COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
LAW SCHOOL

May 1, 2008

Clerk, Superior Court of New Jersey
Law Division, Middlesex County
Middlesex County Courthouse
56 Paterson Street & Elm Row
1 JFK Sq.
P.O. Box 2633
New Brunswick, New Jersey 08903-2633

Re: Sussex Commons Assocs, LLC, et al. v. Rutgers, The State University, et al.
Docket No. MID-L-8465-06

Dear Judge Francis:

Enclosed for filing please find an original and one copy of the Brief of Amicus Curiae Clinical Legal Education Association which is being filed with the Middlesex County Clerk and served upon counsel to the parties in this matter today. Also attached please find a Certificate of Service.

Please contact me if the Court requires any additional information. (212) 854-4291.

Respectfully submitted,

Edward Lloyd
Evan M. Frankel Clinical Professor of Environmental law

Counsel for Clinical Legal Education Association

Enclosures

Cc. Counsel of Record

COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
LAW SCHOOL

May 1, 2008

Honorable Travis L. Francis, A.J.S.C. (via overnight mail)
Law Division, Middlesex County
Middlesex County Courthouse, Room 201
56 Paterson Street
P.O. Box 964
New Brunswick, N.J. 08903-0964

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SUSSEX COUNTY
DOCKET NO.: SSX-L-540-06

Civil Action

SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE,
Plaintiffs,
vs.
RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS,
Defendants.

BRIEF OF AMICUS CURIAE CLINICAL LEGAL EDUCATION ASSOCIATION

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INTRODUCTION

The Clinical Legal Education Association ("CLEA"), amicus curiae in this matter, submits this brief in support of the request of Defendants Rutgers, The State University, Rutgers Environmental Law Clinic, and Rutgers University Custodian of Records (collectively "Rutgers") that the Plaintiffs' Order to Show Cause be dismissed. For the reasons stated herein, CLEA contends that the petition of Plaintiffs for access under the Open Public Records Act ("OPRA") or common law right of access to law clinic files threatens the ability of clinics in New Jersey and throughout the country to provide students with important training in lawyering skills and professional values and to provide clients with appropriate, ethical representation. Accordingly, the Court should deny Plaintiffs' broad request for access to any law clinic client files and other records reflecting the deliberations, communications, work product, or other actions of the law clinic on client-related matters.

STATEMENT OF CLEA'S INTERESTS

CLEA is a non-profit educational organization formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA has approximately 700 annual dues-paying members representing faculty at approximately 140 law schools in the United States, including members on the faculty of public law schools in the State of New Jersey. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by representing clients under the supervision of law faculty. CLEA and its members are committed to legal education which trains law students to be competent, ethical practitioners and to promoting access to legal representation.

CLEA offers its views to this Court because CLEA and its members believe that clinical legal education is an important component of the overall education of our nation's future lawyers. Clinical legal education also is an important means of providing legal representation to clients who, because of lack of financial or other resources, the unpopularity of their views or the complexities of their cases, would otherwise not be represented. CLEA firmly believes that granting Plaintiffs' broad requests in the pending case would adversely affect the ability of law clinics in New Jersey to provide a first-rate, ethical legal education to students and appropriate legal representation to clients, interfere with the availability of *pro bono* services provided by law clinics to needy citizens of New Jersey, and, through the precedential value of the decision of this Court, undermine legal education, access to justice, and attorney-client relations at law clinics in publicly-funded law schools in other parts of the United States. CLEA also believes that fundamental ethical obligations of lawyers are at issue in this matter, as well as important issues of access to legal representation and First Amendment rights of clinic clients.

ARGUMENT

I. REQUIRING PRODUCTION OF THE DISPUTED RECORDS WILL HARM LEGAL EDUCATION

Clinical legal education creates law offices within law schools where law faculty supervise students in actual client representation so that the students may learn how to become competent, ethical lawyers. Requiring production of the requested records will harm the students' education because permitting records requests aimed at client representation will burden law clinics and divert them from their educational and client representation missions. It also will make law practice in law school clinics different from law practice in law firms, corporate law departments, and other legal offices. Record requests would become adversarial tools aimed at clinical law offices and thus will undermine the authentic practice of law within those clinical offices.

