
SUSSEX COMMONS ASSOCIATES, LLC,) SUPERIOR COURT OF NEW JERSEY
a limited liability company of) APPELLATE DIVISION
the State of New Jersey,)
and HOWARD BUERKLE,) DOCKET NO. A-1567-08T3
)
Plaintiffs-Appellants,) Civil Action
)
vs.) On Appeal From the Final Order
) of the Superior Court of
) New Jersey
) Law Division:Middlesex County
RUTGERS, THE STATE UNIVERSITY;) Entered on October 7, 2008
RUTGERS ENVIRONMENTAL LAW)
CLINIC; and RUTGERS UNIVERSITY)
CUSTODIAN OF RECORDS,) Docket No. in the Court Below:
) MID-L-8465-06
Defendants-Respondents.)

SAT BELOW

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

BRIEF OF PLAINTIFFS/APPELLANTS
SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of
the State of New Jersey, and HOWARD BUERKLE

Kelly & Ward, LLC
93 Spring Street
P.O. Box 887
Newton, NJ 07860
e-mail: kkelly@kellyandward.com
Attorneys for Plaintiffs/Appellants

On the Brief:
Kevin D. Kelly, Esq.

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PROCEDURAL HISTORY

On May 11, 2006, Sussex Commons Associates, LLC and Howard Buerkle [collectively("Sussex Commons")] requested specific documents from defendant Rutgers, The State University ("Rutgers"), the Rutgers Environmental Law Clinic ("RELC"), and the Rutgers University Custodian of Records ("Custodian"), initially limited to RELC's opposition to the plaintiffs' application for development in Frankford Township, Sussex County. (Pa9).

On May 13, 2006, the Custodian responded to all of these requests with a blanket denial based solely on her interpretation of *MAG Entertainment LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005). (Pa15).

This action was commenced with the filing of a Verified Complaint and Order to Show Cause in Sussex County, the location of plaintiffs' approved project for a 350,000 sq. ft. shopping center. (Pa1). On October 4, 2006, Rutgers moved before B. Theodore Bozonelis, A.J.S.C. for an Order changing venue to its County. (Pa28). Judge Bozonelis transferred this case to Middlesex County by Order dated October 20, 2006. (Pa201).

1 The following transcripts constitute the record below:

1. June 3, 2008 - transcript of motions ("1T")
2. August 4, 2008 - transcript of decision ("2T")
3. October 7, 2008 - transcript of hearing ("3T")

A conference was held with counsel and Judge Jamie D. Happas On July 23, 2007, and an Order was entered assigning this case to Judge Travis Francis. (Pa202).

On January 17, 2008, Judge Francis entered an Order to Show Cause which set forth the scheduling of the remainder of this case. (Pa204).

On February 14, 2008, Judge Francis conducted a conference in his chambers with counsel (Mr. Kelly and Mr. Lidon). Judge Francis reviewed each of the 18 Sussex Commons OPRA requests with counsel and made decisions with respect to each. Mr. Kelly confirmed his understanding of these decisions, including "responses by Rutgers to Requests 1, 5, 6, 11, 14, 15, 16, 17 and 18 by February 28, 2008", and the production by Rutgers for "in camera review of documents to Requests 8, 10, 12 and 13 to the Court by February 28, 2008." (Pa205). The return date of the Order to Show Cause was scheduled for March 28, 2008. (Pa205).

By letter dated February 25, 2008, Mr. Lidon advised the Court of difficulties in providing these documents, and his disagreement with portions of Mr. Kelly's February 15, 2008 letter. (Pa207). By letter dated March 7, 2008, Mr. Kelly objected to any further delay in the production of documents requested on May 11, 2006. (Pa210). There was no formal order entered by Judge Francis with respect to these documents and communications.

On March 10, 2008, the Custodian provided a partial response to the first of Sussex Commons' OPRA Requests. (Pa212).

Immediately thereafter, a deluge of amicus applications were directed to the Court to prevent the release of any further documents. On March 19, 2008 the Rutgers Constitutional Law Clinic contacted the Court (Pa213); on March 24, 2008, Day Pitney submitted a similar request (Pa216), followed thereafter by several other applicants for intervention.

Judge Francis allowed participation in this matter by the Chelsea Property Group, Inc. and Chelsea Property Group Partners L.P. (competitors of Sussex Commons), Citizens For Responsible Development at Ross' Corner, Coalition to Protect Our Land, Lakes and Watershed, Rutgers Law School/Newark Clinical Program (Constitutional Litigation Clinic), Weismann and Mintz, LLC, Center for Law and Justice, Rutgers, The State University of New Jersey, and Clinical Legal Education Association, as *amicus curiae* and a new briefing and hearing schedule was prepared. (Pa219).

