

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MIDDLESEX

Chambers of
FRANK M. CIUFFANI
Judge



Middlesex County Court House
P.O. BOX 964
NEW BRUNSWICK, N.J. 08903-964

FILED

MAR 15 2011

March 15, 2011

Frank M. Ciuffani, P.J., Ch.

Letter Opinion

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Re: Pat Doe v. Rutgers, Docket No: MID-L-488-11

Dear Counsel:

Before the Court is the plaintiff's, Pat Doe, application to appeal defendant's, Rutgers University ("Rutgers"), denial of his Open Public Records Act ("OPRA") requests pursuant to N.J.S.A. 47:1A-6. After hearing oral arguments on February 16, 2011 Rutgers offered a compromise to the plaintiff to create a summary of the disciplinary files requested. A return date was given to the parties to determine if the summary satisfied the plaintiff's OPRA request. Prior to the return date, plaintiff filed a motion seeking the production of additional documents from Rutgers. Having reviewed

the parties' moving and opposition papers and hearing oral arguments, the Court renders this written decision.

I. Factual and Procedural History

Plaintiff is enrolled as a student at Rutgers Law School- Camden and is currently facing charges of cheating and/or plagiarism on a final exam with the possibility of expulsion. On October 13, 2010 Plaintiff's attorney submitted a request to Rutgers' Custodian of Records, Leslie A. Fehrenbach, pursuant to OPRA and the Right to Know Law seeking access to (1) all Rutgers Law School-Camden students' disciplinary records on plagiarism and/or cheating from 2005 to present; and (2) all final take home exams submitted in Professor Nissen's course on Critical Legal Analysis- Summer 2010 with personally identifiable information redacted. Plaintiff asserts that the requested information is needed to adequately defend against the disciplinary charges.

In a letter dated November 3, 2010 Rutgers denied plaintiff's request for the disciplinary records on the grounds that (1) the request was overly broad and invalid because it would require the University to do research to satisfy the request, (2) OPRA prohibits disclosure of documents that would reveal a student's identity, and (3) disciplinary records are considered "educational records" under the Family Educational Rights and Privacy Act ("FERPA") and are thus protected from disclosure to the public. Rutgers also denied plaintiff's request for the take home exams on the ground that test questions, scoring keys, and other exam data relating to the administration of an academic exam are not considered government records and are thus exempt from OPRA. In a letter dated November 9, 2010, plaintiff's attorney submitted a revised OPRA request essentially seeking the same records. In a letter dated November 16, 2010

Rutgers again denied access to the disciplinary records on the same grounds listed in its earlier correspondence. Accordingly, plaintiff filed an Order To Show Cause to demand that Rutgers provide plaintiff with the records requested pursuant to OPRA, and the common law right of access. After hearing oral arguments on February 16, 2011 this Court denied plaintiff's request for all final take home exams submitted in Professor Nissen's course on Critical Legal Analysis- Summer 2010 pursuant to N.J.S.A. 47:1A-1.1 and case law. As to the other records requested, Rutgers offered a compromise whereby they would create a summary of the twelve disciplinary actions that have occurred since 2005. The summary was to include the nature of the charges, the outcome, the punishment imposed, if any, whether the student admitted to the charges, and if there was an appeal. A return date of March 2, 2011 was scheduled, later adjourned to March 10, 2011, to determine if the plaintiff's OPRA request could be satisfied with the production of the summary and thereby eliminating the need for the Court to perform an *in camera* review of the 2,600 pages of unredacted documents regarding the twelve student disciplinary files. Prior to the return date, Rutgers provided the summary charts to the plaintiff and the Court. Plaintiff also filed a motion, returnable on March 10th, seeking the production of additional documents from Rutgers including any audio or video recordings of the disciplinary hearings, the plaintiff's own disciplinary file, a Vaughn Index, and any documents within the disciplinary files that are capable of being redacted.

