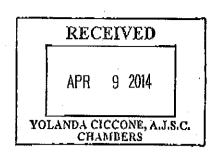
WALTER M. LUERS, ESQ. - 034041999 LAW OFFICES OF WALTER M. LUERS, LLC Suite C202 23 West Main Street Clinton, New Jersey 08809 Telephone: 908,894.5656 Attorney for Plaintiff



JOHN PAFF,

Plaintiff,

٧.

BOUND BROOK SCHOOL DISTRICT and CLIFFORD DOLL in his official capacity as Business Administrator/Board Secretary and Records Custodian of the Bound Brook School District,

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY

DOCKET NO. SON-L 448-14

CIVIL ACTION

ORDER TO SHOW CAUSE

THIS MATTER being brought before the Court by Law Offices of Walter M. Luers, LLC, attorney for Plaintiff John Paff, seeking relief by way of summary action pursuant to R. 4:67-1(a), based upon the facts set forth in the verified complaint and supporting papers filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to N.J.S.A. 47:1A-6 and for good cause shown,

1

- A. Ordering disclosure of copies of the documents requested by

  Plaintiff in his February 10, 2014 OPRA request to Defendants, which were the Snyder

  Investigative Report and for copies of correspondence dated February 9, 2011 from

  Nicholas Stevens, Esq. to Bruce Padula, Esq. and all attachments;
  - B. An award of costs of this action and reasonable attorneys' fees;
- C. Such other, further and different relief as the Court may deem equitable and just.

And it is further ORDERED that:

- 1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the Defendants personally or by certified mail, return receipt requested, within \_\_\_\_\_ days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.
- 2. The Plaintiff must file with the Court their proof of service of the pleadings on the Defendants no later than three (3) days before the return date.
- 4. The Plaintiff must file and serve any written reply to the Defendants' order to show cause opposition by 13, 2014. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the

reply papers must be sent directly to the chambers of the Honorable Yolanda Ciccone, A.J.S.C.

- 5. If the Defendants do not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the Plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.
- 6. If the Plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the Court no later than three (3) days before the return date.
- 7. Defendants take notice that the Plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer and opposition papers and proof of service before the return date of the order to show cause.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A list of these offices is provided. Include a \$135 filing fee payable to the "Treasurer, State of New Jersey." You must also send a copy of your answer and opposition papers to the Plaintiff's attorney whose name and address appear above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer and opposition papers (with the fee) or judgment may be entered against you by default.

- 8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.
- 9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the Court and parties are advised to the contrary no later than \_\_\_\_\_\_ days before the return date.

HON. YOLANDA CICCONE, A.J.S.

WALTER M. LUERS, ESQ. - 034041999 LAW OFFICES OF WALTER M. LUERS, LLC Suite C202 23 West Main Street Clinton, New Jersey 08809 Telephone: 908.894.5656 Attorney for Plaintiff

JOHN PAFF,	SUPERIOR COURT OF NEW JERSEY
	LAW DIVISION: SOMERSET COUNTY
Plaintiff,	·
	DOCKET NO
<u>v.</u>	
	CIVIL ACTION
BOUND BROOK SCHOOL DISTRICT	
and CLIFFORD DOLL in his official	VERIFIED COMPLAINT
capacity as Business Administrator/Board	
Secretary and Records Custodian of the	
Bound Brook School District,	
Defendants.	

Plaintiff John Paff through his undersigned counsel Law Offices of Walter M.

Luers, LLC, by way of complaint against the Defendants Bound Brook School District and

Clifford Doll in his official capacity as Business Administrator/Board Secretary and Records

Custodian of the Bound Brook School District, alleges as follows:

## PRELIMINARY STATEMENT

1. This is an action alleging violations of the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA") and the common law right of access seeking to require disclosure of (1) an investigative report prepared by Defendants' agent; and (2) correspondence and attachments sent from Nicholas Stevens, Esq. to Bruce W. Padula, Esq. on or about February 9, 2011.