Pursuant to R.2:6-1(a)(2), we are including the briefs of all parties without editing as a separate Appendix (Volume 3) because they are addressed specifically in the Court's decision and are germane to the issues in this appeal.

On June 3, 2008, Judge Francis conducted a hearing, in which all parties participated, on the issue of "whether or not the Rutgers Environmental Law Clinic at Rutgers School of Law is subject to the Open Public Records Act." (Pa274).

Based upon a lack of specific information during the June 3, 2008 hearing about the nature and extent of the relationship

between Rutgers University, Rutgers Law School, and RELC (1T at 6:9-23; 7:1-8; 28:1-11), the plaintiffs propounded supplemental questions to the Custodian on June 10, 2008 with respect to specific financial information provided by Rutgers (Pa221), and on June 11, 2008 relative to the specific structure, organization and operations of RELC (Pa224).

The Custodian requested and received additional time in which to respond. By memo dated June 30, 2008, the Custodian advised **for the first time** that RELC was neither incorporated nor a separate entity from the University; RELC had no by-laws, Board of Directors, bank accounts, or operating agreements with the University. (Pa234). This information was confirmed by a corporate search (Pa235, 236).

By letter dated July 2, 2008 plaintiffs' counsel contacted Judge Francis and counsel with respect to this new and significant information, and also requested a more complete record pursuant to R. 4:67-2(a).

The Custodian provided additional significant and substantial responses to the plaintiffs' supplemental OPRA requests in July 2008. (Pa256, 259, 262). On July 21, 2008, the plaintiff filed a motion with the Court to:

- 1) Allow the plaintiff to depose a representative of Rutgers with knowledge of the public financial information requested.
- 2) Allow the plaintiff to supplement the record to include the information produced by the Custodian since the June 3, 2008 hearing.
- 3) Allow further argument by counsel limited to this new information. (Pa263).

Judge Francis announced his decision that the Rutgers Law School clinic was not subject to OPRA on August 4, 2008. (2T at 14:14-21).

On October 7, 2008, the Court denied the plaintiffs' motion, thereby ending this litigation at the trial level. This appeal followed. (Pa298).

STATEMENT OF FACTS

The Rutgers Environmental Law Clinic (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 received and complied with the only other OPRA request ever submitted to RELC or any other Rutgers Clinic. (Pa260). Although the trial Court requested this information on many occasions during the June 3, 2008 hearing (1T at 6:9-23; 7:1-8; 28:1-11), none of this information was presented. None of these facts were available or considered in the trial Court's decision.

According to RELC's website,

"the Clinic has been the sole public interest law firm for New Jersey's environmental community since 1985. Since the Clinic's founding, more than 500 Rutgers law students have helped successfully resolve hundreds of cases. 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's cases are frequently litigated before the New Jersey Appellate Division and Supreme Court, as well as Federal Court, municipal land use boards and municipal zoning boards. The Clinic also provides ongoing advice and counsel to environmental and community organizations. 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. . .The Clinic serves a broad range of clients, including New Jersey's major environmental organizations, local community associations and national organizations concerned with New Jersey issues. . .Students participate in all aspects of litigation, client counseling and advocacy conducted by Clinic staff attorneys." (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 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) and intervening on May 2, 2008. (Pa219).

OPRA and COMMON LAW REQUESTS:

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. The very first request was for the source of funding for these years of opposition:

"Documents reflecting the allocation of funds by Rutgers University to Rutgers Environmental Law Clinic for 2003, 2004, 2005 and 2006." (Pa11).

To this request, Rutgers has provided the following responses:

- 1) "the University is searching for responsive documents and will produce same." Defendant's letter brief: **OCTOBER 17, 2006; (Pa198).**
- 2) "Plaintiffs OPRA Request No. 1 seeks documents reflecting the allocation of funds by Rutgers University to Rutgers Environmental Law Clinic for 2003, 2004, 2005 and 2006. To the best of my knowledge, the University is searching for responsive documents and will produce same." Certification of RELC counsel: **OCTOBER 17, 2006; (Pa76,77).**
- 3) "Rutgers will provide documents and an explanation with respect to funding issues between the University and its Environmental Law Clinic (RELC)." **FEBRUARY 16, 2008; (Pa205).**
- 4) (Mr. Lidon) "In addition, with respect to the description in plaintiffs counsel's February 15, 2008 letter relating to Request No. 1, the University indicated that it had no documents reflecting an allocation of funds from the University to the RELC for 2003-2006, but that it would provide a written explanation of the funding. That explanation is that the University paid the salary and benefits of the Director of the RELC and made space and law office facilities available to the RELC on University property." **FEBRUARY 25, 2008; (Pa208, 209)**
- 5) "As the University's Custodian of Records, I write by way of supplemental response to the OPRA requests presented to the University by plaintiffs Howard Buerkle and Sussex Commons Associates, LLC.