A. Law School Clinics Are a Fundamental Component of Legal Education

Clinical education is now a fundamental component of American legal education and is an important part of the professional training of today's lawyers. The origins of clinical legal education date back to the early part of the twentieth century when several law schools began using real cases to teach law students.[1] In 1933, Jerome Frank proposed that each law school develop a legal clinic, staffed by full-time "teacher-clinicians."[2] In the ensuing decades, leaders of the bench, bar, and academia recognized that our nation's law schools were insufficiently preparing lawyers for practice and called for greater attention to lawyering tasks other than legal reasoning and writing.

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[1] See, e.g., John S. Bradway, The Beginning of the Legal Clinic of the University of Southern California, 2 S. Cal. L. Rev. 252 (1929); John S. Bradway, Some Distinctive Features of a Legal Aid Clinic Course, 1 U. Chi. L. Rev. 469 (1934).

Clinical programs became established at most American law schools during the 1960's. Through the Council on Legal Education for Professional Responsibility, the Ford Foundation provided seed money for clinical programs at law schools across the country.[3] Former Chief Justice Warren Burger was a prime proponent of clinical legal education. In 1973, he complained that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."[4] He called for expanded law school skills programs and noted specifically that "[t]he law school . . . is where the groundwork must be laid."[5]

Chief Justice Burger's campaign led to further calls for change. A committee formed within the Second Circuit found "a lack of competency in trial advocacy in the Federal Courts," and recommended that law schools teach trial skills.[6] A committee from the United States Judicial Conference made similar recommendations.[7] An American Bar Association ("ABA") task force on lawyer competency also recommended that law schools offer instruction in litigation skills.[8] Amplifying the support of clinical programs by both the bench and bar, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]his [student

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[2] Jerome Frank, Why Not A Clinical-Lawyer School, 81 U. Pa. L. Rev. 907, 917 (1933); see also Karl N. Llewellyn, On What Is Wrong With So-Called Legal Education, 35 Colum. L. Rev. 652 (1935).

[3] See George S. Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162, 172-80 (1974).

[4] Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227, 234 (1973).

[5] Id. at 233.

[6] See Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164, 167-68 (1975).

[7] See Final Report of the Committee to Consider Standards For Admission To Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215 (1979).

[8] Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 3-4 (1979).

intern] practice has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation."[9]

In 1992, a different task force addressed the problem of lawyer competency and expanded the recommendations of bench and bar. The ABA's Task Force on Law Schools and the Profession recommended that legal education necessarily include instruction in lawyering skills and professional values. The Task Force also promulgated The MacCrate Report, a statement of skills and values necessary for lawyers to assume "ultimate responsibility for a client."[10] These lawyering skills can be generally categorized as: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and litigation alternatives, organization and management of legal work, and recognizing and resolving ethical dilemmas.[11] The professional values are, generally, providing competent representation, seeking to promote justice, fairness and morality, seeking to improve the profession, and commitment to self-development.[12] According to the Task Force, law schools must play an important role in developing these skills and values.[13]

As a result of these recommendations and reports, professional skills programs are now firmly established in American law schools. Each law school accredited by the ABA is obligated to "require that each student receive substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[14] Moreover, the ABA specifically acknowledged the value of law school clinics by amending

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[9] Jordan v. United States, 223 U.S. App. D.C. 325, 334 (1982).
[10] Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 125 (1992) (hereafter MacCrate Report).
[11] Id. at 138-40.
[12] Id. at 140-41.
[13] Id. at 331-32.
[14] ABA Standards and Rules of Procedure for Approval of Law Schools (2007) (Std. 302(a)(4)).

Accreditation Standard 302 in 1996. In order to achieve and maintain ABA accreditation, a law school now must offer "substantial opportunities" for "live-client or other real-life practice experiences."[15] The profession thus recognizes that law school clinics in which faculty teach students through the vehicle of actual cases are necessary to the professional education of law students. As the New Jersey Supreme Court so aptly put it: "Clinical training is one of the most significant developments in legal education."[16]

Recently, a renewed commitment to clinical legal education was proffered by two leading reports. The first was "Best Practices in Legal Education," which among its conclusions determined that students who learn in the context of a law clinic "seem to believe that more is expected of them, and treat associated intellectual tasks with a greater seriousness of purpose and a higher level of engagement."[17] The second was a Carnegie Foundation for the Advancement of Teaching report, "Educating Lawyers: Preparation for the Profession of Law," which identified three "apprenticeships of professional education" to which law schools should be attending: the intellectual or cognitive apprenticeship, the apprenticeship to the forms of expert practice shared by competent practitioners (taught in law clinics), and the ethical-social apprenticeship (also advanced in clinics).[18]