II. Discussion and Decision

In New Jersey, access to public records may be provided by statute under OPRA, N.J.S.A. 47:1A-1 et seq., which repealed the Right to Know Law¹, or by the common law

¹ Right to Know Law codified at N.J.S.A. 47:1A-2-4 repealed by L. 2001, c. 404.

right of access. While the public policy underlying the OPRA statute favors ready access to public records, this right of access is not without limitation. See MAG Entm't., LLC v. Alcoholic Beverage Control, 375 N.J. Super. 534, 544 (App. Div. 2005). The OPRA statute defines the scope of “government records” and also provides twenty one categories of records that are exempt from public disclosure. N.J.S.A. 47:1A-1 .1. The common law right of access allows for broader disclosure of public records, but this right depends on two requirements before access is granted to common law records, which are defined as “those made by public officers in the exercise of public functions.” Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). First, the citizen seeking the record must establish an interest in the information requested, and second, the citizen’s right to access must be balanced against the state’s interest in confidentiality. Id. The courts have further clarified what types of request are proper and public records that are prohibited from disclosure to prevent abuse. MAG Entm't., 375 N.J. Super. at 546.

A. Take Home Exams

The plaintiff’s request for all final take home exams submitted in Professor Nissen’s course on Critical Legal Analysis- Summer 2010 was denied based on the statute’s express exemption under N.J.S.A. 47:1A-1.1 of all “test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.” This Court held that exam answers would fall under “other examination data” and the broad language used in the statute is indicative that exam answers should be exempt from disclosure. This Court also held that the requested exam answers could not be provided under the common law right of access. In Fair Share Housing Ctr. v. N.J. League of Municipalities, 413 N.J. Super. 423, 433 (App.

Div. 2010) the court denied common law access because the League of Municipalities was not a “public agency” within the intent of OPRA, and the requested records were also deemed to be prepared by a private entity and not by public officials. In the case at bar, Rutgers is a state university and is properly categorized as a public agency, but the exam answers were prepared by students and not public officials in the exercise of a public function according to the definition of a common law record. Accordingly, the plaintiff’s request for exam answers was denied.

B. Disciplinary Records

This Court finds that the summary of the twelve disciplinary files Rutgers provided to the plaintiff sufficiently satisfies the plaintiff’s OPRA request. The information provided in the charts regarding the nature of the charges, the outcome, the punishment imposed, if any, whether the student admitted to the charges, and if there was an appeal is the relevant information that the plaintiff is ultimately seeking to prepare a defense to his own disciplinary case. In MAG Entm’t., 375 N.J. Super. at 545 the court held that

OPRA is a public disclosure statute and is not intended to replace or supplement the discovery of private litigants. Its purpose is to inform the public about agency action, not necessarily to benefit private litigants. That is, a party’s status as a litigant does not enlarge its access to public records under OPRA.

Here, the plaintiff is seeking information for the private benefit of preparing his defense against disciplinary charges brought by Rutgers, and has made repeated demands for the production of such documents. However, Rutgers has established that student disciplinary records are protected by FERPA, prohibiting disclosure of “those records, files, documents, and other material which contain information directly related to a

student; and are maintained by an educational agency or institution by a person acting for such agency or institution.” 20 U.S.C. §1232g(a)(4)(a). While this Court acknowledges that FERPA does not bar disclosure when the educational records can be meaningfully redacted, the Court holds that the summary provided was an effective compromise that ensured both meaningful redaction of all personally identifiable information and ensured public disclosure. The summary further eliminates the need for the Court to perform the same exercise of redaction, which would achieve the same result of what has already been provided in the summary.

C. Audio/Video Recordings

Rutgers explained and plaintiff has acknowledged that there are no audio or video recordings of the disciplinary files because the matters were resolved by the student admitting to the charges or through disciplinary conferences which are neither audio nor video recorded nor transcribed by Rutgers. Therefore, this Court holds that Rutgers is not in violation of Judge McDonnell’s December 8, 2010 Order requesting unredacted documents *for in camera* review nor is Rutgers in violation of litigant’s rights.

D. Plaintiff’s Own Disciplinary File

The court holds that Rutgers is not improperly withholding plaintiff’s disciplinary file. Rutgers has formally advised the plaintiff in writing that a FERPA release form is required before the University can produce a copy of a student’s unredacted records.

20 U.S.C. § 1232g(b)(1) governs the release of educational records under FERPA, which states that

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined

in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following . . .

The statute further provides an enumerated list of those who are permitted to receive educational records without written consent, and a student is not included in this list.