The University has conducted additional inquiries into plaintiffs' OPRA Request No.1, which seeks documents reflecting the allocation of funds by the University of Rutgers Environmental Law Clinic for 2003-2006.

Those inquiries disclosed no documents describing or reflecting such an allocation. Although not required by OPRA, the University has authorized us to inform you that the **sole funding** allocated by the University to the Rutgers Environmental Law Clinic during the period in question has been for the salary of the person holding the position of Director or Acting Director of the Clinic. The salary funding was as follows:

2002-2003 Academic Year	\$75,016
2003-2004 Academic Year	84,140
2004-2005 Academic Year	82,804.99
2005-2006 Academic Year	76,641.43

Funding for other clinic faculty and staff was provided via restricted grants." **MARCH 10, 2008**; (Pa212).

- 6) (Mr. Lidon) "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 clients whose files are at issue here. Presently, no OPRA request pertaining to expenditure of public funds is before this Court." **MAY 22, 2008**; (Pa379,380).
- 7) "THE COURT: Does the Clinic report its finances to the Law School?
MR. LIDON: I believe there is a - there is a - certainly a financial accountability, yes." **JUNE 3, 2008**; (1T at 7:3-6).
- 8) (Mr. Webster) "Mr. Kelly cited here how-how-how little funds were put in by Rutgers to the Rutgers Environmental Law Clinic. Well, you know, that's, that's well, that illustrated that Rutgers needs outside funding to support its clinical program. And relies, to some extent, on outside funding. And subjecting the Clinic to OPRA's - to OPRA, would actually tend to direct that funding away from Rutgers and into private entities." **JUNE 3, 2008**; (1T at 31:14-22).
- 9) "THE COURT: But you concede that the donors to the clinic program, the names of the donors and the - - and the amounts donated would be subject to discovery?

MR. WEBSTER: Well, I'm - - I'm arguing about the client files here. I'm not going to argue about the other materials the - - that are associated with the clinics. So I'll - - I'll allow my colleague Mr. Lidon, I think, to respond to that - -

THE COURT: Okay" **JUNE 3, 2008;** (1T at 35:5-14)

- 10) (Mr. Lidon)"I mean, and with respect to issues of, you know, a desire on the part of the plaintiffs for more specific information with respect to, you know, where money came from or what money was spent in connection with this other lawsuit, the request is what the request is. And it - and it seeks non-information about, you know, we've provided information responsive to the - - to the request and - - both this request, with respect to the funding of the Clinic . . ." **JUNE 3, 2008;** (1T at 78:3-11).
- 11) (Mr. Lidon) "A copy of the University's March 10, 2008, supplemental response to that request (No.1) is attached hereto as **Exhibit B**. That response identifies the funds allocated to the RELC by the University during the years at issue and notes that other expenses of the RELC were covered by restricted grants." **AUGUST 12, 2008;** (Pa263a, 263b).

The Court accepted these responses as sufficient and acceptable financial disclosure:

"The clinics represented during oral arguments that, other than the salaries of professors in the clinics, the bulk of the clinics' funding comes from donations . . . Those who wish to know about the university and the law school's allocations of funds to the clinics may request those through the allocating agencies." (2T at 13:9-12; 24 to 14:1)

On June 10, 2008, the plaintiffs specifically requested the following financial records (Pa221):

Item 1:

"Any payment, funding, and/or in kind assistance provided by the University to RELC with respect to:

- | | |
|-----------------|-------------|
| a. office space | e. benefits |
| b. insurance | f. library |

- c. staff
- d. equipment
- g. technology
- h. outside counsel
- i. pensions."

On July 18, 2008 the Custodian provided the following response to Item 1:

"Stuart Deutsch, Dean of the Rutgers-Newark Law School has advised us that there could be minimal documents that outline items such as office assignments, but that it would take hundreds of hours to search for these documents as they are not readily available. If you are willing to pay a special services fee for a search for these documents, please let me know and I will ask the Dean to calculate the estimated cost for the search." (Pa262).

As defense counsel correctly advised the Court at the June 3, 2008 hearing, the plaintiffs' initial OPRA and common law requests did not specifically include donations and charitable gifts.

"If they asked for the donors, then maybe that would be an issue, but that's not what they asked for." (1T at 19:24 to 20:1).

Accordingly, on June 11, 2008 the plaintiffs requested the following specific information pursuant to N.J.S.A. 47:1A-1.1:

- "2. Records of the "restricted grants" funding referred to in your letter of March 10, 2008;
- 3. Records of pursuit of charitable contributions to the University and/or RELC with respect to RELC's functions as the sole public interest law firm for New Jersey's environmental community during the years of our request (2002 through 2006);
- 4. Records containing the identity of the donor of any charitable contribution to the University and/or RELC with respect to RELC's functions as the sole public interest law firm for New Jersey's environmental community during the years of our request (2002 through 2006)." (Pa224).