Law school clinics are unique vehicles for teaching law students the professional skills and values that they must master.[19] Clinical programs strongly reinforce the non-clinical curriculum in developing student's legal analysis and research skills. More importantly, they provide law teachers an unequalled format for teaching students problem-solving, factual

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[15] Id. (Std. 302(b)(1)).
[16] In re Executive Commission on Ethical Standards, 116 N.J. 216, 217 (1989).
[17] Roy Stuckey, et al., Best Practices for Legal Education 40 (2007).
[18] William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law (2007).
[19] See MacCrate Report, supra note 10, at 234.

investigation, counseling, litigation, and negotiation.[20] Good lawyering skills instruction must "1) develop[ ] students' understanding of lawyering tasks, 2) provid[e] opportunities to . . . engage in actual skills performance in role, and 3) develop [students'] capacity to reflect upon professional conduct through the use of critique."[21] Professional educators consider each of these aspects of skills instruction in structuring law school clinics.

Additionally, in order to become competent and responsible attorneys, law students must be taught to recognize and resolve ethical dilemmas.[22] Live-client clinics have been widely recognized to have exceptional value in teaching professional responsibility and ethical skills.[23] To impart these skills, clinical professors themselves must be able to identify, analyze, and decide the correct course when confronted with ethical issues and must be able to place students in the role of a practicing attorney confronting comparable ethical dilemmas.[24] Clinical professors are ethical role models and clinics should be structured as "ethical law firms."[25]

B. Requiring Production Will Undermine Clinical Legal Education

To be most effective, law clinics seek to put law students into the role of lawyer so that the clinic student can learn to "think and act like a lawyer" and be confronted with the same practical and ethical situations that confront practicing lawyers in comparable situations. To that end and to the extent consistent with their unique educational objectives, most law school clinics seek to operate similar to and reflect the practices of a typical law office. In turn, law school

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[20] Id.
[21] Id., at 243.
[22] See Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report, 33 Gonz. L. Rev. 1, 4 (1997).
[23] See, e.g., Joan L. O'Sullivan et al., Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice, 3 Clinical L. Rev. 109 (1996).
[24] Laflin, supra note 22, at 18.
[25] Eleanor W. Myers, "Simple Truths" About Moral Education, 45 Am. U.L. Rev. 823 (1996); Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35 (2003).

clinics, like other law offices, are bound by the professional responsibility and other court rules guiding licensed attorneys and their offices.

The Plaintiffs' broad public records request seeks to distort the operations of the Rutgers Environmental Law Clinic ("Clinic") and deny it the ability to operate like other law offices. The request for Clinic time records, disbursements and payments, minutes of meetings at which client matters were discussed, documents submitted by clients to the Clinic, documents received by the Clinic from another law firm, and documents between the Clinic and government agencies or officials is plainly objectionable. The request seeks to compromise the core of the attorney-client relationship, as well as disrupt the day-to-day internal operations of a clinical law office.

The effect, as well as likely intent, of Plaintiffs' request is to intrude into sensitive Clinic and client matters and to divert the Clinic's attention, time, and resources away from its cases and clients. Another effect is to restrict the time that Clinic staff can devote to training students to be effective lawyers and to signal to the Clinic attorneys and students that they should back off from their ethical, zealous representation of Clinic clients.

The request in this case is particularly troubling because it comes after courts have twice dismissed lawsuits brought by the Plaintiffs over matters involving the Clinic[26] and have denied efforts to pry into the activities of the Clinic and its clients.[27] Unable to obtain information about the inner workings of the Clinic or the Clinic's relations with its clients through appropriate, court-supervised discovery methods, the Plaintiffs' broad OPRA request now seeks to burden and intimidate Rutgers with wasteful, invasive demands.

CLEA believes that the Clinic and American clinical legal education will be severely compromised if disgruntled opponents in law clinic cases can use state public records requests as

[26] Certification of Julia LeMense Huff, ¶¶ 32, 39.
[27] Id. at ¶¶ 52-53, 57.

a means to interfere with the normal educational and legal representation operations of law school clinics. Time and resources spent by the Clinic responding to improper public records requests are time and resources that cannot be focused where most needed and where most beneficial to legal education, the legal profession, and the public -- on producing competent lawyers.

