

## KELLY & WARD, LLC

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September 22, 2006

### HAND DELIVERY

Superior Court Clerk  
Law Division  
Sussex County Judicial Center  
Newton, NJ 07860

**Re: Sussex Commons Associates, LLC and Howard Buerkle vs.  
Rutgers, The State University and Rutgers Environmental Law Clinic**

Dear Sir/Madam:

Enclosed please find an original and one copy of Verified Complaint, letter Brief, Certification of Service and Order to Show Cause. A courtesy copy is being sent directly to Judge Bozonelis.

Please file and return conformed copies in the enclosed self-addressed, stamped envelope and charge the \$230.00 filing fee to our Superior Court account 140583. Thank you.

Very truly yours,

KELLY & WARD, LLC

By: Kevin D. Kelly  
Kevin D. Kelly

KDK:kes  
enclosures

cc: ALL WITH ENCLOSURES

Sussex Commons Associates, LLC (via regular mail)

Julia LeMense Huff, Esq. (via certified mail RRR)

Jean W. Sidar, Registered Agent for Rutgers (via certified mail RRR)

Leslie A. Fehrenback, Rutgers University Custodian of Records (via certified mail RRR)

S:\litigation\general\sussex commons\OPRA litigation rutgers\corresp\clerk filing otsc.wpd

**KELLY & WARD, LLC**

Attorneys at Law  
93 Spring Street  
PO Box 887  
Newton, NJ 07860  
Phone: (973) 579-6250  
Fax: (973) 579-6249  
Attorneys for Plaintiffs

<b>SUSSEX COMMONS ASSOCIATES, LLC,</b>	<b>: SUPERIOR COURT OF NEW JERSEY</b>
<b>a limited liability company of the State of New Jersey, and HOWARD BUERKLE,</b>	<b>: LAW DIVISION</b>
	<b>: SUSSEX COUNTY</b>
	<b>: DOCKET NO.: SSX-L-</b>
Plaintiffs,	<b>: Civil Action</b>
v.	<b>: VERIFIED COMPLAINT</b>
<b>RUTGERS, THE STATE UNIVERSITY,</b>	<b>:</b>
<b>RUTGERS ENVIRONMENTAL LAW:</b>	<b>:</b>
<b>CLINIC, and RUTGERS UNIVERSITY</b>	<b>:</b>
<b>CUSTODIAN OF RECORDS,</b>	<b>:</b>
Defendants.	<b>:</b>

The plaintiffs, Sussex Commons Associates, LLC and Howard Buerkle, ("plaintiffs" or "Sussex Commons") by way of Verified Complaint against the defendants, allege as follows:

**FIRST COUNT**

1. Plaintiff, Sussex Commons, is a New Jersey limited liability corporation with its principal place of business located at 1 Harmon Plaza, 8<sup>th</sup> Floor, Secaucus, New Jersey 07094. The plaintiff files this action in part pursuant to the Open Public Records Act ("OPRA"), *N.J.S.A. 47:1A-1 et seq.*
2. Plaintiff, Howard Buerkle, is a taxpayer and resident of the State of New Jersey and a Member of Sussex Commons Associates, LLC.
3. Defendant, Rutgers, The State University ("Rutgers"), is the State University of the State of New Jersey pursuant to a 1956 compact between the institution and the State of New Jersey. State and taxpayer funds are allocated to support Rutgers.

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4. Defendant, Rutgers Environmental Law Clinic ("Clinic"), is a legal clinic in operation at the Rutgers University School of Law whose business address is 123 Washington Street, Newark, New Jersey 07102. State and taxpayer funds are allocated to support the Clinic.

5. Defendant, Rutgers University Custodian of Records, is an employee of Rutgers, the custodian of its public records, and the author of the denial of Open Public Records Request #363.

