

## KELLY & WARD, LLC

KEVIN D. KELLY +  
MEGAN A. WARD

+ NJ AND PA BARS

ATTORNEYS AT LAW  
93 SPRING STREET -4<sup>TH</sup> FLOOR  
P O. BOX 887  
NEWTON, NEW JERSEY 07860

TELEPHONE: (973) 579-6250  
TELECOPIER: (973) 579-6249  
E-Mail: firm@kellyandward.com

September 22, 2006

Honorable B. Theodore Bozonelis  
Morris County Court House  
Washington & Court Streets  
P O Box 910  
Morristown NJ 07960

**Re: Sussex Commons Associates, L.L.C. and Howard Buerkle vs.  
Rutgers, The State University, Rutgers Environmental Law Clinic and  
Rutgers University Custodian of Records**

Dear Judge Bozonelis:

Please accept this letter brief in support of the plaintiffs application for an Order to Show Cause.

### PRELIMINARY STATEMENT

The plaintiffs rely upon the facts set forth in the Verified Complaint.

On May 11, 2006, plaintiffs requested specific public documents from the defendants (see Verified Complaint **Exhibit A**). These requests included budget information, expenditures of public funds, and communications between Rutgers and parties involved in a significant public application and debate in Frankford Township.

All of the plaintiffs' requests were limited to one matter. Each of the 18 specific requests were denied by the defendants in a single page letter dated May 13, 2006.

KELLY & WARD, LLC  
ATTORNEYS AT LAW

Honorable B. Theodore Bozonelis

September 22, 2006

Page 2

LEGAL DISCUSSION

The plaintiffs' request for public documents and records was made pursuant to the Open Public Records Act ("OPRA") and the common law. These proceedings are to be conducted in a "a summary or expedited manner", *N.J.S.A. 47:1A-6; R. 4:67*. If satisfied with the sufficiency of the application, the Court shall order the defendant to show cause why final judgment should not be entered for the relief sought. *R. 4:67-2(a)*.

In denying all of plaintiffs' OPRA requests in this matter, defendants relied entirely upon the Appellate Division's decision in *MAG Entertainment LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super.* 534 (App.Div. 2005) (see Verified Complaint **Exhibit B**). The memorandum of denial, written 2 days after receipt of the request, actually recites parts of the Court's decision. The memorandum did not specifically address any of the 18 itemized OPRA requests made by plaintiffs (see Verified Complaint **Exhibit A**); the out of hand denial implies that the Rutgers custodian concluded that they were "wholesale, open-ended requests", not subject to OPRA. The Rutgers custodian made no effort to explain the reasoning for the blanket denial, to apply this reasoning to any specific request, and/or to limit and/or resolve the matter, all in violation of *N.J.S.A. 47:1A-5(g)*.

KELLY & WARD, LLC  
ATTORNEYS AT LAW

Honorable B. Theodore Bozonelis  
September 22, 2006  
Page 3

An analysis of plaintiffs' 18 OPRA requests shows the fallacy of this conclusion and the misapplication of the *MAG Entertainment* decision. Examples of these violations of the OPRA statute, State public policy and the common law include the following:

- 1) The plaintiffs' first request is for 4 specific budget items. OPRA provides immediate access to this information. *N.J.S.A. 47:1A-5(e)*.
- 2) The plaintiffs' second request is for specific bills to a specific party limited to a single case during the time of the defendants' representation. *N.J.S.A. 47:1A-5(e)* also provides immediate access to this information.
- 3) Requests 3-6 contain similar financial records limited to this single matter. Parenthetically, although defendants did not assert a claim of privilege, any such claim would, at best, allow redaction of privileged information. Production of the records would still be required.
- 4) The seventh request is for minutes of public meetings limited to discussion(s) of plaintiffs' application for development.
- 5) Requests 8-18 concern correspondence and other documents submitted to the public entity by third parties, including other public entities, limited to plaintiffs' matter.

As with of all other requests in this matter, requests 8-18 are limited to one specific case during the time of the defendants' representation. None of these requests require the custodian to review any other matter(s) or file(s). None require any research or analysis of information. The

KELLY & WARD, LLC  
ATTORNEYS AT LAW

Honorable B. Theodore Bozonelis  
September 22, 2006  
Page 4

custodian does not contend that there would be any disruption of her agency and, perhaps for this reason, made no effort to reach a reasonable accommodation with the plaintiffs as required by N.J.S.A. 47:1A5(g). ACCORD: *Bent v. Township of Stafford Police Department, Custodian of Records*, 381 N.J. Super. 30 (App.Div. 2005).