In addition, allowing public records requests into the internal workings and client files of law clinics will have a chilling effect on the types of cases and clients that law school clinics agree to handle. The repeated efforts by law clinic opponents to interfere in the ability of law school clinics to provide legal assistance have been well documented.[28] The ABA has noted the problem and warned that "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."[29]

These efforts by clinic opponents, including real estate developers, to restrict the normal lawyering activities of law school clinics have been particularly pronounced against environmental law clinics, like the Rutgers Clinic.[30] Indeed, it has become all too common for opponents of environmental advocates to file lawsuits or wage other attacks that seek to limit the ability of lawyers to provide these citizens with legal representation and that threaten the willingness of citizens to speak out on matters of environmental concern. This phenomenon has

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[28] See Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 Fordham L. Rev. 1971, 1975-92 (2003) (chronicling outside interference in law clinic cases, including repeated efforts to limit the operations of law clinics at Rutgers).

[29] Memorandum D8383-25 from James P. White, Consultant on Legal Education, ABA, to Deans of ABA Approved Law Schools (Feb. 21, 1983), reprinted in Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom, 11 J.C. & U.L. 179, 197-98 (1984).

[30] See Robert R. Kuehn, Shooting the Messenger: The Ethics of Attacks on Environmental Representation, 26 Harvard Envtl. L. Rev. 417, 424-32 (2002).

been referred to as "SLAPP" suits -- "Strategic Lawsuits Against Public Participation."[31] "[I]n a typical Strategic Lawsuit Against Public Participation ("SLAPP suit"), citizens protesting corporate policies or actions get sued by a corporation for defamation or tortious interference with business. An activist who testifies against a real estate developer at a zoning-board hearing . . . may find herself hit with a SLAPP suit."[32] Judge Farber has already noted that efforts to pursue legal action against Clinic clients for engaging in the protected activity of petitioning their government would chill the citizens' rights.[33]

These varied efforts of clinic opponents also chill law clinic activities more generally, signaling to clinic faculty the need to fear the consequences of taking on certain cases or representing certain clients. Clinic professors have repeatedly expressed concerns about the interference that may result from representing unpopular clients or challenging the actions of certain well-funded or well-connected opponents.[34] One lawyer observed that attacks on publicly-funded law offices demonstrate, as here, "the vulnerability of publicly funded legal services programs to political interference -- increasing in proportion to the effectiveness of the lawyers' work."[35]

Therefore, if this Court allows the form of interference in law clinic operations sought by Plaintiffs it will scare clinics away from certain cases or needy clients, thereby driving law

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[31] George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 83-104 (1996) (discussing SLAPP strategy of going after environmental activists and their attorneys).
[32] David Luban, Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers, 91 Cal. L. Rev. 209, 219 (2003).
[33] Certification of Julia LeMense Huff, ¶ 52.
[34] See, e.g., David E. Rovella, Law Students Urged to Take Death Cases, Nat'l L.J., Dec. 7, 1998, at A9; Beverly T. Watkins, Limits Urged on the Litigation that Law Schools May Undertake in Clinics, Chron. of Higher Educ., Jan. 26, 1983, at 8.
[35] Jerome B. Falk, Jr. & Stuart R. Pollak, Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services, 24 Hastings L.J. 599, 600 (1972-73).

clinics to make case intake or other decisions for non-pedagogical reasons and preventing clinics from using the best means to train students in professional skills and values.

Of equal importance, forcing production of documents in this case also will create a clinic law office that must operate in a way that grossly differs from other law offices. It would make clinic lawyers constantly concerned -- beyond the requirements in evidentiary and ethics rules that guide the judgments of other lawyers -- that what the clinic receives from its clients or develops on their behalf may have to be revealed to the public or clinic opponents. Clinical legal education operates best and clinic students learn best when the actions of clinic attorneys, students, and clients are guided by the same legal principles that govern other law offices in the state, not by invasive, burdensome actions of clinic opponents that distort a law clinic's operations and harm its educational objectives.

II. REQUIRING PRODUCTION WOULD BE CONTRARY TO THE PRIVILEGES PROVIDED OTHER CLIENTS AND WOULD INTERFERE WITH CLINIC ATTORNEY-CLIENT RELATIONS AND ACCESS TO LEGAL REPRESENTATION

Plaintiffs' broad-reaching request for documents, if granted, would make the Clinic's case records and internal operations open to Clinic opponents in a way that the records and operations of other law offices representing private clients are not. If this Court were to permit such requests, it will make it impossible for Clinic attorneys and students to provide the same assurances of confidentiality that are available to clients of private law firms. Such a ruling also would interfere with the relationship between clinic attorneys and their clients and restrict access by needy New Jersey residents to the free legal assistance of law clinics. Instead, the Court should ensure that the same rules of privilege and confidentiality that govern the attorney-client relations of other lawyers in the state who represent private citizens also govern law clinic relationships by denying Plaintiffs' request for Clinic records.

