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October 17, 2006

VIA HAND DELIVERY
Honorable B. Theodore Bozonelis, A.J.S.C.
Superior Court of New Jersey
Morris County Court House
Washington & Court Streets
Morristown, New Jersey 07963

Re: Sussex Commons Associates, LLC, et al. v. Rutgers, The State University of New Jersey, et als.
Docket No.: SSX-L-540-06

Dear Judge Bozonelis:

Please accept this letter in lieu of a formal brief on behalf of defendants, Rutgers, The State University of New Jersey and its Custodian of Records, in opposition to the Order to Show Cause initiated by plaintiffs Sussex Commons Associates, LLC ("Sussex Commons") and Howard Buerkle ("Buerkle") (collectively "plaintiffs").

PRELIMINARY STATEMENT

Under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., and the citizen's common law right of access, plaintiffs seek to require the University to provide them with copies of numerous broad categories of documents most of which are contained in the client files maintained by the Rutgers Environmental Law Clinic in its role as attorney for private citizens and

citizens' groups who are objecting to plaintiffs' plans to build a large commercial shopping mall in their rural community.

As shown in Point I herein, the majority of plaintiffs' OPRA requests are deficient under MAG v. Division of ABC, 375 N.J.Super. 534 (App. Div. 2005), and Bent v. Township of Stafford, 381 N.J.Super. 30 (App. Div. 2005), because they seek broad categories of documents, rather than specific documents described with reasonable particularity. Further, many of the documents are not subject to disclosure under OPRA because they are protected by the attorney-client and/or attorney work product privileges. In addition, compelled disclosure of several categories of the requested documents is impermissible because it would infringe upon the rights of the Rutgers Environmental Law Clinic's clients under the First Amendment to the United States Constitution.

In addition, defendants have no documents responsive to plaintiffs' request nos. 3, 5, 7, 9 or 12. Defendants have produced and/or will produce documents responsive to request nos. 1, 2, 4 and 6.

As shown in Point II herein, plaintiffs' common law claim is deficient because plaintiffs never have made a request to defendants for common law access to any of the documents in question. For this reason alone, plaintiffs' claim that defendants violated plaintiffs' common law rights by denying a request that never was made must fail. Moreover, even if a common law request for access had been made, defendants have identified legitimate public interests militating against disclosure of many of the documents in question. Our Supreme Court repeatedly has ruled that, in such circumstances, judicial determination of common law access rights requires a balancing of the interests militating against and in favor of disclosure. Plaintiffs

have not articulated any legitimate interest they seek to further by intruding into the client files maintained by the Rutgers Environmental Law Clinic. Nor is any interest evident -- other than that of seeking an unfair advantage over their legal adversaries. In addition, plaintiffs' common law claim is unsuited to a summary action because it is highly unlikely that claim could be disposed of completely in a summary manner. In order to develop the factual background necessary for application of the common law balancing test, defendants would need to conduct discovery to examine the interests to be stated by Mr. Buerkle, as well as to explore any unstated interests he may have. Similar discovery would be necessary to examine the stated and unstated interests of plaintiff Sussex Commons.

For these reasons, and for the additional reasons stated below, the Order to Show Cause must be discharged.

STATEMENT OF FACTS

The Parties

Rutgers

The University's Custodian of Records received and responded to the OPRA request in this action (Fehrenbach Cert., ¶¶4 and 5 and Exh. A and B).[1] Otherwise, the only unit of the University having any involvement relating to this matter is the Rutgers Environmental Law Clinic attached to Rutgers Law School-Newark (Huff Cert., ¶3).

[1] References to "Fehrenbach Cert." and "Huff Cert.," respectively, are to the October 4, 2006 Certification of Leslie Fehrenbach and the October 17, 2006 Certification of Julia LeMense Huff, submitted herewith.

Rutgers Environmental Law Clinic

The Rutgers Environmental Law Clinic has been in existence since 1985. It is one of eight clinical legal educational programs at Rutgers Law School-Newark offering students opportunities for "hands-on" legal experience in actual cases involving under-represented clients, communities or causes. The Rutgers Environmental Law Clinic provides pro bono legal assistance to clients on environmental matters that range from general consultation and advice to administrative advocacy and litigation. It is the principal provider of pro bono environmental legal services in the State of New Jersey (Huff Cert., ¶¶4-7).

The Clinics at Rutgers Law School-Newark operate as one law firm. They share space in an office suite within the Center for Law and Justice in Newark. The clinical office suite is separate from the rest of the law school classrooms and offices and is accessible after-hours only by a swipe-card mechanism for authorized personnel. The Clinics have a dedicated computer server that houses documents accessible only by clinical professors, current clinical students, clinical support staff and administrators. The Clinics maintain files within the clinical office suite. The Clinics train students each semester to ensure that client confidentiality is honored, and that applicable privileges, such as attorney-client and work product, are maintained (Id., ¶8). The Rutgers Environmental Law Clinic maintains client files for seven years, at which point it returns the files to clients or shreds the materials (Id., ¶9).

Sussex Commons and Howard Buerkle

Plaintiff Howard Buerkle is a principal (i.e., member) of plaintiff Sussex Commons Associates, LLC ("Sussex Commons") (Verified Complaint, ¶2). Sussex Commons is engaged

in efforts to develop property at Ross' Corner in Frankford Township, New Jersey to include a commercial shopping mall (Verified Complaint, ¶¶1, 6).

Clients Represented by the Rutgers Environmental Law Clinic

Coalition to Protect our Land, Lakes and Watersheds

In January 2004, the Rutgers Environmental Law Clinic began representing a New Jersey non-profit corporation called the Coalition to Protect our Land, Lakes and Watersheds ("Coalition"). The Coalition is an organization composed of community groups and individual citizens from northwest New Jersey committed to preserving and protecting the lands and watersheds that surround and feed the Paulinskill, Lake Owassa and Culver, Kemah, Ann, Clearview and Crandon Lakes so that the lakes, brooks and streams remain pure and unpolluted (Huff Cert., ¶10).

The Coalition sought assistance from the Rutgers Environmental Law Clinic in connection with land use matters in Frankford Township, Sussex County. Because of the breadth of the Coalition's mission, and the important role land use decisions play in fulfilling the goals of the Coalition, the Rutgers Environmental Law Clinic continues to represent the Coalition and provide it with legal assistance and advice (Id., ¶14).