# THE PARTIES

- 2. Plaintiff John Paff is a resident of Franklin Township, New Jersey. His address is P.O. Box 5424 Somerset, NJ 08875.
- 3. Defendant Bound Brook School District ("District") is a public body corporate and politic of the State of New Jersey and is a political subdivision of the State. The District's principal place of business is LaMonte Building, 337 West Second Street, Bound Brook, New Jersey 08805. The District is a "public agency" as the term is defined by OPRA, *N.J.S.A.* 47:1A-1.1.
- 4. Defendant Clifford Doll is the Business Administrator/Board Secretary of the Defendant District and is the District Records Custodian as well as the "custodian of a government record" as that term is defined by *N.J.S.A.* 47:1A-1.1. On information and belief, Doll's principal place of business is Lamonte Building, 337 West Second Street, Bound Brook, New Jersey 08805.

# JURISDICTION AND VENUE

- 5. The Court has subject matter jurisdiction of this action pursuant to *N.J.S.A.* 47:1A-6 and the common law.
- 6. Venue is proper in this Court pursuant to R. 4:3-2(a)(2) because all of the relevant events occurred in this County, and the public agency, the District, is physically located within this County.

# **FACTUAL ALLEGATIONS**

7. Plaintiff's OPRA request relates to a lawsuit between a District employee and the District that was settled for \$250,000.

- 8. In January 2014, District Employee Shari Duddy, who is the person who sued the District, settled a discrimination lawsuit against the District for \$250,000.
- 9. On August 11, 2011, Duddy filed an amended complaint against the Bound Brook Board of Education and several other defendants alleging (1) "harassment;" (2) "bullying;" (3) "discrimination;" (4) discrimination on the basis of "race and religion;" (5) conduct that "violates public policy;" (6) "intentional infliction of emotional distress;" (7) retaliation; (8) false light; (9) defamation; and (10) unlawful retention of personal property. The amended complaint did not allege sexual harassment.
- 10. On February 10, 2014, Plaintiff submitted a written OPRA request to Defendants, in which he asked for copies of the Snyder Investigative Report that was sent to Duddy's lawyer on or about February 17, 2011, and for copies of correspondence dated February 9, 2011 from Duddy's lawyer (Nicholas Stevens, Esq.) to the Defendants' lawyer (Bruce Padula, Esq.) and all attachments.
- On February 19, 2014, the Defendant Business Administrator Clifford Doll denied access to these records on the grounds that the responsive documents were "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position."
- 12. The documents requested by Plaintiff are public records and subject to disclosure. Plaintiff submitted a valid OPRA request.
- 13. Plaintiff has a strong public interest and legitimate private interest in obtaining the requested documents. Plaintiff submits hundreds of OPRA requests to public

agencies at all levels of government. Sometimes he does so to ensure compliance with OPRA or the Open Public Meetings Act or financial disclosure laws. Other times he reads about matters in the press, especially those involving official misconduct or police misconduct, and he files OPRA requests for information. Often Mr. Paff will frequently follow-up such OPRA requests by filing internal affairs complaints, ethics grievances or complaints with the Division of Local Government Services or the Department of Education if warranted.

14. Defendant's interest in non-disclosure does not outweigh Plaintiff's interest in disclosure.

# **COUNT I: VIOLATION OF OPRA**

- 15. The Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-14 of the Plaintiff's complaint as though fully set forth at length herein.
- The Defendants have violated OPRA by not providing copies of the documents requested by him.

# **COUNT II: VIOLATION OF COMMON LAW RIGHT OF ACCESS**

- 17. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1-16 of the Plaintiff's complaint as though fully set forth at length herein.
- 18. Plaintiff has a common law right of access to receive copies of the documents requested by Plaintiff on February 10, 2014.
- 19. Plaintiff has a legitimate private interest and wholesome public interest in the requested records.

20. Defendant has no legitimate interest in maintaining the secrecy of these documents. Therefore, the Defendant has violated Plaintiff's common law right of access.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against the Defendant:

- A. Ordering Defendants to disclose copies of the documents requested by him on February 10, 2014;
  - B. Awarding Plaintiff costs and reasonable attorneys' fees; and
  - C. For such other or further relief as this Court deems just and equitable.

# CERTIFICATION PURSUANT TO R. 4:5-1

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

# **CERTIFICATION PURSUANT TO R. 1:38-7(B)**

I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future.