6. On or about January 3, 2005, the Clinic entered its appearance on behalf of Citizens For Responsible Development at Ross' Corner ("CRDRC") in opposition to plaintiffs' application for development of a commercial shopping mall at Ross' Corner in Frankford Township, New Jersey. Thereafter, the Clinic participated in all public hearings with respect to this application. The Clinic's participation included the presentation of witnesses and expert witnesses in opposition to this application. On July 26, 2006, the Frankford Township Land Use Board approved plaintiffs' application.

7. By Order dated March 28, 2005, the Clinic's motion to intervene was granted in litigation entitled *Sussex Commons Associates, LLC v. Township of Frankford, et als*, Docket No. SSX-L-180-05. On April 12, 2005, the Clinic filed an answer and Cross/Counterclaim. The Clinic remained an active participant in this litigation until the final dismissal of their counterclaim by way of summary judgment by Order dated August 4, 2006.

8. On April 12, 2006, the Clinic applied for, and was granted, permission to appear as amicus curiae on behalf of CRDRC in litigation entitled *Sussex Commons Associates, LLC v. Township of Frankford Land Use Board*, Docket No. SSX-L-685-05. The Clinic remained an active participant until the litigation was dismissed by Order dated August 4, 2006.

9. On each of these occasions, the Clinic opposed plaintiffs' position and interests on behalf of its client CRDRC.

10. During the course of this opposition to plaintiffs' project, the Clinic's client, CRDRC, solicited, obtained and used funds from Chelsea Property Group, Inc. ("Chelsea").

11. Chelsea and CRDRC have a common interest in opposing plaintiff's project. According to Chelsea's President Thomas J. Davis, Chelsea opposed the Sussex Commons project because it had made significant investments in its shopping centers located at The Crossings in Tannersville, Pennsylvania, and Woodbury Commons in Central Valley, New York, and wanted exclusivity in the market trade area.

12. On May 11, 2006, Sussex Commons requested specific documents from defendant Rutgers limited to its involvement in this project and its opposition to their project at Ross' corner. A copy of this OPRA request is attached hereto as **Exhibit A**.

13. On May 13, 2006, defendant Rutgers responded to all of these requests by issuing a blanket denial based upon its interpretation of the Appellate Division's decision in *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App.Div.2005). A copy of this written denial is attached hereto as **Exhibit B**.

14. Plaintiffs assert that each defendant is required to provide the requested documents and records pursuant to OPRA.

15. To date, defendant Rutgers, has not provided the requested documents and records.

16. To date, defendant Clinic, has not provided the requested documents and records.

17. To date, the Rutgers University Custodian of Records has not provided the requested documents and records.

18. All of the requested documents and records are subject to the disclosure requirements of OPRA.

19. The defendants' refusals to provide the requested documents and records constitute violations of OPRA.

20. The defendants' refusals to provide the requested documents and records are willful, knowing and unreasonable denials of access in violation of *N.J.S.A. 47:1A-11*.

**SECOND COUNT**

21. The plaintiffs repeat each of the preceding paragraphs as though fully set forth at length herein.

22. The requested documents and records are subject to the common law right to know and disclosure.

23. Plaintiffs assert that each defendant is required to provide the requested documents and records pursuant to the common law right to know and disclosure.

24. The defendants' refusal to provide the requested documents and records constitutes violations of the common law right to know and disclosure.

**WHEREFORE**, plaintiffs demand the entry of final judgment as follows:

A. Ordering the defendants to immediately provide true and exact copies of all of the requested documents and records to the plaintiffs;

B. Awarding to the plaintiffs' attorneys' fees and costs incurred in this action, pursuant to *N.J.S.A. 47:1A-6*;

C. Declaring that the defendants' Custodian of Records unreasonably denied access and ordering said custodian to pay civil penalties pursuant to *N.J.S.A. 47:1A-11*;

D. Granting such other and further relief to the plaintiffs as the Court deems just and proper.

**DESIGNATION OF TRIAL COUNSEL**

Kevin D. Kelly, Esq. is hereby designated to try this case on behalf of plaintiff.