As early as November 2000, Frankford Township identified the area known as Ross' Corner – at the intersection of Routes 15 and 206-- as the location for a town center. The purpose of the center was to concentrate future growth in the Township into its center, and have it serve as a central gathering place and as the identity for the community (Id., ¶15).

The Coalition supported the Frankford Township Ross' Corner planning concept and intervened on behalf of the Township in a challenge by Culvemere Alliance, a developer, to

defend the Township's efforts to direct growth to the proposed center and away from other more rural areas of the Township (Id., ¶16).

David Mintz

David Mintz is the President of the Coalition (Id., ¶11).

Allyn Jones

Allyn Jones is the Vice President of the Coalition (Id., ¶12).

Paul Sutphen

Paul Sutphen is the Treasurer of the Coalition (Id., ¶13).

Citizens for Responsible Development at Ross' Corner

In April 2004, Citizens for Responsible Development at Ross' Corner ("CRDRC") was formed by Paul Sutphen, Geri Sutphen and Allyn Jones. CRDRC is a New Jersey non-profit corporation with three officers, no membership or membership dues, funded by voluntary contributions. Its mission is to promote responsible development at Ross' Corner and to oppose Sussex Commons' proposed outlet mall (Id., ¶19).

Paul Sutphen, Geri Sutphen and Allyn Jones are the three original officers of CRDRC (Id., ¶19).

Beginning in April 2004 and continuing to the present, CRDRC actively engaged the community and public officials on issues regarding the development of Ross' Corner, town center planning, and the outlet mall project (Id., ¶20).

CRDRC engaged the Rutgers Environmental Law Clinic to represent it in connection with all issues related to Ross' Corner in August 2004 (Id., ¶21).

Disputes and Litigation Between Plaintiffs and Clients of the Rutgers Environmental Law Clinic

In the Spring of 2003, Sussex Commons announced plans to develop a 90-store, 350,000 square foot outlet mall in Frankford Township at Ross' Corner. In connection with the conceptual plan for a mall at Ross' Corner, Sussex Commons began meeting with Frankford Township officials (Id., ¶17).

In August 2003, Frankford Township entered into a development agreement with Sussex Commons and another developer regarding the development of an outlet mall, housing, and a wastewater treatment facility at Ross' Corner. At the same time, Frankford Township and the Sussex County Municipal Utilities Authority entered into an escrow agreement regarding the construction, ownership and operation of a wastewater treatment facility to service the developments proposed for Ross' Corner (Id., ¶18).

On November 12, 2004, Sussex Commons filed a preliminary site plan and subdivision application with the Frankford Township Land Use Board (Id., ¶22).

CRDRC, represented by the Rutgers Environmental Law Clinic, notified the Land Use Board that it intended to obtain Objector status in the proceedings concerning Sussex Commons' development application (Id., ¶23).

Sussex Commons revised its application on February 18, 2005 (Id., ¶24).

In February 2005, Harold Pellow, the Township's consulting engineer, deemed Sussex Commons' application to be incomplete (Id., ¶25).

On March 11, 2005, Sussex Commons filed a lawsuit in the Superior Court, Sussex County against Frankford Township, the Frankford Township Land Use Board, Sussex County Municipal Utilities Authority ("SCMUA") and its consulting engineers Cerenzio & Panaro, Harold Pellow, and Robert McDowell (Township Committee member and Land Use Board

member) ("Frankford I Litigation"). Sussex Commons alleged that the defendants had breached their contracts, tortiously interfered with development plans, and that McDowell was using his position on the Township Committee to obstruct Sussex Commons' development. Sussex Commons sought to disqualify McDowell from participating in any public process that involved Sussex Commons' development (Id., ¶26).

Shortly after Sussex Commons initiated its lawsuit, in April 2005, the Land Use Board deemed the site plan application complete and began the public hearing process on the application (Id., ¶27).

CRDRC, represented by the Rutgers Environmental Law Clinic, appeared as an Objector before the Land Use Board in May 2005 in connection with Sussex Commons' development application (Id., ¶28).

CRDRC, represented by the Rutgers Environmental Law Clinic, appeared at every Land Use Board hearing on Sussex Commons' development application from May 2005 through May 2006 (Id., ¶29).

CRDRC, represented by the Rutgers Environmental Law Clinic, intervened in the Frankford I Litigation and filed cross-claims against the Township for contract zoning and conflict of interest with respect to the development agreement between Sussex Commons and the escrow agreement between the Township and SCMUA (Id., ¶30).

On October 7, 2003, Sussex Commons Outlets, LLC, ("Outlets") an entity closely related to Sussex Commons Associates, LLC, sued Chelsea Property Group ("Chelsea"), among others, for tortious interference. Outlets alleged that Chelsea was unlawfully interfering with Outlets ability to execute leases for the proposed outlet mall with tenants, among other claims (Id., ¶31).

In July 2005, the Court dismissed with prejudice Sussex Commons' claims in the Frankford I Litigation. The Court also dismissed all but one of CRDRC's cross-claims, but allowed CRDRC to proceed to discovery on the conflict of interest claim involving former Frankford Mayor Gary Chiusano (Id., ¶32).[2]

In November 2005, the Frankford Township Land Use Board voted to approve a Town Center Plan for Ross' Corner that corresponded in large measure to the recommendations made to the Township by a stakeholders committee (Id., ¶34).

Although hearings on Sussex Commons' application were ongoing from May 2005 and did not conclude until May 2006, in or about November 2005, Sussex Commons sued the Frankford Township Land Use Board, individual members of the Board, including Robert McDowell, alleging that the Land Use Board's approval in November 2005 of the Town Center Plan was arbitrary, and that it violated the terms of the development agreement between Sussex Commons and the and escrow agreement between the Township and SCMUA, and that McDowell had a conflict of interest and should be disqualified from making any decisions relating to Sussex Commons' development ("Frankford II Litigation") (Id., ¶35).

In April 2006, the Frankford Township Land Use Board adopted amendments to the Frankford Center Plan (Id., ¶36).

In April 2006 and on May 31, 2006, CRDRC, represented by the Rutgers Environmental Law Clinic, presented witnesses and testimony on Sussex Commons' development application

[2] In July 2006, the Court denied CRDRC's motion for summary judgment on the conflict of interest cross-claim in the Frankford I Litigation and dismissed the action with prejudice (Id., ¶33).

pending before the Land Use Board, and urged the Land Use Board to deny the application (Id., ¶37).

