
SUPREME COURT OF NEW JERSEY

Docket No. 067232

SUSSEX COMMONS ASSOCIATES, LLC,)	<u>Civil Action</u>
a limited liability company of)	
the State of New Jersey, and)	ON PETITION FOR CERTIFICATION
HOWARD BUERKLE,)	FROM A FINAL JUDGMENT OF THE
)	NEW JERSEY SUPERIOR COURT
Plaintiffs-Respondents,)	APPELLATE DIVISION
)	
)	Appellate Division:
v.)	Docket No.: A-1567-08T3
)	Hon. Jose L. Fuentes
RUTGERS, THE STATE UNIVERSITY;)	Hon. William P. Gilroy
RUTGERS ENVIRONMENTAL LAW)	Hon. Marie P. Simonelli
LAW CLINIC; and RUTGERS)	
UNIVERSITY CUSTODIAN OF)	Law Division:
RECORDS,)	Docket No. L-8465-06
)	Hon. T.L. Francis
Defendants-Petitioners.)	

**BRIEF OF PLAINTIFFS-APPELLANTS,
SUSSEX COMMONS ASSOCIATES, LLC AND HOWARD BUERKLE**

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PRELIMINARY STATEMENT

This is in opposition to a Petition for Certification for review of the Appellate Division's decision that the Environmental Law Clinic at Rutgers University Law School ("RELC") is subject to the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to 13. The Appellate Division held that the provisions of OPRA apply to RELC because it meets the definition of a public agency contained in N.J.S.A. 47:1A-1.1. This matter was reversed and remanded to the trial court for a determination of whether the requested documents are exempt from disclosure under the definition of "government record" in N.J.S.A. 47:1A-1.1 and the State common law right of access.

The Appellate Division carefully considered and rejected RELC's categorical exemption from OPRA noting that the Legislature "carefully delineated" six specific statutory exemptions for institutions of higher education. The Court further rejected all of the unproven and unsupported contentions with respect to the dramatic negative consequences predicted by RELC in the event that a special judicial exemption was not created for it. Specifically addressing these imaginary concerns, the Court stated that:

"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, OPRA would be used to indiscriminately access clinical records by those seeking to gain some kind of adversarial advantage." *Sussex Commons Associates, LLC v. Rutgers, the State*

The Appellate Division correctly applied the law to the facts and upheld the Legislature's and the statute's intent based upon established rules of statutory interpretation.

RELC acknowledges that this petition fails to present any issues of general public importance, is limited to its singular perceived problem, or set forth any special reasons requiring review by this Court.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

This petition concerns the Appellate Court's refusal to amend the Open Public Records Act to create a special provision/exemption for Rutgers legal clinics.

RELC is not a legal entity. It is not incorporated. It has no by-laws. It has no Board of Directors. It has no bank accounts. It has no operating agreements with Rutgers University. (Pa234). RELC has no employees. (Pa262).

During the entire existence of OPRA, RELC has received only four (4) requests for public records/documents pursuant to this statute; three (3) of these have been submitted by the plaintiffs in this litigation. (Pa257). On June 27, 2003, the Custodian

¹The Procedural History and Counterstatement of Facts are combined because they are closely related.

received and complied with the only other OPRA request ever submitted to RELC or any other Rutgers Clinic. (Pa260).

According to RELC's website,

"the Clinic has been the sole public interest law firm for New Jersey's environmental community since 1985. The Clinic works with the Eastern Environmental Law Center, a public interest law firm located on Rutgers campus in Newark, New Jersey. The Clinic has litigated many of the most important environmental cases in the State on topics as varied as land use/sprawl, transportation, clean water, clean air, environmental justice, endangered species, hazardous waste site remediation, public access to beaches and other public lands, open space, parkland preservation and energy policy. The Clinic currently has a docket of over 50 matters, approximately 2/3 of which are litigation matters and 1/3 of which are a combination of policy and administrative matters. . ." (Pa16) (Pa68).

Without identifying any environmental basis or reasons, RELC began its opposition to the Sussex Commons project in "the Spring of 2003." (Pa69). In April 2004, Paul Sutphen, Geri Sutphen and Allyn Jones formed and incorporated Citizens for Responsible Development at Ross' Corner ("CRDRC") whose mission is "to oppose Sussex Commons' proposed outlet mall." (Pa70). CRDRC officially engaged RELC to represent it in connection with all issues related to Ross' Corner in August 2004. (Pa70). Thereafter, RELC represented CRDRC for several years in opposing the Sussex Commons project including the following:

- 1) appearing at every Land Use Board hearing on Sussex Commons' development application from May 2005 through

May 2006; (Pa71).

- 2) Presenting expert witnesses during the hearing process; however, these were limited to a traffic engineer and a professional planner who raised no environmental issues; (Pa37).
- 3) Intervening on June 21, 2005 in *Sussex Commons Associates, LLC v. Township of Frankford, et al.*, Superior Court of New Jersey, Law Div., Docket No. SSX-L-180-05 and filing cross-claims against the Township for alleged contract zoning and conflicts of interest with respect to the development agreements between Sussex Commons and the escrow agreement between Frankford Township and the Sussex County Municipal Utilities Authority ("SCMUA") (Pa71); RELC's participation in this litigation continued until July 2006, when Judge Bozonelis dismissed the last of its claims with prejudice. (Pa72).
- 4) Appealing on September 14, 2006 the Land Use Board's decision to approve the Sussex Commons application by filing an action in lieu of prerogative writs in the Superior Court, Sussex County, Docket No. SSX-L-520-06. On August 3, 2007, B. Theodore Bozonelis, A.J.S.C. upheld the board's decision. RELC filed an appeal of this decision with the Appellate Division which was withdrawn

on December 14, 2007. (Pa73).

