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Walter M. Luers, Esq.*
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August 4, 2014

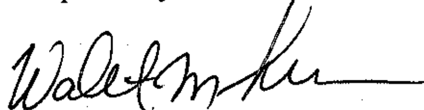
Deputy Clerk of the Superior Court
Civil Division
Passaic County Court House
77 Hamilton Street
Paterson, New Jersey 07505

Re: ***Paff v. Clifton Board of Education, et al.***
Docket No. PAS-L-000349-14

Dear Sir or Madam:

On behalf of the Plaintiff, I enclose for filing the original and one copy of our Notice of Motion, original letter brief, two copies of our proposed order and $30 check. Please return one copy of the notice of motion stamped "received and filed" in one of the enclosed self-addressed, stamped envelopes, and return the order in the second such envelope. Thank you, and please let us know if we may be of any assistance.

Respectfully submitted,



Walter M. Luers

cc: Hon. Ralph L. DeLuccia, J.S.C. (via First-Class Mail)
Donald T. Okner, Esq. (via email and First Class Mail)

WALTER M. LUERS, ESQ. - 034041999
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Attorney for Plaintiff

JOHN PAFF, Plaintiff, v. CLIFTON BOARD OF EDUCATION and KAREN L. PERKINS in her official capacity as Business Administrator/Board Secretary and Records Custodian, Defendants.	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY** **DOCKET NO. PAS-L-000349-14** **CIVIL ACTION** **NOTICE OF MOTION**

TO: Donald T. Okner, Esq.
Dwyer Connell & Lisbona
100 Passaic Avenue
Fairfield, New Jersey 07004

COUNSEL:

PLEASE TAKE NOTICE that on August 22, 2014, at 9 a.m. or as soon thereafter as counsel may be heard the undersigned, Walter M. Luers, Esq. of the law firm Law Offices of Walter M. Luers, LLC, counsel for Plaintiffs shall move pursuant to Court *Rule* 1:38-12 before the Honorable Ralph L. DeLuccia, J.S.C., Superior Court, Passaic County Court House, 77 Hamilton Street, Paterson, New Jersey for an order unsealing the May 23, 2014 submission of Defendants.

PLEASE TAKE FURTHER NOTICE that Plaintiff shall rely upon the enclosed Letter Brief. A proposed form of order is included. Oral argument is not requested.

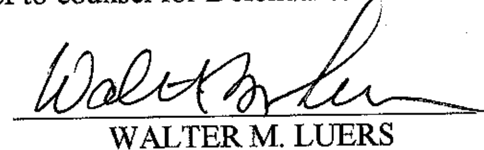
The discovery end-date was August 3, 2014. No arbitration date or trial date has been set.

Law Offices of Walter M. Luers, LLC
Attorney for Plaintiff

August 4, 2014 BY: WALTER M. LUERS

CERTIFICATION OF SERVICE

I hereby certify that I am contemporaneously mailing by First-Class Mail one copy of Plaintiffs' Notice of Motion and Letter Brief to counsel for Defendants named above.



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August 4, 2014

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Honorable Ralph L. DeLuccia, J.S.C.
Superior Court – Law Division
Passaic County Courthouse
77 Hamilton Street
Paterson, New Jersey 07505

Re: ***Paff v. Clifton Board of Education, et al.***
Docket No. PAS-L-000349-14

Dear Judge DeLuccia:

We write this letter brief in support of our motion to unseal Defendants' May 23, 2014 *ex parte* submission pursuant to Court *Rule* 1:38. (Of course, this motion does not seek access to documents that the Court previously held were not subject to OPRA, which were the redacted June 19, 2013 minutes and attached letter).

"The public has a common-law right of access to judicial proceedings and a right to inspect judicial records." *Lederman v. Prudential Life Ins. Co. of America, Inc.*, 385 N.J. Super. 307, 315 (App. Div. 2006) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984)). "The presumption of openness to court proceedings requires more than a passing nod. Open access is the lens through which the public views our government institutions. It is essential to foster public confidence in the judiciary." *Id.* at 323.

> There is a presumption of public access to documents and materials filed with a court in connection with civil litigation. That right exists under the common law as to the litigants and the public.... [T]he right of access is not absolute. Under both the

> common law and the First Amendment, a court may craft a protective order. [T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the person who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption. Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure.

Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 307, 316, 897 A.2d 362, 368 (App. Div. 2006) (quoting *Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. at 375-76).

The presumption of access also applies to all "non-discovery pretrial motions, and attaches to all 'materials, documents, legal memoranda and other papers" that are "filed" with the Court, regardless of whether the Trial Court relied upon them and regardless of the disposition of the motion. *Id.* at 316-17 (quoting *Hammock*).

"To determine whether to seal the record, the court must conduct a 'flexible balancing process . . . to determine whether the need for secrecy substantially outweighs the presumption of access.'" *Id.* at 317 (quoting *Hammock*).

"The burden of proof rests with the person who seeks to overcome the 'strong presumption of access' to establish 'by a preponderance of the evidence that the interest in secrecy outweighs the presumption.'" *Id.* (quoting *Hammock*). The presumption is "very strong" in favor of public access. *Id.* "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." *Id.* at 317.

In the context of the rules governing sealing in Federal Court, the proponent of a motion to seal must show (1) the nature of the materials sought to be sealed; (2) the "legitimate private or public interests which warrant the relief sought," (3) similar to New Jersey jurisprudence, the "clearly defined and serious injury that would result if the relief sought is not

granted," and (4) "why a less restrictive alternative to the relief sought is not available." *Recchia v. Kellogg Co.*, 951 F. Supp. 2d 676, 694 (D.N.J. 2013).

Rule 1:38-11 authorizes the Court to seal records from "the public," and *Rule* 1:38-12 gives any member of the public the right to move for the unsealing of that record. In all instances, the burden of proof to seal and continue to seal a record is on the proponent of sealing.

Defendants have done nothing to justify the sealing of a portion of this case. They did not even make a motion to submit their filing under seal, in violation of Court *Rule* 1:38-11(d), which requires both a motion and court order. In this case, the May 23, 2014 submission was submitted under seal without a motion by Defendants and at the invitation of the Court.

Based on colloquy during the July 16, 2014 case management conference, it is our understanding that Defendants' *ex parte* submission was a certification or affidavit by the Defendants' day-to-day attorney. Counsel for the Defendants also suggested that the information contained information subject to the attorney-client privilege.

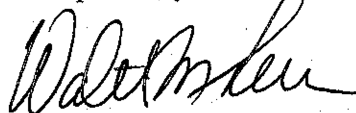
Prior to the 2009 amendments to the Court *Rules* that added *Rule* 1:38, it might have been proper practice to submit information to the Court informally under seal and in an *ex parte* manner. However, unlike the Court's in camera review of the documents that are subject to Plaintiff's OPRA request (which are the June 19, 2013 minutes and attached letter), the May 23, 2014 submission is being used to persuade the Court and to create, for the first time, a factual basis for Defendants' OPRA denial. To overcome both the "strong" presumption that Court records are open to the public and Plaintiff's right in an adversarial process to review and challenge all information presented to the Court, the Defendants must present evidence showing that sealing is necessary to prevent a "clearly defined and specific injury."

In this case, the privilege is being used as both sword and shield. Defendants successfully withheld disclosure of Item 4 of the June 19, 2013 minutes from Plaintiff and the letter attached thereto on the basis that it was related to litigation, but now Defendants are also using the attorney-client privilege to shield its arguments to the Court. Defendants cannot have it both ways. If the non-disclosure of the June 19, 2013 minutes and letter attachment has sufficient import, then Plaintiff is entitled to know the facts that form the basis of the non-disclosure and the Court's ruling that affirmed that non-disclosure. Waiver of a privilege is not a clearly defined and specific injury. In some cases, parties may have information that would be helpful to them, but they cannot use that information without waiving the privilege. For example, in the context of personal injury cases, it is understood that when a person puts their health at issue, they are expected to waive the doctor/patient privilege and disclose their medical records to their adversary. Here, Defendants elected to transmit information to the Court via a sworn statement by one of their attorneys. Defendants elected to turn their counsel into a fact witness. Having done so, they must now show some "clearly defined and serious injury" to withhold that information from the public.

On the current record, there is absolutely no evidence that has been shared with Plaintiff that a "clearly defined and serious injury" to any person or entity would occur if the sworn statement at issue were disclosed.

For these reasons, Plaintiff's motion to unseal the Defendants' May 23, 2014 submission should be granted.

Respectfully submitted,



Walter M. Luers