

MC ELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
ATTORNEYS AT LAW

1300 MOUNT KEMBLE AVENUE
P.O. BOX 2075
MORRISTOWN, NEW JERSEY 07962-2075
(973) 993-8100
FACSIMILE (973) 426-0161

JAMES P. LIDON
Direct dial: (973) 425-8751
jlidon@mdmc-law.com

May 22, 2008

VIA HAND DELIVERY

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

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

Dear Judge Francis:

Please accept this letter in lieu of a formal brief on behalf of defendants, Rutgers, The State University of New Jersey ("Rutgers" or "University") and its Custodian of Records (collectively "defendants"), in response to the briefs of the *amici curiae*.

From the outset, the University has been concerned that plaintiffs' use of the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1-1, et seq., to obtain access to files maintained by the Rutgers Environmental Law Clinic ("RELC") relating to its representation of private citizens' groups (Citizens for Responsible Development at Ross' Corner ("CRDRC") and Coalition to Protect Our Land, Lakes and Watersheds ("Coalition")) was destructive of the RELC's ability to achieve its educational objectives and simultaneously satisfy the expectation of effective legal representation upon which clients of the RELC (including, but not limited to, the CRDRC and the Coalition) necessarily rely in entrusting their legal matters to the RELC. In their October 17, 2006 letter brief in opposition to the Order to Show Cause, defendants articulated those concerns, inter alia, in urging that application of OPRA to permit public access to the RELC client files at issue would impermissibly chill the First Amendment rights of those clients.

As explained and clarified through the perspectives and the comprehensive and skillful briefs of *amici*, if OPRA is construed to require the University to compel the RELC and other legal clinics to provide public access to client files, the result would be devastating not only to the interests of the private clients represented by the clinics, but to the educational programs of the clinics themselves. If clients cannot be assured that their interests will be represented without

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Honorable Travis L. Francis, J.S.C.

May 22, 2008

Page 2

the prospect of their files being invaded by their legal adversaries, then clients will be dissuaded from entrusting their matters to the clinics. In turn, the educational experience that the clinics would be able to provide to students would be limited not only by the problem of having real client matters to serve as curriculum for clinical courses, but by the hamstringing the clinical faculty's efforts to assure that the clients who remain will receive appropriate legal representation as the clinics attempt to conduct law practices in a fishbowl.

The brief submitted on behalf of the Rutgers Law School/Newark Clinical Program persuasively argues that the serious negative consequences that would result from the application of OPRA to the Law School clinics cannot have been intended by the Legislature and that the clinics should be exempted from OPRA for reasons analogous to those upon which the New Jersey Supreme Court based its conclusion that clinical faculty should not be deemed to be State employees for purposes of the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12, et seq. See In Re Executive Commission on Ethical Standards, 116 N.J. 216 (1989). The University joins with the Rutgers Law School/Newark Clinical Program in that argument.

Even if this Court were to conclude that a complete OPRA exemption for the clinics is not warranted, however, the University concurs with the Coalition, CRDRC and Weissman and Mintz, LLC, and respectfully submits, that the same considerations that militate in favor of such an exemption also strongly support the narrower conclusion that the client files maintained by the RELC that are the subject of plaintiffs' OPRA request fall within an exclusion from the definition of "Government record" set forth in N.J.S.A. 47:1A-1.1.

Under N.J.S.A. 47:1A-1.1, "pedagogical, scholarly and/or academic research records" are excluded from the definition of "Government records." In the context of a clinical legal education program, the University respectfully submits that the client-case files are pedagogical materials. Students work with and contribute to those files in the course of discharging clinical course assignments. The student work not only is used in the course of representing clients, but forms part of the basis upon which students are graded in the clinical courses. Moreover, documents and other contributions to client-case files by clinical faculty and volunteer attorneys also are pedagogical not only to the extent that students are exposed to them in the course of students' educational experience in participating in the representation, but because such documents and information are necessary to the inception and continuation of the ongoing representation and, thus, to the very existence of the clinical program. Simply stated, without supervisory attorneys contributing their work product to the representation, and maintaining ultimate responsibility for the files, there can be no clinical program.

Accordingly, the University respectfully submits that the client files maintained by the RELC, in their entirety, are pedagogical materials excluded from the definition of "Government

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Honorable Travis L. Francis, J.S.C.
May 22, 2008
Page 3

record" and, therefore, plaintiffs are not entitled under OPRA to access any of the requested documents.¹

With regard to plaintiffs' request for access to documents reflecting communications between the RELC and counsel for Chelsea, the University concurs with and joins in the arguments presented by Chelsea, and the Coalition, CRDRC and Weissman and Mintz, LLC.

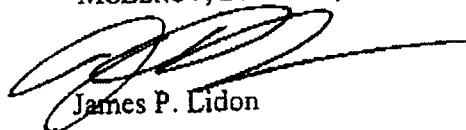
As to plaintiffs' claim for access under the common law, the University notes – as it did in its October 17, 2006 letter brief in opposition to the Order to Show Cause – that the University has no record of plaintiffs' making any request under the common law for access to the documents in question.

Finally, even if the Court were to conclude that it is necessary to reach the merits of plaintiffs' assertion of a common law right of access, the University submits that the interests described at length in the submissions of *amici* must be given great weight under the common law balancing test and that those interests manifestly outweigh the countervailing interests of plaintiffs in access to the RELC client files of the Coalition and the CRDRC.