Although the Custodian advised on March 10, 2008 that "funding for other clinic faculty and staff was provided via restricted grants", on July 18, 2008, the Custodian's responses were as follows (Pa262):

Item 2:

"Steve DiPoalo, the University Controller, is searching for any documents that are responsive to this request. Apparently, the documents are not readily available and this search is taking more time than he expected."

Items 3 and 4:

"According to Dean Deutsch the fundraising was done through the Eastern Environmental Law Clinic (EELC) and Rutgers would have no record of those activities. However, during that time the Director of Development did attempt to do some fundraising for several clinics. The Dean is not aware of any specific documents that are responsive to this request and therefore a special search would have to be conducted. Please let me know whether you are interested in having us prepare a cost estimate to search through the Director of Development's records."

The plaintiffs' June 11, 2008 request also contained the following (Pa224):

- "5) Set forth the name and position of each RELC employee during the years of our request (2002 through 2006);
- 12) With respect to each RELC employee identified please provide all documents evidencing all compensation, reimbursement, and/or payment by the University and/or RELC during the years of our request (2002 through 2006)."

On July 18, 2008, the Custodian provided the following responses with respect to Items 5 and 6:

"The Dean advised that the RELC did not have employees of its own. These were apparently **Rutgers employees.**" (Pa262).

None of the admissions, omissions, confirming, denying, and contradictory information provided by Rutgers in response to the plaintiffs' June 2008 supplemental OPRA and common law requests was considered by Judge Francis.

LEGAL ARGUMENT

POINT ONE

THE DEFENDANTS FAILED TO PROVIDE ACCESS TO GOVERNMENT RECORDS IN ACCORDANCE WITH THE REQUIREMENTS OF THE OPEN PUBLIC RECORDS ACT.

N.J.S.A. 47:1A-1 establishes that the public policy of the State of New Jersey is to provide its citizens with ready access to government records. Any limitations on this right of access "shall be construed in favor of the public's right of access." Particular importance is recognized with respect to financial information and public funds; the Legislature has provided that "immediate access . . . shall be granted to budgets, bills vouchers, contracts" and other records of public expenditures. N.J.S.A. 47:1A-5. The burden of proof shifts to the agency if it fails to respond at all to requests within seven business days. *Mason v. City of Hoboken*, 196 N.J. 51 (2008).

The Legislature further provided an extensive and inclusive definition of what constitutes a government record:

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of

the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

In this action, the plaintiffs seek numerous categories of government records of public expenditures and documents made and/or received in the course of the official business of Rutgers and RELC.

The plaintiffs acknowledge that Judge Francis' decision with respect to the applicability of the OPRA and common law to the clinics affects Requests 8 through 18 and these will be discussed later in this brief. Requests 1 through 7 seek financial information only from the University. (Pa267). The plaintiffs contend that complete responses have been provided to Requests 2, 4 and 7; incomplete and/or contradictory responses have been made with respect to Requests 1, 3, 5 and 6 as set forth in detail in the Statement of Facts.

The Legislature placed added significance on access to public financial information in N.J.S.A. 47:1A-5(e):

IMMEDIATE ACCESS RECORDS:

"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts and public employee salary and overtime information."

Among the numerous protections provided to the defendants by the OPRA are privileges and exemptions for "pedagogical, scholarly and/or academic records, research development information, test questions, valuable or rare book collections, admission applications", etcetra. There is also an exemption for charitable contributions **but only** if the donor requires non-disclosure, **and** has not received any benefits in return. No other information and documents are exempt. N.J.S.A. 47:1A-1 et seq.

Rutgers University is subject to OPRA by virtue of the New Jersey Supreme Court's ruling in *Keddie v. Rutgers*, 148 N.J. 36 (1997) which determined that the University was subject to OPRA's predecessor statute (the Right to Know Law, N.J.S.A. 47:1A et. seq. ("RTKL") and the common law). Although both the trial court and defense counsel paid lip service to *Keddie*, all meticulously avoided the facts, the reasoning, and the holdings by the Supreme Court. The issue in *Keddie* was whether there was either a statutory or common law right to access "public records concerning Rutgers expenditures for outside legal counsel in labor, civil rights and employment related matters in which Rutgers is or has recently been a party." *Keddie*, supra. 148 N.J. at 40. The documents requested were classified in three categories:

- "(1) attorneys bill;
- (2) documents Rutgers generates internally from the legal bills;
- (3) pleadings, briefs, affidavits and other filings made with courts, agencies and arbitral forums and the

decisions or awards rendered." *Keddie*, supra. 148 N.J. at 41.