# **DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Walter M. Luers, Esq. is designated as trial counsel on behalf of Plaintiff.

# Respectfully Submitted,

LAW OFFICES OF WALTER M. LUERS, LLC

Bv

DATED: April 5, 2014

Walter M. Luers, Member

Suite C202

23 West Main Street

Clinton, New Jersey 08809

Telephone:

908.894.5656

# **VERIFICATION**

John Paff, of full age, certifies as follows:

- 1. I am the Plaintiff in the action captioned "John Paff v. Bound Brook School District, et al." All of the facts stated in the verified complaint to which this Verification is attached are true, and as to those facts that are alleged on information and belief, I believe those facts to be true.
- 2. 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.

John Paff

Dated: April 7, 2014

WALTER M. LUERS, ESQ. – 034041999 LAW OFFICES OF WALTER M. LUERS, LLC Suite C202 23 West Main Street Clinton, New Jersey 08809 Telephone: 908,894,5656

JOHN PAFF.

Attorney for Plaintiff

Plaintiff,

V.

BOUND BROOK SCHOOL DISTRICT and CLIFFORD DOLL in his official capacity as Business Administrator/Board Secretary and Records Custodian of the Bound Brook School District.

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY

DOCKET NO.

CIVIL ACTION

CERTIFICATION OF WALTER M. LUERS

WALTER M. LUERS, of full age, who is the attorney for the Plaintiff in this action, hereby certifies and says:

- Attached to this Certification are true and correct copies of Plaintiff's OPRA request; Defendants' denial of access; and the February 17, 2011 correspondence referenced in Plaintiff's OPRA request.
- 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.

DATED: April 7, 2014



John Paff <opengovtissues@gmail.com>

### RE: OPRA Request Bound Brook Board of Education

1 message

Theresa Zacharewich <TZacharewich@bbrook.org>

To: John Paff < paff@pobox.com>

Co: Edward Hoffman <eHoffman@bbrook.org>, Dan Gailagher <dGallagher@bbrook.org>

Wed, Feb 19, 2014 at 2:31 PM

Mr. Paff: In response to your e-mail below, we are not at liberty to release either of these items.

Mr. Snyder's investigative report and Mr. Stevens' letter constitute "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position."

Accordingly, they are exempt from disclosure as public records pursuant to N.J.S.A. 47:1A-1.1.

Clifford Doll, Interim Business Administrator

-----Original Message----From: John Paff [mailto:paff@pobox.com]
Sent: Monday, February 10, 2014 1:41 PM
To: Theresa Zacharewich; paff@pobox.com
Subject: OPRA Request Bound Brook Board of Education

Bound Brook Board of Education

Please accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA) and the common law right of access. Please respond and send all responsive documents to me via e-mail at paff@pobox.com. If e-mail is not possible, please fax responses and responsive records to me at 908-325-0129. Also, I would appreciate it if you would acknowledge your receipt of this e-mail.

#### Records requested:

- 1. Copy of Hal Snyder's investigative report that was enclosed with Bruce Padula's February 17, 2011 letter to Nicholas Stevens.
- 2. Mr. Steven's February 9, 2011 letter, with attachments, that Bruce Padula's February 17, 2011 letter responded to.

Thank you,

John Paff (voice - 732-873-1251)

Attachment: This request as a text file.

# CLEARY GIACOBBE ALFIERI JACOBS LLC

BRUCE W. PADULA, Partner bpadula@cgajlaw.com

Reply to: Matawan Office

February 17, 2011

# FOR SETTLEMENT/RESOLUTION PURPOSES ONLY

Via Facsimile (973.226.0031) and Regular Mail

Nicholas Stevens, Esq. Starr, Gern, Davison & Rubin, P.C. 105 Eisenhower Parkway Roseland, New Jersey 07068-1050

Re: Bound Brook Board of Education and Shari Duddy

Dear Mr. Stevens:

Please accept this correspondence in reply to our recent telephone conference and to your correspondence dated February 9, 2011. Unfortunately, that correspondence, as well as Ms. Duddy's recent actions, appear to be nothing more than a fabrication and misrepresentation of the facts of this matter in an attempt to bolster a legally baseless harassment cause of action and manufacture a whistleblower claim. I will discuss each of your contentions below.