For these reasons, and for the reasons set forth in the University's opposition submission and in the submissions of *amici*, the University respectfully submits that the Order to Show Cause must be discharged.

Very truly yours,

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP



James P. Lidon

JPL:lo

cc: Clerk (via hand delivery)
Kevin D. Kelly, Esq. (via facsimile and regular mail)
Frank Askin, Esq. (via facsimile and regular mail)
Jon Dubin, Esq. (via facsimile and regular mail)
Richard Webster, Esq. (via facsimile and regular mail)
John C. Maloney, Jr., Esq. (via facsimile and regular mail)
Edward Lloyd, Esq. (via facsimile and regular mail)

¹ The University provided plaintiffs with documents and information responsive to their OPRA requests for documents relating to the expenditure of public funds in connection with the RELC's representation of the client's whose files are at issue here. Presently, no OPRA request pertaining to expenditure of public funds is before the Court.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 MOUNT KEMBLE AVENUE
P.O. BOX 2075
MORRISTOWN, NEW JERSEY 07962-2075
PHONE: (973) 993-8100
FAX: (973) 425-0161

FACSIMILE TRANSMITTAL SHEET

TO:

Frank Askin, Director, Constitutional
Litigation Clinic

FROM:

James P. Lidon, Esq.

COMPANY:

Rutgers, The State University of New
Jersey

DATE:

May 22, 2008

FAX NUMBER:

(973) 353-1249

TOTAL NO. OF PAGES INCLUDING COVER:

8

PHONE NUMBER:

MATTER NUMBER:

RE:

Rutgers - Sussex Commons

MATTER NUMBER:

250-19

☐ URGENT

☐ FOR REVIEW

☐ PLEASE COMMENT

☐ PLEASE REPLY

☐ PLEASE RECYCLE

NOTES/COMMENTS:

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAMED ABOVE. THIS MESSAGE MAY BE AN ATTORNEY-CLIENT COMMUNICATION, AND AS SUCH IS PRIVILEGED AND CONFIDENTIAL. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR ANY AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, AND THAT ANY REVIEW, DISSEMINATION, DISTRIBUTION OR COPYING OF THIS MESSAGE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US BY MAIL. THANK YOU.

Askin fax.doc

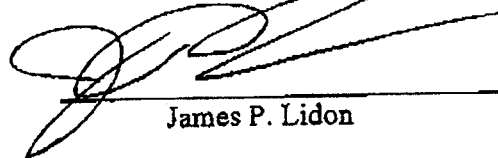
Frank Askin, Esq.
Director, Constitutional Litigation Clinic
Rutgers, The State University of New Jersey
123 Washington Street
Newark, New Jersey 07102-3192
Attorneys for Amicus Curiae Rutgers Law
School/Newark Clinical Program

Jon Dubin, Esq.
Director of Clinical Programs
Rutgers, The State University of New Jersey
123 Washington Street
Newark, New Jersey 07102-3192
Director of Clinical Programs

Richard Webster, Esq.
Eastern Environmental Law Center
744 Broad Street
Suite 1525
Newark, New Jersey 07102
Attorneys for Coalition, CRDRC and Weissman
and Mintz, LLC

John C. Maloney, Jr., Esq.
Day Pitney LLP
P.O. Box 1945
Morristown, New Jersey 07962
Attorneys for Chelsea Property Group, Inc.
and CPG Holdings, LLC

Edward Lloyd, Esq.
Columbia University
Jerome L. Greene Hall
435 West 116th Street
New York, New York 10027
Attorneys for Clinical Legal Education Association



James P. Lidon

DATED: May 22, 2008

MC ELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
ATTORNEYS AT LAW

1300 MOUNT KEMBLE AVENUE
P.O. BOX 2075
MORRISTOWN, NEW JERSEY 07962-2075
(973) 993-8100
FACSIMILE (973) 425-0181

JAMES P. LIDON
Direct dial: (973) 425-8751
jlidon@mdmc-law.com

May 22, 2008

VIA HAND DELIVERY

Clerk, Superior Court of New Jersey
Law Division, Middlesex County
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, New Jersey 08903-0964

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

Dear Sir or Madam:

Enclosed herewith for filing in the above-referenced matter on behalf of defendants Rutgers, The State University of New Jersey and Rutgers University Custodian of Records are an original and two (2) copies of the following:

1. Letter Brief to Judge Francis; and
2. Certification of Service.

We also enclose an additional copy of each of the foregoing documents and request that you mark them with the date and fact of filing and return them to this office in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Very truly yours,

MC ELROY, DEUTSCH, MULVANEY & CARPENTER, LLP


James P. Lidon

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Clerk, Superior Court of New Jersey
May 22, 2008
Page 2

JPL:lo

Enclosures

cc: Honorable Travis L. Francis, A.J.S.C. (w/encls.) (by hand delivery)
Kevin D. Kelly, Esq. (w/encls.) (via telecopier and regular mail)
Frank Askin, Esq. (w/encls.) (via telecopier and regular mail)
Jon Dubin, Esq. (w/encls.) (via telecopier and regular mail)
Richard Webster, Esq. (w/encls.) (via telecopier and regular mail)
John C. Maloney, Jr., Esq. (w/encls.) (via telecopier and regular mail)
Edward Lloyd, Esq. (w/encls.) (via telecopier and regular mail)