On May 31, 2006, at the end of CRDRC's presentation, the Land Use Board approved Sussex Commons' development application by a vote of 7-2 (Id., ¶38).

On July 26, 2006, Sussex Commons acknowledged at a hearing before the Court in the Frankford II Litigation that the Land Use Board's subsequent amendment of the Town Center Plan in April 2006 rendered Sussex Commons' claims moot. The Court dismissed the Frankford II Litigation with prejudice (Id., ¶39).

On September 14, 2006, CRDRC, represented by the Rutgers Environmental Law Clinic, appealed the Land Use Board's May 31, 2006 decision to approve Sussex Commons' development application by filing an action in lieu of prerogative writs against the Land Use Board in Superior Court, Sussex County (Id., ¶40).

In addition, in June 2005, Outlets, during fact discovery in the Outlets vs. Chelsea case, directed a subpoena to Schoor DePalma. Schoor DePalma is the engineering company retained by CRDRC as an expert witness to review traffic information submitted by Sussex Commons in connection with the Land Use Board case (Id., ¶41).

CRDRC, represented by the Rutgers Environmental Law Clinic, moved to quash the Schoor DePalma subpoena on the grounds that Outlets was attempting to gain access to CRDRC's expert materials before CRDRC was entitled to offer the information to the Land Use Board as part of the case against the development application (Id., ¶42).

On August 5, 2005, Outlets directed a subpoena to Paul Sutphen of CRDRC, attempting to gain access to CRDRC membership information, traffic and other expert materials, and many other categories of documents (Id., ¶43).

CRDRC, represented by the Rutgers Environmental Law Clinic, moved to quash the Sutphen subpoena, on a number of grounds, including that Outlets was using the discovery process to chill CRDRC and Sutphen's rights to petition the government and participate in the public process without retaliation (Id., ¶44).

Outlets directed another subpoena to CRDRC, this time to Allyn Jones, on October 18, 2005. CRDRC, again represented by the Rutgers Environmental Law Clinic, moved to quash the Jones subpoena (Id., ¶45).

On October 31, 2005, Outlets directed a subpoena to Rutgers Environmental Law Clinic as counsel for CRDRC seeking information about payments received by the Clinic for work done on behalf of CRDRC. Outlets offered to withdraw the subpoena in exchange for a certification containing certain information. The Clinic provided that information to Outlets on November 10, 2005 and on or about November 17, 2005, Outlets withdrew the subpoena (Id., ¶46).

In November 2005, Sutphen and Schoor DePalma produced documents responsive to the subpoenas, as modified by a discovery order entered by the Discovery Master in the Outlets vs. Chelsea case (Id., ¶47).

On November 14, 2005, Outlets moved for sanctions against Sutphen and the Clinic's staff attorney, individually, alleging discovery violations (Id., ¶48).

Also in November 2005, Outlets moved to amend the complaint in the Outlets vs. Chelsea case, and alleged, among other things, that Jones, Sutphen, Mintz and McDowell were

Non-Defendant Co-Conspirators, conspiring with Chelsea to block the Sussex Commons development project at Ross' Corner. In addition to amending the complaint, Outlets sought broader discovery from Jones, Sutphen, Mintz and McDowell (Id., ¶49).

On December 5, 2005, David Mintz, represented by Weissman & Mintz, filed a motion to appear as amicus curiae in the Outlets vs. Chelsea case for purposes of opposing Outlets' motion to amend. CRDRC joined Mintz in that motion (Id., ¶50).

In December 2005, the special discovery master made several discovery rulings with which CRDRC disagreed, and CRDRC, represented by the Rutgers Environmental Law Clinic, appealed those rulings to Judge Farber, the judge presiding over the Outlets vs. Chelsea litigation in Sussex County (Id., ¶51).

On January 6, 2006, Judge Farber heard argument on the motion to amend the complaint, as well as CRDRC's appeals of the discovery master's discovery rulings. Judge Farber denied Outlets' motion to amend the complaint to name Sutphen, Jones, Mintz and McDowell as Non-Defendant Co-Conspirators. Judge Farber found that CRDRC, Jones, Sutphen and Mintz were engaged in protected activity—namely petitioning the government—and that this protected activity could not subject them to liability. Judge Farber found that to allow otherwise would chill citizens' rights (Id., ¶52 and Exhibit 1 at pp. 54:21 to 55:23)

On January 6, 2006 Judge Farber granted CRDRC's request for a protective order for Jones, limiting discovery only to information relating to the tortious interference claim (Id., ¶53 and Exhibit 1 at p. 73).

On January 30, 2006, Outlets moved for partial reconsideration of Judge Farber's January 6, 2006 order, which was denied (Id., ¶54 and Exhibit 1 at p. 73).

On May 2, 2006, Special Discovery Master Politan granted CRDRC's motion to reconsider earlier rulings in light of Judge Farber's January 6, 2006 ruling, and extended Judge Farber's ruling limiting the scope of discovery to Sutphen (Id., ¶55).

On May 18, 2006, Special Discovery Master Politan denied a motion by Outlets to compel Chelsea to produce communications between Pitney Hardin, LLP (Chelsea's counsel) and the Rutgers Environmental Law Clinic (Id., ¶56).

Outlets appealed Politan's ruling with respect to the communications between the Rutgers Environmental Law Clinic and Pitney Hardin to Judge Farber. On June 23, 2006, Judge Farber denied Outlets' appeal and found that communications between Pitney Hardin and the Rutgers Environmental Law Clinic are work product and attorney materials prepared in connection with litigation and in connection with the clients efforts to petition the government. Judge Farber also found that Outlets is not entitled to the substance of those communications because disclosure thereof would undermine attorney-client privileges and work product privileges (Id., ¶57 and Exhibit 2 at pp. 17:6-18:8).

Plaintiff's OPRA Requests

On or about May 11, 2006, plaintiff Buerkle submitted a Request for Government Record form to the University's Custodian of Records seeking a production of 18 separate categories of documents (Fehrenbach Cert., ¶4 and Exh. A).

Facts Relating to Issues Implicated by Plaintiffs' OPRA Requests

Plaintiffs' OPRA Request No. 1

Documents reflecting the allocation of funds by Rutgers University to Rutgers Environmental Law Clinic for 2003, 2004, 2005 and 2006;

The University is searching for responsive documents and will produce same (Huff Cert. ¶58).