KELLY & WARD, LLC

Attorneys for Plaintiff

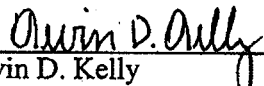
BY: Kevin D. Kelly  
Kevin D. Kelly

Dated: September 22, 2006

**CERTIFICATION OF COUNSEL**

Pursuant to *Rule 4:5-1*, it is hereby certified that the matter in controversy in this litigation is not the subject matter of any other action pending in any court or arbitration proceeding, nor is any other action or arbitration proceeding contemplated. At this time there are no other parties known to plaintiff that should be joined in this action.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

  
\_\_\_\_\_  
Kevin D. Kelly

DATED: September 22, 2006

Sep-22-06 11:41am From-

Page 01

-To-

-NOJ-

Received Sep-22-06 11:46am

T-458 P.01/02 F-779

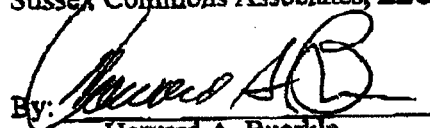
**CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT**

Howard A. Buerkle, of full age, hereby certifies to the following:

1. I am the Managing Member of Sussex Commons Associates, LLC.
2. I have personal knowledge of the within facts.
3. I have read the Verified Complaint to which this Certification is annexed, and to the

best of my knowledge and belief the information set forth therein is true.

Sussex Commons Associates, LLC

By:   
Howard A. Buerkle,  
Managing Member

DATE: September 22, 2006

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Attorneys for Plaintiff

**SUSSEX COMMONS ASSOCIATES, LLC,** : **SUPERIOR COURT OF NEW JERSEY**  
a limited liability company of the State of New : **LAW DIVISION**  
Jersey, and **HOWARD BUERKLE** : **SUSSEX COUNTY**

Plaintiffs,

: **DOCKET NO.: SSX-L**

v.

: **Civil Action**

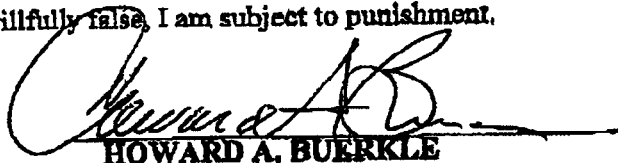
**RUTGERS, THE STATE UNIVERSITY, and :**  
**RUTGERS ENVIRONMENTAL LAW :**  
**CLINIC, :**

: **CERTIFICATION OF**  
: **HOWARD A. BUERKLE**  
: **IN LIEU OF OATH OR**  
: **AFFIDAVIT**

Defendants.

**Howard A. Buerkle, of full age, hereby certifies to the following:**

1. I have read the attached Verified Complaint and the information set forth therein is true and correct to the best of my knowledge and recollection.
2. Pursuant to Rule 1:4-4(o), I acknowledged the genuineness of my signature provided via telecopier, and a copy of the Certification with original signature will be filed if requested by the Court or a party.
3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
**HOWARD A. BUERKLE**

**DATED: September 22, 2006**

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# **Exhibit A**

**RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY**  
**UNIVERSITY CUSTODIAN OF RECORDS**  
**7 COLLEGE AVENUE**  
**NEW BRUNSWICK, NJ 08901**  
**732/932-1352 - Phone**  
**732/932-1245 - Fax**  
**records@rci.rutgers.edu - Email**

**REQUEST FOR GOVERNMENT RECORD**

*Please complete this form to request a government record. Mail or fax the completed form to the address listed above.*

Under the New Jersey Public Access to Government Records Law, the requestor must be a citizen of the state of New Jersey to have a citizen's right of public access to documents under the statute.

☒ I hereby certify that I am a citizen of the state of New Jersey.

The Government Records Law provides for a citizen's right of access to certain records. Please note that the Government Records Law does not require a public entity to create documents or compile information and create reports.