The *Keddie* decision held that the disputed records were not public records under the RTKL because they were "not required by law to be made, maintained and kept on file", despite the plaintiffs' argument that in order to be prepared for a State audit, Rutgers must maintain financial records sufficient to withstand such an audit. N.J.S.A. 18A:65-25(d). In reaching this conclusion, the Supreme Court engaged in considerable analysis of the history of decisions strictly and narrowly construing the RTKL's definition of a public record. *Keddie*, supra. 148 N.J. at 36, 46, 47, 48.

These narrow interpretations were discontinued in the OPRA by the Legislative finding that "any limitations on the right of access shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. Additionally, the burden has shifted to the defense in this case based upon their failure to properly respond and comply with the OPRA. Under the broader requirements of the OPRA, it is inconceivable that the financial information that plaintiffs request is not required to be maintained by Rutgers, which is certainly accountable to the Legislature and the public for the funding of its operations. "Law school expenditures are pursuant to and limited by legislative appropriations in accordance with the State Constitution, Art. VIII, SII, par. 2." *Right to Choose v. Byrne*, 173 N.J. Super. 66 (Ch. Div. 1980). Other than affirm that the public "may request" financial and funding information from Rutgers, the trial Court

made no findings with respect to these requests and/or issues.

The long list of contradictory responses by Rutgers range from representations that records would be provided; to representations that most funding comes from "restricted grants"; to representations that most funding comes from donations; to representations that none of these records exist. Even worse is the incredible assertion by Rutgers that it provides only about \$80,000 each year to RELC, which obviously would not cover a portion of the Sussex Commons litigation, let alone the 48 other "active cases" on their 2006 website. The University's football program has much to learn about budget and financial accountability from its clinical programs.

In his decision, Judge Travis cited the following sentence from *Right to Choose v. Byrne*, 173 N.J. Super. 66, 72 (Ch. Div. 1980), rev'd. on other grounds, 91 N.J. 287 (1982):

"Rutgers Law School and its Woman's Rights Litigation Clinics are **subdivisions of the State**, not separate entities as are legal services corporations."

Although this sentence contradicts the Judge's decision and supports the plaintiffs' position (N.J.S.A. 47:1A-1 specifies that **"any political subdivision of the State**, or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality with or created by a political subdivision of the State or combination of political subdivisions" are subject to the OPRA), he omitted the two critical sentences that followed his quotation:

"Law School expenditures are pursuant to and limited by legislative appropriations in

accordance with the State Constitution, Art. VIII, SII, par. 2. The law school in turn allocates funds to the clinic." (emphasis supplied) *Right to Choose*, supra. 173 N.J. Super. at 72.

An issue in *Right to Choose* was whether clinic lawyers "assigned to an educational enterprise approved and sponsored by Rutgers Law School as part of its curriculum" could recover legal fees for the University. (emphasis supplied) 173 N.J. Super. at 69. In reversing on other grounds, the Supreme Court held that "by controlling funds for schools, prisons, highways, housing, welfare, and other public needs, the legislative and executive branches fulfill the definition of our constitutional rights." *Right to Choose v. Byrne*, 91 N.J. 287, 308 (1982).

Of course, the provision of these funds by the Legislature, subjects the schools (i.e. Rutgers) to the OPRA and, as this record indicates, after years of effort, Rutgers finally admitted that RELC has no employees and that Rutgers is the true employer. As such, the University also admitted that it has willfully failed to disclose the requested financial records of the expenditure of public funds. (Pa262). Neither of the *Right to Choose* decisions were cited by any party in the trial court proceedings, or amici submissions.

POINT TWO

**THE DEFENDANTS FAILED TO PROVIDE
ACCESS TO GOVERNMENT RECORDS IN
ACCORDANCE WITH THE COMMON LAW
RIGHT OF ACCESS.**

The plaintiffs also assert a common law right of access to Rutgers' and RELC's public records. "Nothing in OPRA shall be

construed as limiting the common law right of access to a government record." *N.J.S.A.* 47:1A-8.

"In contrast to OPRA's statutory right of access to government records, the common law provides a citizen with broader access to public records." *North Jersey Media Group Inc. v. Department of Personnel*, 389 N.J. Super. 527, 537 (Law Div. 2006); *Bergen County Improvement Authority v. North Jersey Media Group Inc.*, 370 N.J. Super. 504 (App. Div. 2004).

Under the common law right of access to public records, three requirements must be met:

- (1) the records must be common law public documents;
- (2) the person seeking access must establish an interest in the subject matter of the material;
- (3) the right of access must be balanced against the interest in preventing disclosure. *NJMG, supra.*, 389 N.J. Super. at 538.

The common law right of access also limits government claims of confidentiality.