My January 31, 2011 correspondence (to which you responded nine (9) days later and only after I made a follow-up telephone call to your office on February 8, 2011) is not, as you characterize it, an effort to "stonewall" the District's obligations. Rather, my previous correspondence sought to adequately address your client's concerns and provide Ms. Duddy with accommodations even after the District conducted an investigation into her complaint. Further, as explained in that correspondence, it sought to precisely identify your client's additional concerns, which she attempted to verbally convey to the Superintendent in a disorganized manner.

Your correspondence indicates that you conclude that the District's investigation did not comply with the New Jersey Law Against Discrimination; however, you provide no factual basis for this conclusion. Rather, it relies upon your client's own self-serving statements. As we previously discussed - and as was explained to Ms. Duddy - at Ms. Duddy's request, the District agreed to change the word "preoccupation" to "concern." Again, this was specifically requested by Ms. Duddy and the Board's records will be amended to memorialize this change.

You indicate that the memorandum contains a misstatement of fact – that Ms. Duddy complained about other members of the Child Study Team. I did not conduct the investigation; therefore, I am not aware about what Ms. Duddy did or did not complain. I do point out, however, that in our several conversations, you alleged on more than one occasion that part of Ms. Duddy's complaint is that other members of the child study team speak Spanish in her presence. Thus, that statement appears to contradict the contention in your letter that Ms. Duddy never complained about other members of the Child Study Team.

Moreover, I note that the investigation completed by Mr. Hal Snyder does reference the allegation of a forged signature. It further indicates that the matter was dropped. In that regard, even though not legally required and in the spirit of working towards an amicable resolution of this matter, I am enclosing a copy of the investigation report. I trust that this demonstrates the Board's good-faith efforts at addressing Ms. Duddy's concerns and resolving this matter.

Your correspondence also includes a paragraph containing what appears to be a litany of alleged "erroneous statements." Unfortunately, this appears to be part of Ms. Duddy's ongoing attempts to fabricate an otherwise baseless cause of action. It is not disputed that Ms. Duddy was provided a memorandum advising her of the outcome of Mr. Snyder's investigation. It is not disputed that Ms. Duddy does not have a copy of Mr. Snyder's report. If she did, it would not be necessary for you to request a copy. The remainder of Ms. Duddy's complaints in that paragraph appear to be nothing more than concern of the use of the word "requested" and of the term "field work." I trust that word-choice issues can be resolved.

Also, it is my understanding that a response was provided to all communication – including the email of December 17, 2010. Specifically, it is the District's recollection that Dr. Hoffman responded to Ms. Duddy about that email.

Moreover, as I explained in my previous correspondence – and as you acknowledged during our telephone conference on February 8, 2011 – Ms. Duddy presented her additional complaints to Dr. Hoffman in a frenzied and disorganized fashion as she was flipping through pages of a steno notebook. As she attempted to relay these to the Superintendent, those complaints appeared to predate Mr. Snyder's investigation. It was for precisely this reason that the Board requested (not demanded) that Ms. Duddy place her complaint in writing.

You further contend that there has been a "spate of requests for additional CST work" of which I should be aware. It is unclear what your implication is by this statement. Ms. Duddy is assigned work within the scope of her duties. Is it your contention that this work should be assigned elsewhere. To do so would undoubtedly provoke a claim by Ms. Duddy that work is being taken away from her in retaliation for her complaints.

Additionally, your letter responds to the numbered paragraphs in my January 31, 2011 correspondence. I respond as follows:

1. There is no attempt to "sweep" anything "under the rug." In fact, it was the intent of that correspondence to memorialize our discussion and provide Ms. Duddy with the majority of the accommodations she requested. Your comment about "distrust" demonstrates a basic misunderstanding of the nature of special education law and access to pupil records. It is the intent of the Board to provide Ms. Duddy with remote access to anything she requires to do her job while maintaining the security of these sensitive pupil records. Notwithstanding, it is my understanding that Ms. Duddy has now been provided with the computer she previously used. Thus, it appears that at least some of her issues have been resolved in this regard.