The Government Records Law recognizes that there are personal privacy interests that must be preserved and that there is a public interest in the confidentiality of various categories of records. Accordingly, the Government Records Law explicitly excludes various categories of records from a right of access. The Government Records Law is also subject to other exclusions as provided in federal law or state law, regulation, executive order, or legislative resolution. A synopsis of exclusions provided in the Government Records Law itself is Appendix A of this form. For the text of the law, visit [http://www.njleg.state.nj.us/2000/Bills/PL01/404\\_.HTM](http://www.njleg.state.nj.us/2000/Bills/PL01/404_.HTM).

Requestor's name: HOWARD A. BUEKKE  
Address: ONE HARMONY PLAZA 8<sup>th</sup> FLOOR  
SELAUCUS NJ.  
Daytime telephone: 201-223-5999 x 523  
Email address: HA.BAII@AOL.COM  
Fax: 201-223-1849  
Date: 9/11/06  
Company: GUSSEY COMMONS ASSOC. LLC

The following record is being requested under the New Jersey Public Access to Government Records Law, NJSA 47:1A-1 et seq. Please be specific and clearly describe what record you are requesting.

SEE ATTACHED

1. A request for documents is deemed complete when the Custodian has received an understandable request. The Custodian will seek clarification from the requestor as appropriate.
2. Government records (as provided for in NJSA 47:1A-1 et seq.) may be available to be inspected, examined, and/or copied during regular business hours.
3. Government records will be made available as soon as possible, but ordinarily not later than seven (7) business days after receiving a complete request, provided that the record is currently available.
4. The denial of a request for university records will state the basis for the denial.
5. A record that is not readily available or that will require a search of records will be made available as soon as possible. The requestor will be provided with an update within seven (7) business days indicating the estimated time that will be required to locate and provide the record.
6. The fee to copy readily available government records is: first to tenth page, 75 cents per page; eleventh to twentieth page, 50 cents per page; all pages over twenty, 25 cents per page.
7. In accordance with the Government Records Law, a special service charge will be charged in addition to the standard copy costs if the record cannot be reproduced by ordinary document copying equipment in ordinary business size or if accommodating the request involves an extraordinary expenditure of time and effort. This charge will recover the actual cost of compliance with the request including employee labor costs. The request will be deemed complete and will be processed upon payment of the fee.

May-10-06 04:06pm From-

T-335 P.02/03 F-242

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## OPRA REQUESTS

The term "document" includes all electronic media or other tangible forms in which information is stored and includes all written or graphic matter of every kind and description, however produced or reproduced, **WHETHER DRAFT OR FINAL**, original or reproduction, including, but not limited to, letters, correspondence, memoranda, notes, films, transcripts, contracts, agreements, licenses, memoranda of telephone conversations or personal conversations, microfilm, telegrams, books, newspaper articles, magazines, advertisements, periodicals, bulletins, circulars, pamphlets, statements, notices, reports, rules, regulations, directives teletype messages, minutes of meetings, interoffice communications, reports, financial statements, ledgers, books of account, proposals, prospectuses, offers, orders, receipts, working papers, desk calendars, appointment books, diaries, time sheets, logs, movies, tapes for visual or audio reproduction, recordings or materials similar to any of the foregoing, however, denominated, and including writings, drawings, graphs, charts, photographs, data processing results, printouts and computations (both in existence and stored in memory components), and other compilations from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form. **THE TERM "DOCUMENT" INCLUDES ALL COPIES OF A DOCUMENT WHICH CONTAIN ANY ADDITIONAL WRITING, UNDERLINING, NOTES, DELETIONS, OR ANY OTHER MARKINGS OR NOTATIONS, OR ARE OTHERWISE NOT IDENTICAL COPIES OF THE ORIGINAL.**

- 1) Documents reflecting the allocation of funds by Rutgers University to Rutgers Environmental Law Clinic for 2003, 2004, 2005 and 2006.
- 2) Copies of all bills to Citizens for Responsible Development at Ross' Corner from Rutgers Environmental Law Clinic.
- 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.
- 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.
- 5) Documents containing all payments to expert witnesses on behalf of Citizens for Responsible Development at Ross' Corner in connection with the Sussex Commons project at Ross' Corner.
- 6) Documents containing payments made by Citizens for Responsible Development at Ross' Corner to Rutgers Environmental Law Clinic.
- 7) Minutes of Board and Staff meetings at which the Sussex Commons application was discussed.
- 8) All documents and submissions to Rutgers University and Rutgers Environmental Law Clinic by Paul Surphen, Robert McDowell, 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.