Plaintiffs' OPRA Request No. 2

Copies of all bills to Citizens for Responsible Development at Ross' Corner from Rutgers Environmental Law Clinic;

Rutgers Environmental Law Clinic has been involved as counsel for CRDRC in several court actions and numerous proceedings before the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶59).

In November 2005, the Clinic already provided plainitiffs with information concerning billings to CRDRC, which consist solely of requests for reimbursement of disbursements for out-of-pocket costs incurred by the Clinic in connection its representation of CRDRC (Id., ¶59). Defendants have produced invoices submitted to CRDRC (See Huff Cert., Exh. 3).

Plaintiffs' OPRA Request No. 3

Documents containing the time records and time spent for all attorneys, paralegals and secretaries of the Rutgers Environmental Law Clinic on behalf of Citizens for Responsible Development at Ross' Corner in connection with the Sussex Commons project at Ross' Corner;

The requested documents do not exist. Rutgers Environmental Law Clinic has been involved as counsel for CRDRC in several court actions and numerous proceedings before the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶60).

Rutgers Environmental Law Clinic has neither made nor maintained records reflecting the time spent by its attorneys, paralegals or secretaries on behalf of CRDRC in connection with

the various proceedings related to the proposed Sussex Commons project at Ross' Corner (Id., ¶60).

Plaintiffs' OPRA Request No. 4

Documents containing all disbursements on behalf of Citizens for Responsible Development at Ross' Corner in connection with the Sussex Commons project at Ross' Corner;

Rutgers Environmental Law Clinic has been involved as counsel for CRDRC in several court actions and numerous proceedings before the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶61).

The University has produced the requested documents (Id., ¶61).

Plaintiffs' OPRA Request No. 5

Documents containing payments to expert witnesses on behalf of Citizens for Responsible Development at Ross' Corner in connection with the Sussex Commons project at Ross' Corner;

As Rutgers Environmental Law Clinic made no payments to expert witnesses on behalf of CRDRC, the requested documents do not exist (Id., ¶62).

Plaintiffs' OPRA Request No. 6

Document containing payments made by Citizens for Responsible Development at Ross' Corner to Rutgers Environmental Law Clinic;

Rutgers Environmental Law Clinic has been involved as counsel for CRDRC in several court actions and numerous proceedings before the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶63).

Responsive documents have been produced (See Huff Cert., Exh. 3).

Plaintiffs' OPRA Request No. 7

Minutes of Board and Staff meetings at which the Sussex Commons application was discussed;

Intra-office communications relating to confidential matters occur at staff meetings of Rutgers Environmental Law Clinic. However, as Rutgers Environmental Law Clinic has no "Board" and does not create minutes of its staff meetings, the requested documents do not exist (Id., ¶64).

Plaintiffs' OPRA Request No. 8

All documents and submissions to Rutgers University and Rutgers Environmental Law Clinic by Paul Sutphen, Robert McDowall, David Mintz, Citizens for Responsible Development at Ross' Corner and Allyn Jones, prior to Rutgers Environmental Law Clinic's decision to represent Citizens for Responsible Development at Ross' Corner;

Rutgers Environmental Law Clinic has been involved as counsel for CRDRC in several court actions and numerous proceedings before the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶65). The Clinic also has been involved in continuing representation of the Coalition, and of Paul Sutphen, David Mintz and Allyn Jones in their capacity as officers and/or representatives of the Coalition since prior to the commencement of the Clinic's attorney-client relationship with CRDRC (Id., ¶65). The Clinic has no knowledge of any submissions to the Clinic by Robert McDowell (Id., ¶65).

Plaintiffs' OPRA Request No. 9

All documents received by Rutgers Environmental Law Clinic from Robert McDowell;

The Clinic has no knowledge of any submissions to the Clinic by Robert McDowell (Id., ¶66).

Plaintiffs' OPRA Request No. 10

All documents received by Rutgers Environmental Law Clinic from David Mintz;

As President of the Coalition, David Mintz is an officer and representative of a client of the Rutgers Environmental Law Clinic (Id., ¶67).

Plaintiffs' OPRA Request No. 11

All documents received by Rutgers Environmental Law Clinic from Schoor DePalma;

Schoor DePalma is the traffic expert retained by the Rutgers Environmental Law Clinic's client, CRDRC, in connection with proceedings before the Frankford Township Land Use Board. Schoor DePalma and CRDRC already produced information, limited by the rulings of Special Discovery Master Politan and Judge Farber directing that no drafts or preparation materials need be produced. Because the Land Use Board matter is on appeal in Superior Court, that matter is not concluded. The Clinic treats the documentation in question as confidential work product exchanged between counsel for CRDRC and CRDRC's expert (Id., ¶68).

Plaintiffs' OPRA Request No. 12

All documents received by Rutgers Environmental Law Clinic from Chelsea Property Group, Inc.;

As Rutgers Environmental Law Clinic has received no documents from Chelsea Property Group, Inc., the requested documents do not exist (Id., ¶69).

Plaintiffs' OPRA Request No. 13

All documents received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP;

This request is not limited to one matter. Nor is it limited to the complex of several matters which relate to Ross' Corner in Frankford Township. By its terms, the request appears to encompass every document ever received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP in any connection. Pitney Hardin is a large law firm in New Jersey with lawyers who represent parties often adverse to the Clinic's clients. In some cases, Pitney represents clients who are not adverse. As a result, because of the nature of the Clinic's practice and the number of cases in which the Clinic is involved where Pitney Hardin represents a party, the Clinic has approximately six linear feet of paper that could be responsive to this request. The Clinic does not retain inactive files for more than seven years (Id., ¶70).

With respect to the Land Use Board case and the Outlets vs. Chelsea case, and arguably any other case that has to do with development and land use planning at Ross' Corner, Judge Farber ruled that communications between the Clinic at Pitney are privileged (Id., ¶70 and Exh. 2 at pp.17:6-18:8).

Plaintiffs' OPRA Request No. 14

All documents received by Rutgers Environmental Law Clinic from Frankford Township;

As counsel for the Coalition and CRDRC, Rutgers Environmental Law Clinic has been involved in several court actions involving Frankford Township and numerous proceedings before and involving the Frankford Township Land Use Board. Consequently, this request is not limited to a single matter (Id., ¶71).

During the course of its representation of those clients, the Clinic directed several OPRA requests to Frankford Township. Further, the Clinic received documents in the course of discovery in the Frankford I Litigation and, potentially, in other matters (Id., ¶71).