As in other states, information arising from the relationship between clients and attorneys is protected in New Jersey from disclosure by the attorney-client and work product privileges. The Supreme Court has explained that the common law attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[36] The privilege exists "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[37] New Jersey courts have repeatedly recognized the "sanctity of confidentiality" accorded to the attorney-client relationship[38] and that proper preparation of a client's case demands that the attorney be able to assemble and sift through relevant information and plan legal strategies without interference from opponents.[39]

The attorney work product privilege also is firmly established in common law to protect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.[40] As the Supreme Court explained, "it is essential that a lawyer work with a certain degree of privacy" and if an attorney's private thoughts and work product were forced to be disclosed "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[41] New Jersey courts also have long recognized the work product privilege.[42]

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[36] Upjohn Co. v. Unites States, 449 U.S. 383, 389 (1981).
[37] Id. at 390.
[38] Reardon v. Marlayne, Inc., 83 N.J. 460 (1980).
[39] In re Grand Jury Subpoenas Duces Tecum, 241 N.J. Super. 18, 27 (1989) (quoting United States v. Nobles, 422 U.S. 225, 237 (1975)).
[40] Hickman v. Taylor, 329 U.S. 495 (1947).
[41] Id. at 510-11.
[42] See, e.g., Halbach v. Boyman, 377 N.J. Super. 202, 207 (2005).

Beyond the common law, OPRA recognizes these two important privileges. The definition of "government record" in OPRA specifically excludes "any record within the attorney-client privilege."[43] Regarding attorney work product, the court in Gannett New Jersey Partners v. County of Middlesex held that if a document is protected from discovery by rules of court, then it is also protected against disclosure under OPRA[44] The court explained that OPRA provides in section 47:1A-9(b) that its provisions "shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule. Consequently, if a document is protected work product under Rule 4:10-2(c) [the attorney work product rule], it also is protected from disclosure under OPRA."[45] Hence, OPRA protects against disclosure of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party."[46] In addition, the discovery of facts and opinions held by experts is protected by Rules of Court 4:10-2(d) and, in turn, is similarly exempt from disclosure under section 47:1A-9(b) of OPRA.[47]

Two additional exemptions in OPRA protect Clinic records from disclosure. The definition of government record specifically does not include "inter-agency or intra-agency advisory, consultative, or deliberative material."[48] Thus, OPRA protects Clinic deliberative privilege documents containing opinions, recommendations, or advice about clinic policies or decisions.[49]

Finally, materials protected from disclosure by New Jersey rules of professional conduct also are not available to Plaintiffs. As noted, OPRA does not abrogate or erode any exemption

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[43] N.J.S.A. 47:1A-1.1.
[44] Gannett New Jersey Partners v. County of Middlesex, 379 N.J. Super. 205, 216 (2005).
[45] Id. at 216.
[46] N.J. Rules of Court 4:10-2(c).
[47] N.J. Rules of Court 4:10-2(d).
[48] N.J.S.A. 47:1A-1.1.

from public access or privilege or grant of confidentiality established or recognized by court rules.[50] New Jersey Rule of Professional Conduct 1.6(a), a rule issued by the Supreme Court of New Jersey, provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." The confidentiality protection of RPC 1.6(a) "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[51] This rule of confidentiality

> contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.[52]

Therefore, under the authority of Gannett New Jersey Partners and section 47:1A-9 of OPRA, if a Clinic document is deemed confidential under RPC 1.6(a), it also is protected from disclosure under OPRA.

This series of rules demonstrates that Clinic records should be afforded the same degree of confidentiality and protection provided to the records of other law offices in the state. Such protections are particularly vital here since the Clinic's clients are private citizens, not the government agencies or officials that might be represented by the attorney general or other attorneys employed by the state.

In this respect, the Clinic's clients are most similar to the private clients represented by the Office of the Public Defender. The law is clear that "[t]he files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State

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[49] See Gannett New Jersey Partners, 379 N.J. Super. at 219-220.
[50] N.J.S.A. 47:1A-9(a) & (b).
[51] N.J. RPC 1.6 cmt. 1.
[52] ABA Model Rules of Professional Conduct, R. 1.6 cmt. 2.