§ 1232g(b)(1) (A)-(K). The statute also acknowledges that a student over the age of 18 may give the required permission or consent for the release of educational records instead of the parents. § 1232g (d). Rutgers has established that they are a state university that receives federal funding and therefore must comply with FERPA's statutory provisions. Rutgers has provided plaintiff with a copy of a FERPA release so any delay involving the production of plaintiff's own disciplinary file is attributed to the plaintiff's failure to complete the required form.

E. Vaughn Index

This Court also finds that Rutgers should not be required to provide a Vaughn Index to the 2,600 pages of unredacted documents produced to the Court because such a requirement would place an extraordinary burden on Rutgers. N.J.S.A. 47:1A-5(g) protects a public agency against requests that would substantially disrupt agency operations. The statute provides that "if a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." Rutgers has in fact reached a reasonable solution by providing the summary, which accommodates both the plaintiff's interest in disclosure and the University's interest in maintaining confidentiality. Plaintiff cites to Paff v. N.J. Dept. of Labor, Bd. of Review, 379 N.J.

Super. 346 (App. Div. 2005) in support of his argument that a Vaughn Index is required when records are withheld, but Rutgers correctly factually distinguished this case. In Paff, the court required the defendant to produce a Vaughn index as the denial was solely based on a certification from the records custodian that the records were privileged. Here, Rutgers has provided a certification as to the nature and contents of the records and why they are confidential. Thus, Rutgers has complied with Rule 4:10-2(e)(1), which states that

the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

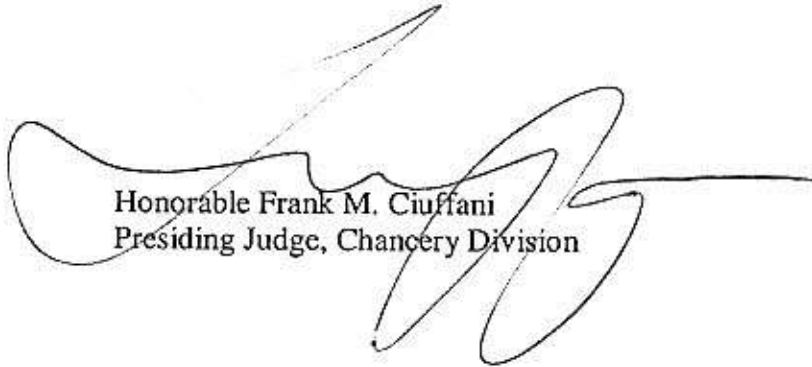
The court's holding in Fisher v. Division of Law, 400 N.J. Super. 61, 76 (App. Div. 2008) is more applicable to the case at bar. In Fisher the court held that "[W]hen the facts in the requestor's possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by Vaughn may be unnecessary." The court further noted that the production of a Vaughn Index is both for the court's benefit to determine if the withheld documents are protected by an exemption or a privilege and for the benefit of the requestor to advocate his position for why the records should not be protected and thereby produced. In Fisher, the court held that a comprehensive Vaughn Index would not have given the plaintiff an additional opportunity to advocate its position for disclosure of the documents and therefore no purpose would be served to require its submission. Similarly, Rutgers has provided certifications from its Dean of Students and Records Custodian to describe the contents of the documents withheld and why they are exempt from disclosure. Thus, a

comprehensive Vaughn Index in this case would not reveal any additional information so that the plaintiff could contest that the unredacted student records should not be considered confidential "educational records" as defined by FERPA.

III. Conclusion

Based on the aforementioned reasons, Rutgers is not required to produce any of the take home exams in Professor Nissen's course on Critical Legal Analysis- Summer 2010, nor are they required to produce any audio or video recordings as Rutgers has plainly established that such recordings do not exist. Rutgers is further not compelled to produce plaintiff's own disciplinary file without the required FERPA release form signed by the student to permit disclosure. Finally, Rutgers is not required to create a Vaughn Index to the 2,600 pages of unredacted documents provided to the Court as it would not further explain to the Court nor the plaintiff why the contents of the disciplinary files are withheld as confidential "educational records" within the meaning of FERPA. For these reasons, the additional relief plaintiff is seeking in his motion is denied.

Very truly yours,



Honorable Frank M. Ciuffani
Presiding Judge, Chancery Division