Plaintiffs' OPRA Request No. 15

All documents between any State agency/Sussex County agency and Rutgers Environmental Law Clinic;

This request is not limited to one matter. Nor is it limited to the complex of several matters which relate to Ross' Corner in Frankford Township. By its terms, the request appears to encompass every document ever exchanged between Rutgers Environmental Law Clinic and any state agency, or Sussex County agency, in any connection and without regard to whether the document relates in any way to Ross' Corner in Frankford Township (Id., ¶72).

Since it came into existence in 1985, Rutgers Environmental Law Clinic has engaged in administrative advocacy on behalf of virtually all its clients. The Clinic regularly communicates with State agencies. In order to attempt to identify all documents responsive to this request, Clinic staff would need to review virtually every matter file maintained by the Clinic (Id., ¶73).

In litigated matters, at times, the Clinic intervenes on behalf of the State and supports the positions argued by the State. The Clinic considers documents relating to those circumstances to be privileged under the common interest privilege (Id., ¶72).

Plaintiffs' OPRA Request No. 16

All documents between any Sussex County agency and Rutgers Environmental Law Clinic;

This request is not limited to one matter. Nor is it limited to the complex of several matters which relate to Ross' Corner in Frankford Township. By its terms, the request appears to

encompass every document ever exchanged between Rutgers Environmental Law Clinic and any Sussex County agency in any connection (Id., ¶73).

Plaintiffs' OPRA Request No. 17

All documents received by the Rutgers Environmental Law Clinic from any Frankford Township Land Use Board member;

As noted, Rutgers Environmental Law Clinic has no record of receiving documents from Frankford Township Land Use Board member Robert McDowell (Id., ¶74). Nor does the Clinic have any record of receiving any documents from any other Frankford Township Land Use Board member, except to extent that documents were made available to the public at meetings of that Board, which also were available to Sussex Commons and its representatives (Id., ¶74).

Plaintiffs' OPRA Request No. 18

All documents received by the Rutgers Environmental Law Clinic from any professional and/or representative of Frankford Township and/or its Land Use Board.

The Clinic has received documents from the secretary of the Frankford Township Land Use Board, as well as from the Frankford Township Clerk in response to OPRA requests. The Clinic also has received documents from attorneys for the Frankford Township Land Use Board in connection with the litigated matters described in the Certification of Julia LeMense Huff and in the Verified Complaint. Those documents included documents from attorneys for the Township, such as pleadings and discovery in the myriad cases in which the Clinic has appeared. To respond to this request as written would require that the Clinic search approximately 16 linear feet of materials (Id., ¶75).

The University's Response to Plaintiff's OPRA Request

On February 13, 2006, the University's Custodian of Records denied plaintiffs' request (Fehrenbach Cert., ¶5 and Exh. B).

LEGAL ARGUMENT

POINT I

PLAINTIFF'S OPRA CLAIM IS DEFICIENT AS A MATTER OF LAW.

In the First Count of their Verified Complaint, plaintiffs contend that the OPRA entitles them to production of 18 categories of documents consisting primarily of the contents of legal files maintained by the Rutgers Environmental Law Clinic. As shown below, that contention fails.

A. Plaintiffs' OPRA Request Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 Are Impermissible Under the OPRA.

Under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, "all government records shall be subject to public access unless exempt." N.J.S.A. 47:1A-1. OPRA defines a "government record" as

> 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 . . . official business . . . or that has been received in the course of . . . official business . . . .

N.J.S.A. 47:1A-1.1.

Generally, the reason for which a request under OPRA is made is irrelevant. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 545 (App. Div. 2005). Consequently, "[t]here is no blanket exception carved out to the requirement of disclosure when the public records sought are germane to pending litigation between the requestor and the public entity." Ibid. However, although OPRA is a public disclosure statute, its purpose is not to replace or supplement the discovery process. Ibid.

Thus, while OPRA permits requests for records, it does not allow requests for information. Bent, supra, 381 N.J. Super. at 37. The statute "is not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG, supra, 375 N.J. Super. at 546. Moreover, a custodian of records is not required to "'conduct research among its records for a requestor and correlate data from various government records in the custodian's possession.'" Id. at 546-47 (quoting Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)). As a result, a proper OPRA request must reasonably identify a record, and may not generally request data, information or statistics. Bent, supra, 381 N.J. Super. at 37. The requestor bears the burden of performing any requisite correlations or analysis that he/she deems necessary. MAG, supra, 375 N.J. Super. at 547.

Further, OPRA does not permit an open-ended search of an agency's records. Id. at 549. The request must specifically describe the document being sought with reasonable clarity, and this requirement is not satisfied by simply requesting all of the agency's documents. Bent, supra, 381 N.J. Super. at 37. Wholesale requests for general information are not encompassed by OPRA. MAG, supra, 375 N.J. Super. at 549.

In MAG, the Appellate Division concluded that the plaintiff's open-ended demand was not a proper OPRA request. MAG, supra, 375 N.J. Super. at 549 There, the Division of Alcoholic Beverage Control ("ABC") filed administrative charges seeking to revoke MAG Entertainment LLC's ("MAG") retail liquor license. Id. at 539. During the enforcement proceeding before the Office of Administrative Law, MAG requested ABC's documents and records relating to the handling of other enforcement actions. Id. at 539. The ABC denied the request, and MAG filed a motion to compel discovery, which the Administrative Law Judge granted. Ibid. The ABC appealed, and the ABC Director reversed, concluding that the demand was burdensome and would require an extensive search of the ABC's records. Ibid.

At that point, MAG submitted an OPRA request to the Division of Alcoholic Beverage Control ("ABC") seeking:

> 'all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident,' and 'all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges or lewd or immoral activity.'

Id. at 539-40.

The request did not identify any particular case by name, date or docket number. Id. at 540. Rather, the demand sought

> [t]he documents or records [setting] forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case

> documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations.

Ibid.

Once again, the ABC rejected the request, explaining that it constituted a general demand for information which failed to request a specific record. Ibid. The records custodian noted that since the request did not identify a particular time period, the search would require manual review of both open and closed files. Ibid. Ultimately, the request "required the custodian to collect, evaluate, and compile information from each file and amounted, in effect, to an improper demand for research." Ibid. MAG filed an order to show cause and verified complaint appealing the denial. Ibid. Ultimately, the Law Division issued an order permitting MAG to depose an ABC official in order to refine its OPRA request. Id. at 542.