Public Defender."[53] This OPRA exemption underscores the recognized principle that it is the client, not the attorney, who controls the waiver of a privilege[54] and that a client should not be punished for being represented by a lawyer paid with public funds. As the Supreme Court explained in another context, a public defender does not act under color of state law as he "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. . . . it is the constitutional obligation of the State to respect the professional independence of the public defender whom it engages."[55] As they too are represented by lawyers paid by the state to represent private clients, Clinic clients should be provided the same level of protection afforded to clients of state public defenders. Consequently, Clinic files also should be deemed confidential and not open to inspection by the public.

A decision of this Court that fails to respect the confidentiality of files maintained by the Clinic would mean that law clinic clients will not be able to communicate freely and frankly with their attorneys, unlike private clients represented by other attorneys. Similarly, sensitive or embarrassing information that Clinic attorneys may develop or obtain that private attorneys can, and indeed under professional responsibility rules must, protect from disclosure could be revealed to the public. Beyond the Rutgers Environmental Law Clinic, law clinics in New Jersey offer free legal representation in the areas of criminal defense, domestic violence, juvenile justice, immigration and human rights, tax, and special education, among others. Given the vulnerabilities of the clients represented by the state's law clinics, it is hard to imagine how these clinics could effectively or ethically operate without the same long-recognized protections afforded private clients in other practice settings.

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[53] N.J.S.A. 47:1A-5(k).
[54] See Restatement of the Law Governing Lawyers § 78 cmt. b.
[55] Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

Because ethics rules require lawyers to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,[56] if the Plaintiffs' request was granted, Clinic attorneys would have to disclose the inability to protect this information to all prospective clients. Many clinic clients, fearful of the consequences of such disclosure, would forgo representation. In some situations, clinic attorneys might have to decline representation for fear that eventual disclosure would compromise a client's case or even safety. Joint defense agreements or other working arrangements between law clinics and private firms, which are often beneficial to clinic clients and useful learning experiences for clinic students, would be hard to enter into since communications with or documents received from those outside firms might now become available to the public.

Law clinics across New Jersey and the rest of the country provide millions of hours each year of unpaid student legal work to clients without the financial resources to hire a private attorney.[57] The plain result of a decision in this case requiring disclosure is that many clinic clients will no longer be assisted by a law clinic. This is particularly problematic because for many needy New Jersey citizens, law clinics are the last, and in many situations the only, lawyer in town that can or will take their case.[58]

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[56] N.J. RPC 1.4(b). All lawyers, including those who provide legal services without charge to the client, have "a duty to this Court to observe all appropriate standards of professional conduct and responsibility." In re Education Law Center, Inc., 86 N.J. 124, 133-134 (1981).

[57] Luban, supra note 32, at 236.

[58] The unavailability of legal representation for the lower-income clients typically served by law school clinics has been well documented:

> Although one in seven Americans lives in poverty, only one percent of attorneys are dedicated to serving the legal needs of the poor. "[T]here is about one lawyer for every 240 non-poor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid."

Robert R. Kuehn, Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation, 2006 Utah L. Rev. 1039, 1041 (quoting Luban, supra note 32, at 211). "According to most estimates, about four-fifths of the civil legal needs of low income individuals

Having to navigate a peculiar set of rules on privilege and confidentiality also means that clinic students in New Jersey would have to be taught rules that diverge from the norms followed by other lawyers. Rather than reinforcing and applying what students learn in law school evidence and professional responsibility classes, clinic students would have to be taught to disregard typical notions of privilege and confidentiality. This is contrary to the efforts of clinics to get the student to think and act like a typical practicing lawyer. It also gives clinic students a skewed notion of privilege and confidentiality rules that would not apply once the student passed the bar and worked in a private law office.

Therefore, the result of failing to subject law clinic records to the same privileges and rules of confidentiality that govern other law offices representing private clients is to interfere with the relationship between clinic clients and their attorneys. As the Restatement of the Law Governing Lawyers observed in explaining the importance of the duty of confidentiality: "A client's approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client."[59] Granting the Plaintiffs' request means that clients will not be able to trust Clinic lawyers to be able to protect their interests, driving some clients away from law clinics and leaving them without legal representation. This result is untenable. Clearly, the Rutgers Clinic and its clients should enjoy the same protections from disclosure that are available to private law firms and their clients.

III. REQUIRING PRODUCTION WILL INFRINGE ON FIRST AMENDMENT RIGHTS OF CLINIC CLIENTS

By chilling public participation in government disputes and interfering with modes of expression and association between clients and their attorneys, Plaintiffs' request to open up the

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. . . remain unmet." Deborah L. Rhode, Access to Justice: Connecting Principles to Practice, 17 Geo. J. Legal Ethics 369, 371 (2004).