Your further response again demonstrates the conflicting requests and complaints made by Ms. Duddy. She must perform the functions of her job. Is it her contention that the position of LDTC is never required to be in the special services office unless there is a departmental meeting. Certainly, such a contention strains credulity.

- 2. Your reply provides general statements but not specific allegations. It is my recommendation that Mr. Snyder renew his investigation and obtain specific information relative to these concerns. Of course, you are welcome to be present during any such interview. If you choose to participate, please let me know, so that I will also be present.
  - 3. As the report is enclosed, I trust this aspect of this matter is resolved.

Lastly, I will inquire about having a District translator present at that specific meeting.

Importantly, you should be aware that Ms. Duddy's actions and comments since the investigation are causing concern among employees. For example, Ms. Duddy is threatening litigation and has commented to Dianne Ianniello, "you could be in a very bad position," "make sure you're protected," and "when you're deposed." These comments are inappropriate, unprofessional and are exacerbating the current situation. Further, these comments demonstrate that Ms. Duddy has already predetermined to file litigation against the Board and undermine these supposed good-faith efforts at reaching an amicable resolution. I request that you: (1) advise your client to cease making any such threatening comments; and (2) advise whether Ms. Duddy has determined to litigate this matter.

Please do not mis-take the tone of this correspondence. It had been and remains the District's hope to amicably resolve this matter; however, the numerous allegations and contentions of your February 9, 2011 correspondence warranted a reply. I recommend that, in the spirit of continued cooperation, the parties conduct an in-person meeting with counsel, Ms. Duddy, Dr. Hoffman and Ms. Ianniello to discuss and assuage Ms. Duddy's concerns.

Very truly yours,

Bruce W. Padula

c: Dr. Edward Hoffman, Superintendent (via email only)

Law Offices of Walter M. Luers, LLC

Suite C202 23 West Main Street Clinton, New Jersey 08809

Telephone: 908.894.5656 Facsimile: 908.894.5729

www.luerslaw.com

April 7, 2014

Walter M. Luers, Esq.\*

\*Also admitted in New York

Writer's Direct Email: wluers@luerslaw.com

Hon. Yolanda Ciccone, A.J.S.C. Superior Court of New Jersey Somerset County Courthouse 20 North Bridge Street, Third Floor Somerville, New Jersey 08876

Re: Paff v. Bound Brook School District, et al.

Dear Judge Ciccone:

We represent Plaintiff John Paff, and we are submitting this Letter Brief in lieu of a formal brief in support of this action, which is being initiated as a Verified Complaint and Order to Show Cause pursuant to the summary procedure set forth in R. 4:67-2(a). For the reasons discussed below, the Court should execute Plaintiff's Order to Show Cause and should, once this matter is heard, order the Defendants to produce the documents being withheld. Defendants have denied access to an investigative report prepared by an agent of the Defendants regarding allegations made by one of Defendant's employees, as well as correspondence relating to that dispute, which ultimately led to the filing of a lawsuit and a \$250,000 settlement of the allegations by the public employee.

# STATEMENT OF FACTS

The Court is referred to the Verified Complaint for a recitation of the facts.

Hon. Yolanda Ciccone, A.J.S.C. April 7, 2014 Page 2 of 8

# LEGAL ARGUMENT

## **POINT I**

# PLAINTIFF'S ACTION SHOULD PROCEED IN A SUMMARY MANNER

"A person who is denied access to a government record by the custodian of the record, . . . may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court." *N.J.S.A.* 47:1A-6. Once instituted, "[a]ny such proceeding shall proceed in a summary or expedited manner." *Id.* "This statutory language requires a trial court to proceed under the procedures prescribed in Rule 4:67." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 378 (App. Div. 2003). Any such action must be initiated by Order to Show Cause, supported by a verified Complaint. *Id.* (citing *R.* 4:67-2(a)). Here, because OPRA authorizes actions under it to proceed in a summary manner, and Plaintiff's request for an order to show cause is supported by a verified complaint and exhibits, the order to show cause should be granted so this matter may proceed in a summary manner. *R.* 4:67-2(a).