- 5) Intervening on June 28, 2005 in litigation involving other parties entitled *Sussex Commons Outlets, LLC v. Chelsea Property Group et. al.* in the Superior Court, Sussex County, Docket No. SSX-L-554-03 to oppose motions and appeal discovery rulings. (Pa74).
- 6) Moving to quash subpoenas issued to Schoor DePalma, Paul Sutphen, Allyn Jones, Julia LeMense and David Mintz in the above matter. (Pa74).
- 7) Intervening and filing an appellate brief on behalf of Frankford Township Committeeman Robert McDowell on December 17, 2007 (A-00377-06T2); (Pa72).
- 8) Participating in this OPRA and common law litigation since October 17, 2006 (Pa43), including and intervening in this OPRA litigation on May 2, 2008. (Pa219).

RELC's extensive involvement in the opposition to Sussex Commons resulted in the initial Sussex Commons OPRA and common law requests dated May 11, 2006, which began exchanges of communications between the requestor and Rutgers' custodian of records lasting until July 18, 2008 (Pa262).

In March of 2008 a deluge of applications was directed to the trial court to oppose the requested release of documents based upon a contention that OPRA did not apply to public law school clinics, all of these were granted.

The trial court rendered a decision that RELC was not subject to OPRA on August 4, 2008. The Appellate Division reversed on October 25, 2010. On November 29, 2010, Petitioner served its Notice of Petitioner for Certification and its brief in support thereof.

ARGUMENT

THE PETITION FOR CERTIFICATION SHOULD BE DENIED BECAUSE THE APPELLATE DIVISION PROPERLY RULED THAT RELC WAS NOT EXEMPT FROM OPRA OR COMMON LAW RIGHT TO PUBLIC RECORDS AND NO SPECIAL REASONS FOR CERTIFICATION EXIST.

The Petition for Certification should be denied because the Appellate Division properly declined to create an exemption for law clinics that the Legislature did not enact. Further, no special reasons exist to review the Appellate Division's decision. **Rule 2:12-4.**

The Petition does not present any question of general public importance that has not been settled, or is similar to a question presented on any other pending appeal, or is in conflict with any other decision of the Supreme Court, or needs to be reviewed in the interest of justice. **Rule 2:12-4.**

Here, the Appellate Division correctly applied settled standards of judicial review of Legislative enactments.

“in adopting OPRA, the legislature specifically delineated twenty-one exemptions from the definition of “government record” in N.J.S.A. 47:1A-1. The decision to exempt certain categories of documents is an expression of public policy by the Legislature

that we are bound to respect and enforce (citing *Education Law Center v. New Jersey Department of Education*, 198 N.J. 274, 284 (2009)). . . . it is not our role to amend this statute by judicial fiat and add a twenty-second exemption category (citations omitted). Sussex Commons Association, LLC v. Rutgers, the State University, _____ N.J. Super. _____ (App. Div. October 25, 2010) (slip op. page 25)."

Since this Court's decision in *Keddie v. Rutgers, The State University*, 148 N.J. 36 (1997), Rutgers and its attorneys have been subject to disclosure of public records and have established a practice to review and comply with these requests. Throughout this matter, Rutgers has relied heavily upon *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). By a 4-3 vote, Rutgers was able to obtain a decision to permit its law professors to practice before State agencies, notwithstanding the Conflicts of Interest Law. The dissent, authored by Justice Pollock emphasized that:

"Exempting the professors from the Conflicts Law is a matter for the Legislature, not the judiciary. In this regard, I am troubled by appellants' argument concerning the relationship between the legislative and judicial branches of government. When asked at oral argument why appellants had not sought a legislative amendment to the Conflicts Law, its counsel replied:

. . . You gotta go through committee, you gotta get it posted in both houses; you got to line up forty-one votes in the Assembly, twenty-one in the Senate. When directly asked

whether the reason why the appellants were proceeding before the judiciary, rather than the legislature, because that course would be easier, appellants' counsel responded: 'I think it probably is.' Although the wall between the Legislature and the judiciary is not insurmountable, it ought not be so easily scaled. More is at stake than an easy answer."

Executive Comm'n on Ethical Standards, supra.
116 N.J. at 234.

Having succeeded in this cynical and deliberate strategy 21 years ago, Rutgers can be criticized but not blamed for continuing this quest for preferential treatment. However, we submit that such practices should no longer be validated, or successful before any Court.

CONCLUSION

For the foregoing reasons, the Petition for Certification should be denied.

Respectfully submitted,

KELLY & WARD, LLC
Attorney for Plaintiffs-
Respondents

Dated: December 13, 2010

By: Kevin D. Kelly
Kevin D. Kelly