[59] Restatement of the Law Governing Lawyers § 58 cmt. b.

internal files of the Clinic infringes on the First Amendment rights of Clinic clients. As a result, this Court must find an interest of the Plaintiffs in the records that is compelling and must narrowly interpret and limit any provision in OPRA or the common law that provides a right of access to Clinic records.

The Supreme Court has recognized that the right of citizens to be heard in agency or court proceedings would be, in many cases, of little use if it did not involve the ability to be heard by an attorney: "Even the intelligent and educated layman has small and sometimes no skill in the science of law."[60] As one commentator observed, "access to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is not equality before the law. The lawyer becomes the critical medium by which access to that legal system and concomitant opportunity to secure justice is achieved."[61]

It is particularly important that citizens advocating for public interests be heard. As the New Jersey Supreme Court noted in the Mount Laurel case: "The practice of public interest law is a much needed catalyst in our legal system. It helps to create a balance of economic and social interests and to assure that all interests have a fair chance to be heard with the help of an attorney."[62]

Given the complexity of environmental disputes, litigation has been particularly crucial to advance environmental interests. Litigation and access to legal representation may be the only means by which conflicts between ordinary environmental advocates and powerful financial interests can be resolved. "Litigation may well be the sole practicable avenue open to a minority

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[60] Powell v. Alabama, 287 U.S. 32, 45 (1932).
[61] Robert A. Katzmann, Themes in Context, in The Law Firm and the Public Good 1, 6 (Robert A. Katzmann ed., 1995).
[62] Township of Mount Laurel v. Dep't of Public Advocate, 83 N.J. 522, 535 (1980).

to petition for redress of grievances."[63] As one experienced environmental lawyer observed about the environmental movement: "[I]n no other political and social movement has litigation played such an important and dominant role."[64]

Yet access to legal representation to advance public, rather than private, interests is hard to find -- less than .001% of lawyers are public interest lawyers.[65] Citizens advancing issues of public concern often are left without an attorney or must turn to the limited free legal assistance provided by law school clinics.

For these reasons, the Supreme Court has been especially vigilant in protecting the First Amendment right of citizens involved in public disputes to be free from intrusive inquires into their operations and restrictions on their access to and association with legal representatives. For example, the Court in NAACP v. Alabama refused to compel production of records of the NAACP, finding that compelled production would adversely affect the ability of the group and its members to pursue their collective advocacy efforts by inducing members to withdraw from the group and dissuading others from getting involved because of fear of exposure of their beliefs and activities and the consequences of such exposure.[66]

Similarly, in NAACP v. Button, the Supreme Court struck down on First Amendment grounds a state law that had the effect of infringing on the ability of lawyers to communicate

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[63] NAACP v. Button, 371 U.S. 415, 430 (1963). As the Court explained in another case, "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." In re Primus, 436 U.S. 412, 431 (1978).

[64] David Sive, The Litigation Process in the Development of Environmental Law, 13 Pace Envtl. L. Rev. 1, 3 (1995).

[65] Debra S. Katz & Lynne Bernabei, Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power, 96 W. Va. L. Rev. 293, 300 (1993-94).

[66] NAACP v. Alabama, 357 U.S. 449, 462-63 (1958). The case involved a claim that the activities of the NAACP were subject to a state law regulating foreign corporations doing business in Alabama. The state claimed that it was entitled to production of the Association's

openly with and assist persons who sought legal assistance to assert their rights.[67] The Court held that litigation in the public interest is not a technique of resolving private differences but a form of political expression and "may be the most effective form of political association."[68] The Court in In re Primus struck down yet another state law that interfered with the ability to make legal assistance available to persons advancing public interests, noting that "[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights."[69]

In each case, the Supreme Court found that the ability of citizens to communicate and associate as a means of advancing pubic interests was protected by the First Amendment. Likewise, in each case the Court required that there be a demonstrated compelling interest in infringing on the relationship between citizens and the organization or their attorneys.[70] In addition, the Court held that the means employed in furtherance of that compelling interest must be drawn with narrow specificity to avoid unnecessary abridgement of expressive and associational freedoms.[71] As the Court stated in In re Primus, where political expression and association are at stake, a state's law "must regulate with significantly greater precision."[72]

In the instant case, the clients of the Clinic have joined to advance their shared interests as concerned citizens in a matter of public dispute -- the Ross' Corner development. They have

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records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all the NAACP's Alabama members and agents.