CONCLUSION

Based upon the foregoing, the defendants have clearly committed numerous violations of the plaintiffs' right to public information under OPRA and common law. These violations include the absence of any effort to explain the complete denial, resolve any issues or limit the inquiries. Under these circumstances, the plaintiffs are entitled to the entry of an Order to Show Cause, the production of the requested documents, and reasonable attorneys fees and costs.

Respectfully submitted,

KELLY & WARD, LLC

By: Kevin D. Kelly  
Kevin D. Kelly

KDK:kes

c: Sussex Commons Associates, LLC  
Julia LeMense Huff, Esq.  
Jean W. Sidar, Registered Agent for Rutgers  
Leslie A. Fehrenbach, Rutgers University Records Custodian

S:\litigation\general\sussex commons\OPRA litigation rutgers\pleadings\lir brief 092006.wpd

**KELLY & WARD, LLC**  
Attorneys at Law  
93 Spring Street  
PO Box 887  
Newton, NJ 07860  
Phone: (973) 579-6250  
Fax: (973) 579-6249  
Attorneys for Plaintiffs

<b>SUSSEX COMMONS ASSOCIATES, LLC,</b>	<b>: SUPERIOR COURT OF NEW JERSEY</b>
a limited liability company of the State of New Jersey, and <b>HOWARD BUERKLE,</b>	<b>: LAW DIVISION</b>
	<b>: SUSSEX COUNTY</b>
Plaintiffs,	<b>: DOCKET NO.: SSX-L-</b>
	<b>: Civil Action</b>
v.	<b>: ORDER TO SHOW CAUSE</b>
<b>RUTGERS, THE STATE UNIVERSITY;</b>	
<b>RUTGERS ENVIRONMENTAL LAW:</b>	
<b>CLINIC, and RUTGERS UNIVERSITY:</b>	
<b>CUSTODIAN OF RECORDS,</b>	
Defendants.	

**THIS MATTER**, having been brought before the Court by Kelly & Ward, LLC, attorneys for plaintiffs, on the plaintiffs' application for the issuance of an Order To Show Cause, and the Court having read and considered the Verified Complaint and the plaintiffs' supporting brief, and good cause having been shown;

**IT IS** on this \_\_\_\_\_ day of \_\_\_\_\_, 2006;

**ORDERED** as follows:

1. The defendant shall show cause before the Honorable B. Theodore Bozonelis, Assignment Judge of the Superior Court of New Jersey, Law Division, Sussex County on \_\_\_\_\_, 2006, at \_\_\_\_\_ a.m. at the Morris County Court House, Washington and Courts Streets, Morristown, New Jersey, why an order of final judgment should not be entered for the relief sought in the Verified Complaint;
2. This Order to Show Cause shall issue in lieu of a Summons and copies of this Order To Show Cause, the Verified Complaint and the plaintiffs' supporting brief shall be served, by overnight

mail and regular mail, upon the defendants or their counsel within \_\_\_\_\_ days from the date of this Order to Show Cause by the plaintiffs' counsel or its designee, and such service shall constitute good and valid service upon the defendants;

3. Within \_\_\_\_\_ days from the date of this Order to Show Cause, the defendants shall file with the Court and serve upon the counsel for the plaintiffs, at the addresses set forth hereinabove, any papers in response to the plaintiffs' papers. In default thereof, this action may proceed ex parte. The plaintiffs shall file and serve any reply to the defendants' papers within \_\_\_\_\_ days of receipt by counsel for the plaintiffs of the defendants' papers; and

4. Within \_\_\_\_\_ days of the date upon which this Order to Show Cause and Verified Complaint are served upon the defendants, the defendants shall file their answers to the Verified Complaint with the Court and the defendants shall serve copies of their answers upon the counsel for the plaintiffs, at the address set forth hereinabove, and the defendants are hereby notified that if they fail to file and to serve their answers to the Verified Complaint, judgment by default may be rendered against the defendants for the relief demanded in the Verified Complaint. If any defendant is unable to obtain an attorney, the defendant may communicate with the New Jersey State Bar Association, with the Sussex County Lawyer Referral Service or, if the defendant cannot afford to pay an attorney, with the Legal Aid Society of Sussex County. The Sussex County telephone numbers are: Lawyer Referral Service: (973) 267-5882 and Legal Services: (973) 383-7400.

---

B. Theodore Bozonelis, A.J.S.C.