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- 9) All documents received by the Rutgers Environmental Law Clinic from Robert McDowell.
- 10) All documents received by the Rutgers Environmental Law Clinic from David Mintz.
- 11) All documents received by the Rutgers Environmental Law Clinic from Schoor DePalma.
- 12) All documents received by Rutgers Environmental Law Clinic from Chelsea Property Group, Inc.
- 13) All documents received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP.
- 14) All documents received by Rutgers Environmental Law Clinic from Frankford Township.
- 15) All documents between any State agency/Sussex County agency and Rutgers Environmental Law Clinic.
- 16) All documents between any Sussex County agency and Rutgers Environmental Law Clinic.
- 17) All documents received by the Rutgers Environmental Law Clinic from any Frankford Township Land Use Board member.
- 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.

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8. In the event that the use of computerized information technology is required to comply with a request, a reasonable special service charge will be assessed for these costs. This charge will recover the actual cost of compliance with the request including employee labor costs. The request will be deemed complete and will be processed upon payment of the fee.
9. When a request is for a copy of a record in a medium other than the one in which it is maintained, the Government Records Law provides that the record may be made available in a meaningful medium.
10. You have the right to challenge a decision to deny access to a requested document either by filing a complaint with the Government Records Council pursuant to NJSA 47:1A-1 et seq., or by filing a lawsuit in Superior Court. You may contact the Government Records Council at 1-866-850-0511.

       I certify that I have not been convicted of any indictable offense under the laws of the State, any other State or the United States and am not seeking government records containing personal information pertaining to my victim or the victim's family as provided by NJSA 47:1A-1 et seq.

Please indicate below how you wish to review the requested record. You will be notified when the record is available. Fees associated with producing the record must be paid prior to receipt of the record.

       I wish to view the record.

☒ I wish to receive a copy of the record.

       I am requesting the record be provided in the following medium  
(i.e. hard copy, via an email attachment, on a computer  
disk) \_\_\_\_\_

☒ I will pick up the requested copy.

       I would like the requested copy mailed to me (complete mailing  
address must be provided in the space at the top of this form).

       I do not need the record within seven business days, but would like to  
receive it by \_\_\_\_\_

Signature of Requester  Date: 9/18/06

## **Exhibit B**

**RUTGER THE STATE UNIVERSITY OF NEW JERSEY**  
**OPEN PUBLIC RECORDS REQUEST # 363**

TO: Howard A. Buerkle

FROM: University Custodian of Records

RE: The Status of Your Record Request

You requested the following record: See attached list

It will be available on: not available

Number of pages: N/A

Fee (if applicable): N/A

The record listed above is not being provided for the following reason(s):

A recent Superior Court decision, *MAG Entertainment, LLC v. Alcohol Beverage Control* doc. no. A-128-04T5, Superior Court, NJ, Appellate Division, Decided March 7, 2005, states that "OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination". It goes on to state that "A proper request under the act must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement simply by requesting *all* of an agency's documents." It further states that "Under OPRA, agencies are required to disclose only identifiable governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated, and complied by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files."

You have the right to appeal the decision that the record is not a government record to which you have access. You may take your appeal to the Government Records Council which has mediation and dispute resolution procedures or you may file a lawsuit with the New Jersey Superior Court, as provided by NJSA 47:1A-1 et seq. If your request has been denied, a brochure listing the procedures for appeal is attached to this notification.

5/13/06  
Date

Leslie A. Fehrenbach  
Leslie A. Fehrenbach  
7 College Avenue  
New Brunswick, NJ 08901  
732/932-7434