Reversing the lower court's decision, the Appellate Division concluded that the broad disclosure order was clearly erroneous. Id. at 543. The reviewing court noted that MAG's request failed to "identify with any specificity or particularity the governmental records sought." Id. at 549. The request did not identify names or identifiers, but instead contained generic descriptions of types of cases prosecuted by the ABC. Ibid. The request basically constituted an open-ended demand which would require the records custodian "to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its . . . defense in the OAL litigation." Ibid. Moreover, even if the custodian did identify the relevant cases, it would still have to "evaluate, sort out, and determine the documents to be produced and those otherwise exempted." Ibid. The request ultimately amounted to a request for research and investigation. Ibid.

Similarly, in Bent, the Appellate Division affirmed the decision of the Government Records Council, concluding that plaintiff's OPRA request was improper. Bent, supra, 381 N.J. Super. at 33. In Bent, the plaintiff, Michael Bent, submitted a request to Stafford Township's record custodian seeking the "entire file" of his criminal investigated conducted by the Stafford Township Police Department ("STDP"), in conjunction with the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. Id. at 33-34. In addition, Bent also sought the "factual basis underlying documented action and advice to third parties to act against my interest [having] been credited to the [STPD] under a Federal Grand Jury credit card." Id. at 34.

The custodian responded to the request, explaining that two police files relating to Bent had already been turned over to him. Ibid. Moreover, Bent's request for "statements, [and] investigation theory and opinions" were not considered public records under OPRA. Ibid. Lastly, any records dealing with grand jury subpoenas were turned over to federal agents, and therefore, could not be provided by Stafford Township. Ibid.

Bent subsequently filed two supplementary requests. Ibid. The custodian denied both, explaining that opinions, interpretations, and statements are not records under OPRA, and that the second request merely posed a series of questions. Ibid. Bent filed a "denial of access" complaint with the GRC, which ultimately dismissed Bent's complaint. Id. at 35.

Affirming the GRC's decision, the Appellate Division first explained that as to Bent's request for discrete records, there was no denial of access because the custodian fully disclosed those documents to Bent. Id. at 38. As to records that did not exist or were not in the custodian's possession, there also had been no denial of access as to those records. Moreover, the Court

noted that even if those documents did exist, Bent's request would require the custodian to search beyond the township's files, which OPRA does not require. Ibid. Lastly, the court found that Bent sought general information and failed to identify or describe the records in his request with any specificity or particularity. Id. at 39. Consequently, the court concluded that "this open-ended demand requires analysis and evaluation which the agency is under no obligation to provide . . . ." Id. at 40.

Applying the aforementioned principles to plaintiffs' OPRA request nos. 8 through 18, it is clear that the University's denial of those requests was entirely appropriate.

Request No. 8 - all documents and submissions to Rutgers and RELC by Paul Surphen, Robert McDowell, David Mintz, CRDRC and Allyn Jones, prior to RELC's decision to represent CRDRC

An OPRA request cannot be used by a litigant to replace or supplant the discovery process. MAG, supra, 375 N.J. Super. at 545. Consequently, the requestor is not entitled to these documents and the request was appropriately denied.

Furthermore, the demand lacks the requisite particularity and specificity necessary under OPRA. Bent, supra, 381 N.J. Super. at 39. Plaintiffs' request no. 8 contains a generic description, which refers to all documents and submissions, and fails to identify a time period or matter to which those records relate. MAG, supra, 375 N.J. Super. at 549. In order to comply with the request, the records custodian would have to conduct an unbridled search of the Rutgers Environmental Law Clinic's files. Bent, supra, 381 N.J. Super. at 37. Since OPRA does not mandate an open-ended search of an agency's records, MAG, supra, 375 N.J. Super. at 549, the request is improper.

Request No. 9 - all documents received by the RELC from Robert McDowell

Plaintiffs' request no. 9 is deficient under OPRA because it generally requests "all documents," and does not specify a particular matter or time period to which the documents relate. MAG, supra, 375 N.J. Super. at 549. Once again, this constitutes a request for information, rather than records, and denial of access is proper. Bent, supra, 381 N.J. Super. at 37.

In any event, the Clinic has not received any documents from Robert McDowell (Huff Cert., ¶66). Consequently, the denial of the request was proper. Bent, supra, 381 N.J. Super. at 38.

Request No. 10 - all documents received by the RELC from David Mintz

This request is improper because it is a general request for "all documents" and fails to specify the records sought with reasonable clarity. Bent, supra, 381 N.J. Super. at 37. Plaintiffs do not identify any particular documents, nor have they specified what the documents should relate to or the relevant time period. This request would require the custodian to undertake a search of all of the agency's files in order to determine which documents must be produced and which are exempt. MAG, supra, N.J. Super. at 545.

Request No. 11 - all documents received by RELC from Schoor DePalma

Plaintiffs' request no. 11 is improper because it would require an open-ended search of the Clinic's files. MAG, supra, 375 N.J. Super. at 549. Like request no.10, this request constitutes a request for research and investigation which OPRA does not require. Id. at 546-47. The demand does not identify the relevant matter or time period. Consequently, such a broad

request would require an unbridled search of the Clinic's records, which is prohibited under OPRA. Bent, supra, 381 N.J. Super. at 37.

Request No. 12 - all documents received by RELC from Chelsea Property Group, Inc.

This request is merely a general request for information, which lacks the specificity and particularity that the ruling in MAG mandates. Bent, supra, 381 N.J. Super. at 39. The generic description "all documents," fails to reasonably identify the records sought by the requestor. Id. at 37. Therefore, the records custodian properly denied access.

However, even if the court concludes that this request is proper, the Clinic has not received any documents from Chelsea Property Group, Inc. (Huff Cert., ¶69). Therefore, the custodian properly denied the request for documents. Id. at 38.

Request No. 13 - all documents received by RELC from Pitney Hardin, LLP

This request also is a general request for information, which lacks the specificity and particularity that the ruling in MAG mandates. Bent, supra, 381 N.J. Super. at 39. The generic description "all documents," fails to reasonably identify the records sought by the requestor. Id. at 37. Therefore, the records custodian properly denied access.

Request No. 14 - all documents received by RELC from Frankford Twp.