"Courts consider whether the claim of confidentiality is premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest. However, where the interest in confidentiality is slight or non-existent standing alone will be sufficient to require disclosure to advance a legitimate private interest." *NJMG, supra.*, 389 N.J. Super. at 538.

In *Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005), the Court, distinguishing common law and OPRA requests, provided a common law right of access to public financial records that "reveal the type of coverage elected by eligible employees, officials and retirees." *Michelson, supra.*, 379 N.J. Super. at 626.

Returning to the *Keddie* decision and analysis, the Supreme Court defined a common law record as "one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." *Keddie*, supra. 148 N.J. at 50 (additional citations omitted). The requested documents, attorneys bills, documents Rutgers generates internally from legal bills, and legal submissions, were held to be common law public records "because they were created by, or at the behest of, public officials in the exercise of a public function. They were created pursuant to Rutgers' procedure for payment of legal fees to outside attorneys or were filed with a court, agency, or arbitral forum. They are also writings filed in a public office." *Keddie*, supra. 148 N.J. at 50. [citing *Nero v. Hyland*, 76 N.J. 213 (1978)].

The *Keddie* decision also focused on the balancing-of-interests requirement which concerns the public's interest in disclosure balanced against the need to keep some information confidential. Confidentiality is founded upon a purpose which either advances or furthers a wholesome public interest, or a legitimate private interest. "Where the interest in confidentiality is 'slight or non-existent', standing alone will be sufficient to require disclosure to advance a legitimate private interest." *Keddie*, supra 148 N.J. at 51, citing *Loigman v. Kimmelman*, 102 N.J. 98, 112.

In this litigation, both public and private common law interests justify disclosure of Rutgers' financial information.

First, the requests involve public funds provided by the Legislature. It is clear from the RELC website in which they detail their extensive involvement in significant environmental litigation and organizations in this State **and** the State of New York, that this activity entails the substantial expenditure of funds by a public entity. One can only speculate with respect to the legal fees and costs required to operate "the sole public interest law firm for New Jersey's (and New York's) environmental community"; however, no speculation is required to conclude that the cost of these operations far exceed the \$80,000 per year that Rutgers admitted to providing RELC almost two years after the plaintiffs' OPRA and common requests and litigation. Rutgers has willfully omitted the disclosure of salaries paid to its employees assigned to RELC.

It is also clear in this record that RELC is not a formal or separate entity from Rutgers, has no employees, bank accounts, or Board of Directors, no speculation is required to conclude that the financing for its operations comes from funds allocated by the Legislature. *Homes News v. Department of Health*, 144 N.J. 446 (1996).

Finally, it is also clear in this record that the plaintiffs have a significant interest in the funding of years of opposition to their development project, particularly as it has become obvious that public money is involved (Rutgers has failed to produce any evidence of donations and/or charitable contributions). *Education Law Center v. New Jersey Department of Education*, 396 N.J. Super. 634 (App. Div. 2007); *Village*

Supermarket Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224 (Law Div. 1993).

The time has come for Rutgers to show us the money.

POINT THREE

**THE RUTGERS ENVIRONMENTAL LAW
CLINIC IS SUBJECT TO THE OPRA AND
COMMON LAW PROVISIONS THAT APPLY TO
RUTGERS, THE STATE UNIVERSITY.**

In the final analysis, this is about an emperor without clothes and, ultimately, the self-serving, laudatory positions advanced by the clinics have as much substance as did the emperor's clothes.

The amicus parties, who sought and obtained grant to participate in this litigation almost two years after the filing of the Complaint, and days before the return date of the Order to Show Cause, offered hundreds of pages of protestations, dire predictions and congratulatory conclusions in opposition to the plaintiffs' comparatively simple argument. Many of these conclusions, neither contained in this record nor supported by law, appear in the amicus briefs such as:

- 1) **AMICUS BRIEF OF THE RUTGERS LAW SCHOOL/NEWARK CLINICAL PROGRAM:**²
 - a. "A determination that such clinical programs are state agencies under OPRA could deprive an under-served and disadvantaged section of society which may have no other means of obtaining representation from benefiting from the legal services that clinical programs provide." (Pa334).

²A more complete list of these allegations is set forth in plaintiffs' amicus response brief. (Pa401-406). Only examples are set forth herein.

- b. " . . . an interpretation that the clinic is a State agency under OPRA would undermine the purpose and the societal value of the Clinic." (Pa336);
- c. "Ruling that OPRA and common law rights of access apply to legal clinics would infringe on academic freedom." (Pa347).

2) **AMICUS BRIEF OF THE CLINICAL LEGAL EDUCATION ASSOCIATION:**

- a. "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." (Pa310);
- b. "Record requests would become adversarial tools aimed at clinical law offices and thus will undermine the authentic practice of law within those clinical offices." (Pa310);
- c. ". . . Plaintiffs' broad OPRA request now seeks to burden and intimidate Rutgers with wasteful, invasive demands." (Pa315);
- d. "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 internal files of the Clinic infringes on the First Amendment rights of Clinic clients." (Pa324, 325).

