing policy regarding interference in law school clinical activities:

"Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility."

[Available at
<http://www.abanet.org/legaled/accreditation/Council%20Statements.pdf>.]

from disclosure. Id. at ____ (slip op. at 20-22).

This reasoning misses the point. The RELC would not only be affected by actually having to disclose its clients' confidential information to the general public. The mere prospect of disclosure would cripple the Clinic by deterring prospective clients from retaining the RELC, and by discouraging actual clients from being completely forthcoming with the RELC. The specter of a public records request would drive a wedge between the RELC and its clients, and likewise diminish the clinical experience for Rutgers' students.

In its decision, the Appellate Division expressed reluctance to "craft a judicial exemption [in OPRA] for legal clinics." Id. at ____ (slip op. at 22). To be clear, the RELC is not requesting a "judicial exemption" for legal clinics. In construing a statute, the Court's paramount duty is "to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009) (citation omitted). Where the plain reading of a statute leads to an absurd result, the statute must be construed in a way that would avoid the absurdity. Cosmair, Inc. v. Director, N.J. Div. of Tax., 109 N.J. 562, 570 (1988). Petitioners do not ask for the Court to craft an

exemption into the statute, but rather to recognize the absurdity in applying OPRA in a manner that could not have been contemplated by the legislature.

CONCLUSION

For the foregoing reasons, Defendants-Petitioners request that the Court grant certification, reverse the Appellate Division's decision and affirm the Law Division's conclusion that the RELC is exempt from OPRA.

I certify that this Petition presents a substantial question and is filed in good faith and not for purposes of delay.

Respectfully Submitted,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Rutgers Defendants-Petitioners

By 

John J. Peirano, Esq.