Sussex Commons's request for all documents received by the Rutgers Environmental Law Clinic from Frankford Township constitutes a general request for information. Bent, supra, 381 N.J. Super. at 37. Documents from the township in the Rutgers Environmental Law Clinic's possession cover a wide range of litigation, pleadings and public notices (Huff Cert., ¶71). Since plaintiffs did not tailor the request with any specificity or particularity, this demand would require the custodian to conduct an open-ended search of the clinic's records. MAG, supra, 375

N.J. Super. at 549. Moreover, even if the request was specifically tailored to the Sussex Commons' litigation only, the custodian would still be required to go through all of the files and determine which documents were public records and which were exempt under OPRA. Ibid.

Request No. 15 - all documents between any State agency/Sussex County Agency and RELC

The request for all documents between the Rutgers Environmental Law Clinic and any State agency encompasses numerous documents in the Rutgers Environmental Law Clinic's files (Huff Cert., ¶72). This general request for information is extremely onerous, and is exactly the type of request that the court in MAG warned against. MAG, supra, 375 N.J. Super. at 549; Bent, supra, 381 N.J. Super. at 37. In Bent, the court noted that a requestor may not simply request all of an agency's files. Ibid. This request fails to identify any particular records or documents, thus it may be considered a wholesale request for general information. MAG, supra, 375 N.J. Super. at 549. Since an unbridled search of the Rutgers Environmental Law Clinic's records would substantially disrupt the Rutgers Environmental Law Clinic's operations, access was properly denied. Bent, supra, 381 N.J. Super. at 37.

Additionally, the request for all documents between the Rutgers Environmental Law Clinic and any Sussex County agency is flawed for the same reason. Documents received by Rutgers Environmental Law Clinic from Sussex county agencies are not limited to this litigation. Consequently, in order to comply with this request, the custodian would need to search all of the Rutgers Environmental Law Clinic files and identify which were related to Sussex Commons (Huff Cert., ¶¶ 72 and73).

Request No. 16 - all documents between any Sussex County agency and RELC

Plaintiffs' request no.16 duplicates request no. 15. For the same reasons cited in response to request no. 16 (Huff Cert., ¶¶ 72 and73), defendants properly denied this request.

Request No. 17 - all documents received from RELC from an Frankford Twp. Land Use Board member

This request properly was denied because it is a general request for information, which does not describe the documents being sought by the requestors with reasonable clarity. Bent, supra, 381 N.J. Super. at 37. The demand fails to identify the matter to which the documents sought relate or the desired time period. In order to comply with this request, the custodian would have to engage in an open-ended search of the Clinic's records, which is not required under OPRA. MAG, supra, 375 N.J. Super. at 549.

Request No. 18 - all documents received by the RELC from any professional and/or representative of Frankford Twp. and/or its Land Use Board

Once again, this request is vague and general, and lacks the requisite specificity which is required pursuant to MAG. It is unclear as to the nature of the documents sought, and without more detail, the custodian would need to engage in an unbridled search of the Rutgers Environmental Law Clinic's records. Bent, supra, 381 N.J. Super. at 37. Therefore, since the demand is phrased in generic terms, the request is a general request for information, which is prohibited. Bent, supra, 381 N.J. Super. at 37.

B. Plaintiffs' OPRA Request Nos. 8, 10, 11, 13, and 15 Properly Were Denied To The Extent That The Requested Documents Are Protected from Disclosure by the Attorney-Client and/or Work Product Privileges.

Request No. 8 - all documents and submissions to Rutgers and RELC by Paul Sutphen, Robert McDowell, David Mintz, CRDRC and Allyn Jones, prior to RELC's decision to represent CRDRC

Prior to the formation of the CRDRC, the Rutgers Environmental Law Clinic represented, and continue to represent the Coalition. David Mintz is the President of the Coalition, and his submissions and communications are privileged (Huff Cert., ¶11). Sutphen is the Treasurer of the Coalition (Huff Cert., ¶13), and his submissions and communications are privileged. Jones was the Vice President of the Coalition (Huff Cert., ¶12), and his submissions and communications are privileged.

Any documents between those individuals and Rutgers Environmental Law Clinic attorneys are protected by the attorney-client privilege. An OPRA request cannot be used by a litigant to replace or supplant the discovery process. MAG, supra, 375 N.J. Super. at 545. Consequently, the requestor is not entitled to these documents and the request was appropriately denied.

Request No. 10 - all documents received by the RELC from David Mintz

As shown in response to request no. 8, documents between Mintz and his Rutgers Environmental Law Clinic attorney are privileged, and an OPRA request may not be utilized to circumvent discovery rules. Ibid.

Request No. 11 - all documents received by RELC from Schoor DePalma

Many of the documents responsive to this request are under a protective order (Huff Cert., ¶68). Others already have been produced to plaintiffs (Huff Cert., ¶68). Therefore, access may not be obtained through an OPRA request. MAG, supra, 375 N.J. Super. at 545.

Request No. 13 - all documents received by RELC from Pitney Hardin, LLP

Certain communications between the Clinic and Pitney Hardin are the subject of a protective order (Huff Cert., ¶70). Therefore, the custodian need not turn over these documents to the requestor. MAG, supra, 375 N.J. Super. at 545.

Request No. 15 - all documents between any State agency/Sussex County Agency and RELC

In litigated matters, at times, the Clinic intervenes on behalf of the State and supports the positions argued by the State. The Clinic considers documents relating to those circumstances to be privileged under the common interest privilege (Id., ¶72).

C. Plaintiffs' OPRA Requests Properly Were Denied Because they Represent an Attempt by Plaintiffs to Chill the Protected First Amendment Activities of the Clinic's Clients.

The citizen and citizens' group clients represented by Rutgers Environmental Law Clinic are protected by the Noerr-Pennington doctrine, which provides immunity for individuals involved in petitioning governmental bodies, whether legislative, executive, administrative or judicial in nature. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609 (1972). The Supreme Court held that Noerr-Pennington immunity derives from the

First Amendment right of free association and the right to petition the government for redress of grievances. Id.

New Jersey courts provide the Clinic's clients with the unequivocal right to participate in the land use decision-making process and to oppose the development of Plaintiff's proposed outlet mall. The right to oppose the outlet mall includes the right of the Clinic's clients to be free from harassment and legal process initiated in retaliation for their opposition – including plaintiffs' efforts to intrude upon citizen participation in the public process by means of efforts to interfere with their relationships with their counsel.

> The right of homeowners to participate in hearings and oppose zoning applications that affect their property is recognized and encouraged by laws which require they be given notice and an opportunity to be heard – an opportunity to participate actively in the approval process. If dissatisfied with the actions of a zoning board, they have an absolute right to appeal to the courts. Plaintiff's complaint seeks to punish defendants for the exercise of these rights.

