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Rutgers Law School Clinics Held To Be Public Agencies, so Subject to OPRA

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Clinics at New Jersey's two public law schools are subject to the Open Public Records Act, an appeals court held Monday, reversing a trial judge's finding that these unique hybrids between law firms and educational institutions deserve a categorical exemption.

The judges, in *Sussex Commons Associates v. Rutgers, The State University*, A-1567-08, rejected arguments that applying the statute to them would infringe on academic freedom and chill clinic operations by scaring off clients fearful their case files might be bared to the public.

The Appellate Division held that no blanket exemption is needed because there are existing OPRA exemptions available, including the attorney-client privilege, the deliberative process exemption and other exemptions geared to colleges and universities.

"These exemptions to OPRA's public disclosure provisions rebut the arguments raised by defendants that unless we craft a judicial categorical exemption for legal clinics," wrote Appellate Division Judge Jose Fuentes, joined by William Gilroy and Marie Simonelli. "OPRA would be used to indiscriminately access clinical records by those seeking to gain some kind of adversarial advantage."

Rutgers also contended that without a blanket exemption, its clinics would be forced to expend its limited resources fending off fact-sensitive records requests, diverting them from their mission to provide legal assistance to underserved clients.

It would also place them at a disadvantage compared with clinics in private law schools and private law firms, to which OPRA does not apply.

The panel again disagreed, saying any disadvantage to the clinics from being part of a public university was offset by their receipt of public funding and was a reasonable burden.

"With the acceptance of public funds comes the accountability and transparency that all publicly financed institutions must endure," stated Fuentes.

In addition, even if the court did declare a blanket exemption under OPRA, that would not protect the clinics from records requests under the common law right of access.

In any event, it is not the job of the courts to amend OPRA "by judicial fiat" and add another exemption beyond the 21 provided by the Legislature, said the appeals court.

The disputed records were requested in 2006 by Sussex Commons, a developer that won approval to build a 90-store outlet mall in Frankford Township but only after overcoming opposition by citizens' groups represented by the Environmental Law Clinic at Rutgers-Newark Law School.

The clinic presented evidence against the application at all permit and development hearings, intervened and filed cross-claims in at least two lawsuits between Sussex Commons and the Township, and directly appealed the township's development approvals.

Believing that a competitor, Chelsea Property Group, was bankrolling the efforts to block the project, Sussex Commons asked for 18 categories of documents dealing with the sources of the clinic's funding and its communications with the clients, including disbursements, billings, payments and time sheets.

Sussex Commons also sought communications between the clinic and lawyers at Pitney Hardin, now Day Pitney, who were defending Chelsea Property in a separate tortious interference suit by Sussex Commons. In the process, Sussex Commons learned that Chelsea Property had given the citizens' groups \$16,500 to pay for a traffic study opposing the mall. The judge there, however, refused to compel discovery of communications between the clinic and Pitney Hardin.

Sussex Commons got a portion of the information it wanted, some of it after it sued.

Rutgers satisfied three of the 18 requests by turning over copies of bills the clinic sent to the citizens' groups for out-of-pocket costs and records of disbursements it made and payments to the clinic by the client groups.

The university also informed Sussex that the only amounts it allocated to the clinic between 2002 and 2006 were to pay the salary of the clinic's director and ranged from \$75,000 to about \$84,000 per year, with other funding coming from restricted grants.

On Aug. 4, 2008, Middlesex County Superior Court Judge Travis Francis ruled that "because of [their] unique situation as a hybrid institution, an academic institution, and a law firm which represents clients, Rutgers Law School Clinics are exempt from OPRA requests."

In reversing, the appeals court said OPRA applies to the clinic because it fits within the law's definition of a public agency, which encompasses the departments of the executive branch of government and any "other instrumentality within or created by such department."

Fuentes pointed out that the clinics were created and partly funded by the law school, and its faculty are part of the law school faculty.

He cited *Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp.*, 183 N.J. 519 (2005), where the Supreme Court held that a private, nonprofit corporation "created by a political subdivision of the State" was a "public agency" subject to OPRA.

The panel sent the case back down for a determination of whether OPRA allows access to the four categories of records as to which Sussex Commons appealed, those having to do with funding, time records, payments to expert witnesses and minutes of board and staff meetings at which the Sussex

Commons case was discussed.

It also asked the trial court to decide whether Sussex Commons has a common law right to the records, an issue raised but not addressed below.

Sussex Commons' lawyer, Kevin Kelly of Kelly & Ward in Newton, says he anticipates an appeal but expects the ruling to stand because it is a solid one.

Asked what he would do with any further records he obtained, Kelly says that with the project approved and groundbreaking for the mall to take place in the spring, "just knowing what happened may be enough."

He adds: "What is most important is that the clinics are now responsible to the public for how they spend their money. Now anyone can find that out, in any case."

Frank Askin, director of the Rutgers Constitutional Litigation Clinic, calls the decision "dead wrong" and "a disaster for the law schools" and hopes Rutgers will decide to appeal.

Askin says the appeals court mentioned but did not discuss *In re Determination of Executive Commission on Ethical Standards re: Appearance of Rutgers Attorneys Before the Council on Affordable Housing*, 116 N.J. 216 (1989), which held Rutgers law professors who teach in the clinics are not state employees for purposes of conflicts-of-interest law. Askin calls it controlling precedent but says the panel did not explain why it did not govern here.

Rutgers-Newark's six active clinics, with their 90 to 100 students and 14 or 15 faculty members share a single secretary, leaving them ill-equipped to cope with the records requests Askin believes will result from the ruling.

"Now they're going to open it up," he says. "Nobody ever dreamt it before. Nobody thought it was possible."

John Farmer Jr., dean of Rutgers Law School-Newark, who argued against OPRA access on behalf of the school's clinical program, an amicus, says, "I understand why they came down as they did; there are 21 exemptions and we're not one of them" but that is probably because "no one thought of this."

While the appeals court might have thought it was not legislating, it effectively did so by engrafting a new exception onto the civil discovery process, he adds.

He also questions the court's use of state funding as a ground for its ruling, noting that state support for the law school has fallen to below 20 percent.

James Lidon, of McElroy Deutsch Mulvaney & Carpenter in Morristown, who represents Rutgers, says no decision has been made yet on an appeal.

Weighing in as amici curiae against applying OPRA to public law school clinics were the Association of American Law Schools, American Association of University Professors, Society of American Law Teachers and the Clinical Legal Education Association.

Chelsea Property also submitted an amicus brief.

Sussex Commons' tortious interference suit against Chelsea Property was tossed out and its appeal from

the dismissal was heard by the same panel as in the OPRA case and on the same date, April 13, 2010.

Fuentes, Gilroy and Simonelli affirmed on Sept. 23, in an unpublished per curiam opinion in *Sussex Commons Outlets v. Chelsea Property Group*, A-3714-07.