## POINT II

# THE DOCUMENTS ARE PUBLIC RECORDS UNDER OPRA

As the Court knows, the Open Public Records Act ("OPRA") mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing N.J.S.A. 47:1A-1). "The purpose of OPRA 'is to maximize the evils inherent in a secluded process." *Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v.

Hon. Yolanda Ciccone, A.J.S.C.

April 7, 2014

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Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). As recently stated by the New Jersey Supreme Court in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011), "[t]hose who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions."

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A.* 47:1A-6; *Asbury Park Press v. Monmouth County*, 406 N.J. Super. 1, 7 (App. Div. 2009).

These lofty descriptions of the purposes of OPRA are not mere bromides or empty statements of legislative intent. Our Supreme Court has stated that "Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011).

The burden of proof in showing that a denial of access was justified rests solely with the Records Custodian. *N.J.S.A.* 47:1A-6; *Asbury Park Press v. Monmouth County*, 406 N.J. Super. 1, 7 (App. Div. 2009). Here, the documents sought by Plaintiff are "government records" within the meaning of OPRA. Under OPRA, a "government record":

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

Hon. Yolanda Ciccone, A.J.S.C. April 7, 2014 Page 4 of 8

received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *N.J.S.A.* 47:1A-1.1.

Here, the issue is whether the requested documents, which are the Snyder Investigative Report and the February 9, 2011 correspondence ("Report" and "Correspondence," collectively, "Records") are public records and are not subject to any exception.

In their denial of access, Defendants claimed that the Records are not public records because they are maintained in connection with a grievance filed by or against an employee. *N.J.S.A.* 47:1A-1.1. OPRA excludes from the definition of a "public record" "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position[.]" *N.J.S.A.* 47:1A-1.1. The issue is wither the Records are "information generated by or on behalf of public employers . . . in connection with . . . any grievance filed by or against an individual[.]" The answer is no.

The Records were not generated in connection with any grievance. The dispute between the District and its employee was not a grievance. A "grievance" is a term of art that means an allegation that there has been a violation of a collective bargaining agreement by the employer or the employee. A grievance may only arise in the context of a collective bargaining agreement. In Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1, 8 (App. Div. 2009), aff'd, 201 N.J. 5 (2010) (per curiam), the Appellate Division held that a sexual harassment lawsuit filed in Superior Court did not constitute a "grievance" within the meaning of

Hon. Yolanda Ciccone, A.J.S.C. April 7, 2014 Page 5 of 8

N.J.S.A. 47:1A-1.1. "A complaint filed in the Superior Court is not the same as a 'grievance' within the context of employment relationships." *Id*.

Asbury Park cited Red Bank Regional Ed. Ass'n v. Red Bank Regional High School Board of Ed., 78 N.J. 122, 127 (1978). In that case, the issue was whether "grievance," as defined in the union's collective bargaining contract, gave the union (as separate and distinct from its individual members) a right to file a grievance in the union's name. Id. When discussing grievances, that case referenced the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., which required public employers to "negotiate written policies setting forth procedures by means of which their Employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization." N.J.S.A. 34:13A-5.3. Asbury Park also cites this definition. Asbury Park Press, 406 N.J. Super. at 9. The other case cited by Asbury Park, which was Saginario v. Attorney General, 87 N.J. 480 (1981), also referenced "grievances" in the context of a negotiated procedure adopted between an employer and a collective bargaining unit.

Here, there is no evidence that the dispute between the District and the employee resulted in the filing of a "grievance" pursuant to any collective bargaining agreement. Rather, just like the circumstances in *Asbury Park Press*, the employee chose not to file a grievance, but instead filed a lawsuit. Importantly, the Appellate Division made a distinction between a "grievance" and a lawsuit. The fact that the employee in *Asbury Park Press* elected to file a sexual harassment lawsuit meant that the defendants in that case could not rely on the

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"grievance" exception in OPRA. In that respect, this case presents the same set of circumstances as in *Asbury Park Press*.

Defendants may argue that the Records are somehow subject to the deliberative process privilege, but that privilege only applies to opinions. "The deliberative process privilege is a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated." *In re Liquidation of Integrity Ins. Co.*, 165 N.J. 75, 83 (2000). "Purely factual material that does not reflect deliberative processes is not protected." *Id.* at 85. To be covered by the privilege, the material must be both "pre-decisional" and "must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." *Id.* Here, the Report was not a recommendation; rather it contained final conclusions.