3. **AMICUS BRIEF ON BEHALF OF THE CRDRC, COALITION AND WEISMANN AND MINTZ, LLC:**

- a. "Developer's motivations are neither legitimate private interests nor wholesome public interests." (Pa361);
- b. "The Developer's attempts to access its opponents' confidential information by using OPRA and the common law as a vehicle, is an affront to the attorney-client relationship, and perverts the fundamental reason for the laws' existence." (Pa365).
- c. "There could be no greater irony than to allow the Developer, a known and long-standing adversary to Amici, to use laws enacted to foster public participation in government as a means of thwarting the ability of these groups to engage in issues of paramount importance in their communities, and to effectively chill their First Amendment rights." (Pa366).

Each of these statements is a conclusion. In an argument in an article in the New Jersey Law Journal (May 12, 2008) entitled "Reasons Consist of Facts Rather Than Conclusions", Kenneth F. Oettle, Esq. explained at length why such conclusions have no legal value:

"Lawyers identify with their clients. As the saying goes, 'When their clients bleed, they bleed.' They empathize with their clients and show anger and indignation toward the other side. This is good bedside manner - clients love to be validated - and thus it is good business. But lawyers should be careful that their empathetic enthusiasm doesn't carry over to and dominate their persuasive writing, where indignation is no substitute for analysis."

"When lawyers become indignant on behalf of their clients - and to some degree they should - they may fall into the trap of thinking that the indignation by itself justifies their position. In the worst manifestation of this tendency, a writer's argument consists only of conclusory (unsupported) statements." 192 N.J.L.J. 376.

The oral arguments presented to Judge Francis were simply more of the same unproven proclamations of the importance of the clinics which were wholly irrelevant to the issues in this litigation. In other words, it is uncontested that the clinics provide valuable and important educational functions.

In all this hyperbole both the facts and the issues were obscured. The court was apparently not aware nor advised that there is no difference or distinction between Rutgers and RELC. There was no consideration of the criteria established by the New

Jersey Supreme Court in *Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation*, 183 N.J. 519 (2005) with respect to what constitutes a "public body" subject to both OPRA and Open Public Meetings Act ("OPMA") requirements.

"The relevant test is framed in the alternative - the entity must perform a governmental function as defined or must be authorized to expend public funds." *Times*, supra. 183 N.J. at 530.

The Supreme Court recognized that *Lafayette Yard* was a separate corporation from the City, had its own Board of Directors and by-laws, but nonetheless was a "public body" because it was controlled and supported by the municipality and performed a "governmental function". Additionally, under OPMA, an entity also may be deemed a 'public body' if it is authorized to spend public funds." *Times*, supra. 183 N.J. at 533. The Supreme Court, as did Judge Francis repeatedly in his opinion, referred to the portion of N.J.S.A. 47:1A-1.1 which defines a "'public agency'" as any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office commission or other instrumentality within or created by a political subdivision of the State." *Times*, supra. 183 N.J. at 535.

In the continuous use of the word "subdivision" the trial court only reinforced the substance and applicability of the *Times* decision to this case, albeit there was much more separation between Trenton and its agency than there is between

Rutgers and its "subdivisions". The trial court demonstrated its reluctance to use the proper description which is "department", as in the biology, pre-law, English departments, which are simply designations within the State University, funded by the Legislature through the University.

The *Keddie* decision in 1997 long ago provided the response to the clinics' arguments with respect to the "burden issue":

"We reject Rutgers' argument that the costs of document production and diversion of dedicated manpower are sufficient reasons under the balancing test not to compel it to produce the documents. Budgetary constraints cannot relieve Rutgers of its obligation to produce the documents." *Keddie*, supra 148 N.J. at 53 (citations omitted).

The fact is that no burden exists in this case. Since the enactment of the OPRA, only one other OPRA request was made to the clinics (other than those in this case). Plus, the clinics are authorized by the OPRA to charge special services fees for extraordinary expenses.

Similarly, the claims of "file invasion" are intentionally exaggerated or even non-existent. Neither the clinics nor the trial court seriously contended that the attorney-client and other privileges in OPRA and common law would be abrogated by disclosing public information to plaintiffs. Further and again, there was no mention of the *Keddie* conclusion that "where common law documents have been filed with courts, agencies and arbitral forums without being sealed, confidentially is nonexistent; standing alone is sufficient to require disclosure unless

otherwise protected by one of the exceptions articulated in the RTKL." *Keddie*, supra. 148 N.J. at 52.