[67] NAACP v. Button, 371 U.S. 415 (1963). The case involved a challenge to a state law that prohibited communications (viewed as improper solicitation) between the NAACP and citizens about legal rights and the organization's free legal assistance programs.

[68] Id. at 429-31.

[69] In re Primus, 436 U.S. 412, 432 (1978). Similar to NAACP v. Button, the case addressed a state law prohibiting communications between the ACLU and citizens about their legal rights and the availability of free legal assistance from the ACLU.

[70] See, e.g., NAACP v. Alabama, 357 U.S. at 463; NAACP v. Button, 371 U.S. at 438-39; In re Primus, 436 U.S. at 432.

[71] NAACP v. Button, 371 U.S. at 437-38; In re Primus, 436 U.S. 412, 432-33.

sought to advance those interests, through the assistance of the Clinic, at public hearings and through litigation. The success of the citizens in advancing these public interests is dependent both on their ability to gain access to the legal representation of the Clinic and on their ability to associate, communicate, and share information with Clinic attorneys without fear of disclosure and possible reprisal.

In turn, Clinic lawyers, like the lawyers in the above Supreme Court cases, must be allowed to freely, without fear of disclosure, "acquaint persons with what they believe to be their legal rights and . . . (advise) them to assert their rights."[73] As in those cases, the activities of the Clinic's clients are modes of expression and communication protected by the First Amendment. As such, to withstand constitutional scrutiny, Plaintiffs must show a compelling reason why OPRA should be interpreted to infringe on the protected First Amendment interests of Clinic clients.

Plaintiffs have offered no justification, claiming an absolute right to the Clinic's internal records and persisting in this case even after its two lawsuits challenging Frankford Township's actions toward the development of Ross' Corner were dismissed with prejudice.[74] Before Plaintiffs may seek to use an alleged right to law clinic documents against citizens who are, as Judge Farber found, engaged in the protected First Amendment activity of petitioning their government,[75] Plaintiffs must first demonstrate a compelling showing that the public interest is served by turning public records access into a "weapon of oppression" that curtails citizen involvement and access to legal representation.[76]

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[72] In re Primus, 436 U.S. at 437-38.
[73] NAACP v. Button, 371 U.S. at 435.
[74] See Certification of Julia LeMense Huff, ¶¶ 33, 39.
[75] Certification of Julia LeMense Huff, ¶ 52.
[76] See NAACP v. Button, 371 U.S. at 436.

The Supreme Court recently noted in Legal Services Corp. v. Velazquez that restrictions on First Amendment rights related to legal representation are even more problematic where the result may be that citizens are unlikely to find other legal counsel not encumbered by the restriction.[77] "There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights . . . . It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[78] Here, because providing access to Clinic records will inhibit communications between Clinic attorneys and clients and drive many New Jersey citizens away from associating with law clinics and without any legal representation, the Plaintiffs' justification for an interpretation or application of state law that intrudes into Clinic records must be even more compelling.

Moreover, in applying OPRA or any alleged common law right of access to public records of the Clinic, Supreme Court case law requires that this Court must closely limit that access to avoid infringement on the First Amendment rights of Clinic clients. That narrow specificity requires that no access be permitted into the Clinic's client files or into other Clinic records that reflect the deliberations, communications, work product, or other actions of the Clinic on client-related matters. It has already been demonstrated through the public defender exception in OPRA that prohibits access to records "that relate to the handling of any case" that this limited access is the appropriate scope of public inquiry into the relationship between a private citizen and a state-funded lawyer. Accordingly, only a similar, narrowly-defined right of

[77] Legal Services Corp. v. Velazquez, 531 U.S. 533, 546 (2001). Velazquez involved a challenge to legislation restricting Legal Services Corporation attorneys in advising their clients and presenting arguments and analyses to the courts.
[78] Id. at 546, 548 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

access to law clinic records that would parallel the access permitted for records of public defender offices can withstand First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, CLEA requests that the Court deny the Plaintiffs' Order to Show Cause for access under the Open Public Records Act or common law right of access to any law clinic client files and other records reflecting the deliberations, communications, work product, or other actions of the law clinic on client-related matters..

Respectfully submitted,

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SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE, Plaintiffs, vs. RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SUSSEX COUNTY DOCKET NO.: SSX-L-540-06 Civil Action **CERTIFICATE OF SERVICE**

I, EDWARD LLOYD, hereby certify that on May 1. 2008 true copies of the attached Brief of Amicus Curiae Clinical Legal Education Association were filed with the Middlesex County Clerk and served upon the following persons by overnight mail:

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