For the foregoing reasons, the Records do not constitute documents or information generated in connection with a grievance or sexual harassment complaint filed with a public employer.

If this Court should deny access to the records requested under OPRA, the Court should grant access under the common law right of access. The public's right of access to records is broader under the common law right of access than under OPRA. "Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." *N.J.S.A.* 47:1A-8; see also North Jersey Media Group Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 536 (Law. Div. 2006); Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 516 (App. Div. 2004). Thus, the right of access to records under the common law is broader than under OPRA. North Jersey Media Group, 389 N.J. Super. at 537.

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The common law right of access has three elements: (1) the records must be common law public documents; (2) the person who seeks 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.*, 141 N.J. at 46; *see also Keddie v. Rutgers, The State University*, 148 N.J. 36, 50 (1997) (discussing these three elements).

Common law public records "include almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file." Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992). Here, the records sought here are public records because they are kept by the public agency. Higg-A-Rella, Inc., 141 N.J. at 46 (defining a common-law record as one that is made by a public official in the exercise of their public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office). Thus, Plaintiffs have standing to request these documents under the common law, a requirement that is easily met. "A citizen, and the press on its behalf, does not have to prove any personal interest in order to satisfy the common law standing requirement." Daily Journal v. Police Dep't of City of Vineland, 351 N.J. Super. 110, 122 (App. Div. 2002).

To determine whether the records should be disclosed to Plaintiffs, this Court must balance Plaintiffs' interest in disclosure against Defendants' interest in confidentiality. In weighing whether disclosure outweighs confidentiality, New Jersey courts have weighed several factors, including

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who

have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency, and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).

The principal reason why access should be granted under the common law is because this dispute between the District and the employee resulted in litigation that culminated in a \$250,000 settlement. A settlement of this amount may suggest to some that there was some culpability, or at least vulnerability, on the part of the District. Plaintiff takes an interest in how municipalities and school districts spend taxpayer money, particularly with regard to the resolution of lawsuits. If he received these documents, he would probably write about the investigation on his blog and post about it on social media.

## POINT III

## AWARD OF REASONABLE ATTORNEYS' FEES

If the Court orders Defendants' to produce the documents at issue, the Court should find that Plaintiff is the prevailing party and, under OPRA's fee-shifting provision and the common-law right of access, award Plaintiff a reasonable attorneys' fee and costs. *N.J.S.A.* 47:1A-6; *Mason v. Hoboken*, 196 N.J. 51, 79 (2008) (concluding that catalyst theory applies to fee awards under both OPRA and the common law right of access).

Respectfully submitted,

Walter M. Luers

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Attorney for Plaintiff

JOHN PAFF,		SUPERIOR COURT OF NEW JERSEY
		LAW DIVISION: SOMERSET COUNTY
Plainti	ff,	
		DOCKET NO
v.		
		CIVIL ACTION
BOUND BRO	OK SCHOOL DISTRICT	
and CLIFFOR	D DOLL in his official	ORDER
capacity as Bu	siness Administrator/Board	
Secretary and	Records Custodian of the	
Bound Brook S	School District,	
Defen	dants.	

A. **ORDERED** that Defendants shall within 20 days after service of this Order upon them provide Plaintiff with copies of the documents requested by him in his February 10, 2014 OPRA request to Defendants, which are (1) a copy of Hal Snyder's Investigative Report that was enclosed with Bruce Padula, Esq.'s February 17, 2011 letter

to Nicholas Stevens, Esq.; and (2) Stevens' February 9, 2011 letter and attachments to Padula; and it is further

- B. **ORDERED** that Plaintiff is the prevailing party in this matter and that counsel for Plaintiff shall serve and file their motion and fee certification for reasonable attorneys' fees and costs within 20 days after service of this order upon Plaintiff; and it is further
- C. **ORDERED** that Plaintiff shall serve a copy of this Order upon Defendants within seven days of service of this order upon Plaintiff.

	HON. YOLANDA CICCONE, A.J.S.C.	
This order was:		
OPPOSED		
UNOPPOSED		