This litigation is not about the clinics' desire to protect their clients' files. To the extent that these files contain filed documents, they are not confidential, and privileged documents remain protected by the OPRA. What the clinics, in their vast and dramatic pronouncements are trying to protect is their financial unaccountability, and their unrestricted and secret use of public funds. Like the hapless Wizard of Oz, the clinics want all attention directed elsewhere, while they struggle mightily to keep concealed their actual use of public funds. These efforts are completely understandable; if this information was publicly known, the public (and the Legislature) could very well disagree with the clinics' heretofore unsupervised activities.

For example, if the public were to discover that a significant amount of public funds was arbitrarily invested (without any oversight) in opposing the plaintiffs' project in Frankford Township (in which no environmental issues were involved), such activity might be seriously questioned by many, particularly in these economic times. Such questions could have dire consequences, as Rutgers is well aware from the recent impacts on its football program resulting from public financial disclosures via the OPRA process. Similarly, the individuals involved in these expenditures would be subject to public scrutiny.

The plaintiffs' request for financial information with respect to Rutgers and RELC is simple and straightforward, and the information is **available** (although if not, other serious problems would exist). Focusing attention on the clinics' voluminous diversions has overshadowed the main issue in this litigation, i.e. the use of public funds. Only the University and the clinics have this information and, so far, they are not telling.

Finally, a variety of decisions have required State agencies and their subdivisions to comply with the OPRA and common law. *Paff v. New Jersey Department of Labor*, 379 N.J. Super. 346 (App. Div. 2005); *Fisher v. Division of Law*, 400 N.J. Super. 61 (App. Div. 2008); *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007); *Education Law Center v. New Jersey Department of Education*, 396 N.J. Super. 634 (App. Div. 2007); *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005).

The clinics have failed to demonstrate any extraordinary reasons or entitlement to a superior status than all other State agencies. Should they so desire, this argument could be made to the Legislature, which enacted OPRA and which funds and, hopefully, supervises their operations.

CONCLUSION

For many years, RELC chose to involve itself in public proceedings involving a major land use application in Sussex

County in which it raised no environmental issues or objections. During these years, RELC dramatically expanded its role in these public proceedings by instituting suit against a municipality and its officials and by intervening in all other litigation, however remote, on behalf of parties already represented by counsel. Throughout these years, RELC both accepted and provided substantial assistance from entities and public officials opposed to the project.

Neither the lengthy recitation of RELC's activities set forth in the Certification of RELC staff attorney, Julia LeMense, Esq., dated October 17, 2006 (Pa68), nor any filings by any party, indicate a specific purpose or function for RELC's involvement in these matters, nor do they indicate that any student participation was involved (and there is none reflected in any record of these proceedings). RELC's filings, however, make clear its anti-development political agenda and bias, particularly in their amicus brief which invokes and denounces "the Developer" 31 times in 14 pages, concluding with the contemptuous proclamation that "the Developer" should have no legal rights in this litigation (contrary to well established precedent that the reason for which an OPRA or common law request is made is irrelevant). The public funds expended in opposition to the Sussex Commons project and all funding provided by Rutgers to RELC from 2003 to the present should be released immediately by this Court, including all expenses incurred in this litigation.

In addition, throughout the years of this litigation (which began in 2006) there has been no compliance with requirements established by OPRA and case law with respect to responses to OPRA requests. From the May 11, 2006 backhanded dismissal of these requests [in violation of *N.J.S.A. 47:1A-5(g)*] to the present, there has been no identification of documents, explanation of reasons for denial, production of a Vaughn index or any *in camera* review conducted. *N.J.S.A. 47:1A-7(c)*; *Paff v. New Jersey Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005); *Hartz Mountain Industries Inc. v. N.J. Sports and Exposition Authority*, 369 N.J. Super. 175, certif.. denied 182 N.J. 147 (2004); *Fisher v. Division of Law 400*, N.J. Super. 61 (App. Div. 2008). This Court should direct production of this information.

The plaintiffs raised this issue continuously before Judge Francis from the initial conference on February 14, 2008, during the June 3, 2008 hearing, and in motions and arguments before and after that hearing. It is time for a serious response to these OPRA requests. What has occurred throughout these years is a scenario that was certainly never contemplated by the OPRA and one which should be remedied promptly by this Court.

We further submit that the plaintiffs, having devoted substantial efforts and expense to pursuit of these documents, should no longer be required to directly and solely pursue compliance. This extraordinary set of circumstances justifies the appointment of a Special Master pursuant to R. 4:41-1 at the

defendants' costs. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158 (1983).

Finally, we request permission of this Court to award counsel fees and costs to the plaintiffs at a time and in a manner designated by the Court.

KELLY & WARD, LLC
Attorneys for Plaintiffs,
Sussex Commons Associates, LLC
and Howard Buerkle

By: Kevin D. Kelly
Kevin D. Kelly,

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