Structure Bldg. Corp. v. Abella, 377 N.J. Super. 467, 471 (App. Div. 2005).

In Structure Bldg. Corp., where defendants objected to a subdivision on traffic and environmental grounds, the Appellate Division extended the Noerr-Pennington doctrine to land use matters. In so doing, the court cited with approval Fraser v. Bovino, 317 N.J. Super. 23 (App. Div. 1998) wherein the court observed that

> recognizing the fundamental values that undergird a citizen's right to communicate on issues of public import, courts have applied the Noerr-Pennington doctrine in contexts beyond anti-trust activity.

Id. at 37. The court then concluded that those who have standing to object to land use applications are immune from claims of damages based on the exercise of that right. Id.

> To vindicate these rights the courts have developed the Noerr-Pennington doctrine under which those who petition the government for redress are afforded immunity for their action. New Jersey recognizes this doctrine and has applied it to the sort of conduct undertaken by defendants. LoBiondo v. Schwartz, 323 N.J. Super. 391 (App. Div. 1999), certif. den., 162 N.J. 488 (1999); Fraser v. Bovino, 317 N.J. Super. 23 (App. Div. 1998), certif. den., 160 N.J. 476 (1999).

Structure Bldg. Corp. v. Abella, 377 N.J. Super. at 471. In so doing, the Appellate Division affirmed the trial court's view that

> We don't want to chill residents' rights to object, and they have a right to object, and when they come out and exercise that right, the last thing they want to happen to them was to be hit with a law suit. So, if we didn't have Noerr-Pennington doctrine, the Court would have to create one, because certainly that's unfair to the residents and to persons who wish to object to the actions of developers.

Id. at 472.

Plaintiffs seek to use he processes of this Court to harass, intimidate, burden and eventually restrain the clients of the Clinic from further participation in the public forum – in violation of the Noerr-Pennington doctrine.

For these reasons, defendants respectfully submit that the Order to Show Cause must be discharged as it relates to the First Count of the Verified Complaint.

POINT II

PLAINTIFFS' COMMON LAW CLAIM OF ACCESS FAILS FOR SEVERAL REASONS.

A. Plaintiffs' Common Law Claim of Access Fails Because Plaintiff Never Requested Access to the Documents in Question.

As noted, plaintiffs' common law claim is deficient because plaintiffs never have made a request to defendants for access to any of the documents in question under the citizen's common law right of access. Plaintiffs' Verified Complaint nowhere alleges that such a request was made. Further, plaintiffs' request makes no reference to the common law.

Accordingly, it is beyond dispute that the Second Count of plaintiffs' Verified Complaint is based upon a hypothetical denial by defendants of a request by plaintiff under the common law that never, in fact, occurred.

For this reason alone, plaintiff's claim that defendants violated plaintiffs' common law right of access by denying a request that never was made is baseless.

B. Plaintiffs' Common Law Claim of Access Fails Because Plaintiffs Cannot Show that Their Interest in Access Outweighs Defendants' Countervailing Interests in Nondisclosure.

The common-law right to access public records depends on three requirements: (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," South Jersey Publishing Co. v. New Jersey Expressway Auth., 124 N.J. 478, 487 (1991); and (3) the citizen's right to access "must be

balanced against the State's interest in preventing disclosure." Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995).

Because the common-law right of access to public records is not absolute, one seeking access to such records must "establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure." Home News v. State Department of Health, 144 N.J.446, 454 (1996). Thus, it has been said that the balancing process is "concretely focused upon the relative interests of the parties in relation to [the] specific materials." McClain v. College Hosp., 99 N.J. 346, 361 (1985); Atlantic City Convention Center Authority v. South Jersey Publishing Co, 135 N.J. 53, 60 (1994) (quoting McClain, supra, 99 N.J. at 361.

Generally, the public's interest in nondisclosure is based on the need to keep the information confidential. Keddie v. Rutgers, The State University, 148 N.J. 36, 51(1996). Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. Ibid. In that context, 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.'" Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) (quoting City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky.1974)). 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. Id. at 105; see also McClain, supra, 99 N.J. at 362.

Thus, even if a common law request for access had been made, defendants have identified in Point I herein legitimate public interests militating against disclosure of many of the documents and categories of documents in question. As shown, several of the requests are framed in such a broad and unreasonable manner as to result in an inappropriate diversion of public resources from their dedicated functions to the necessity of responding to plaintiffs' highly burdensome requests. Further, defendants showed that many of the categories of documents requested by plaintiffs are protected by the attorney-client and work product privileges.

Moreover, plaintiffs have not articulated any legitimate interest they seek to further by invading the client files maintained by the Rutgers Environmental Law Clinic. Nor is any interest evident. Defendants believe that plaintiffs' "interests" include retaliation against the Clinic for its continued representation of the citizens' groups that oppose plaintiffs' planned shopping mall in their community and diversion of the Clinic's efforts from the prosecution of that appeal to the defense of an OPRA action. The University issued its response to plaintiffs' OPRA requests in mid-May 2006 (Fehrenbach Cert., ¶4). During the four months that passed between the University's denial of plaintiffs' OPRA request and the Clinic's September 14, 2006 filing of an appeal from the Frankford Township Land Use Board's decision to approve plaintiffs' development application (Huff Cert., ¶40), plaintiffs took no action to reformulate or otherwise pursue their OPRA requests. Within days after the Clinic's filing of an appeal on behalf of CRDRC, plaintiffs initiated these proceedings on an Order to Show Cause.

In addition, plaintiffs' common law claim is unsuited to a summary action because it is highly unlikely that claim could be completely disposed of in a summary manner. See R. 4:67-

1(b). In order to develop the factual background necessary for the Court to conduct the common law balancing test, discovery would be needed so that defendants may discover the stated and unstated interests of plaintiffs Buerkle and Sussex Commons in reviewing much of the content of several client files at the Clinic. Only after discovery is conducted will the parties be in a position to provide the Court with a complete presentation concerning the countervailing interests at issue.

Accordingly, defendants respectfully submit that the Order to Show Cause must be discharged with respect to the Second Count of the Verified Complaint.

CONCLUSION

For all of the foregoing reasons, defendants Rutgers, The State University of New Jersey and its Custodian of Records, respectfully submit that the Order to Show Cause must be discharged.

Respectfully submitted,

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James P. Lidon

JPL:lo
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