Law Offices of
Walter M. Luers, LLC
Suite 2
122 West Main Street
Clinton, New Jersey 08809
Telephone: 908.894.5656
Facsimile: 908.894.5729
www.luerslaw.com

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Walter M. Luers, Esq.*
*Also admitted in New York
Writer's Direct Email: wluers@luerslaw.com

VIA OVERNIGHT DELIVERY

Mark Neary, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0970

Re: *Paff v. Galloway Township, et al.*
Appellate Division Docket No: A-0125-14-T4
Supreme Court Docket No. 077692

Dear Honorable Justices of the Supreme Court:

Please accept this letter brief in lieu of a more formal brief in Reply to Respondents' Opposition to Plaintiff's Petition for Certification. As discussed within, this Court should reject Respondents' arguments and grant this Petition, to enforce the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*'s ("OPRA") plain language, to reverse the erroneous application of the "creation of a record" doctrine from below, and to clarify the proper role of the Government Records Council ("GRC").

POINT I

THIS COURT MUST REJECT RESPONDENTS' AND THE APPELLATE DIVISION'S POSITION ON THE "PLAIN LANGUAGE" OF OPRA

This case concerns the plain language of the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* ("OPRA") and its mandate that "information stored or maintained electronically" is a "government record" subject to the statute. *N.J.S.A.* 47:1A-1.1. Petitioner reads this plain language for a simple conclusion, which no party contradicts. OPRA defines "information stored or maintained electronically" as a "government record" because ***under OPRA citizens may request information stored in a computer***. *N.J.S.A.* 47:1A-1.1. The Trial Court drew the same conclusion when it ordered Respondents to disclose to Petitioner a list of data fields from government emails. The Appellate Division's opinion did not discuss the meaning of this provision, and this Petition must be granted to reverse the decision below and make clear that the public's right to data stored on computers is equal to the public's right to copy documents maintained in paper.

Respondents' and their *amici*'s claim that Petitioner's request should be denied under the "actual text of OPRA," (Pb1), and "OPRA as enacted by the Legislature" (Amicus Brief of the New Jersey State League of Municipalities, at 2, hereafter "NJSLOM") is unsupported by any legal authority, because they

have not anywhere cited to, much less discussed, OPRA's language on "information stored or maintained electronically." By contrast, Petitioner has discussed this at length. (Pb at 6-9). Petitioner also cites the extensive New Jersey, sister state and federal authority that supports, without exception or qualification, Petitioner's and the trial court's interpretation of the plain language mandate that "information stored or maintained electronically" is a "government record." *N.J.S.A.* 47:1A-1.1. (Pb9-15). Respondents and *amici* do not engage with this sizable body of law that shows their position to be untenable, but instead dismiss it as "perhaps relevant to a legislative hearing" (Brief of NJSLOM, at 2).

Not only do Respondents fail to discuss the more than one dozen New Jersey, sister state and federal cases cited by Petitioner, which all hold that a request such as Petitioner's should be permitted because it does not "create a record," (Pb9-15), their only response has been to initiate an *ad hominem* discussion that is unrelated to the issues before this Court. Specifically, Respondents now advise in their new "comments" on this case that Petitioner is a "prodigious OPRA requestor and litigator," who has "suddenly discovered what he and everyone else had overlooked for all these years." (Db1). Such commentary is not appropriate in these filings.

We request that this Court afford no weight to these unfortunate assertions, which are not supported by the record. The record shows that Respondents "discovered" the possibility of providing an email log, not Petitioner. (Da8a, Finding of Fact #6) ("the Township concedes that in the past it acted pursuant to an 'informal policy of voluntarily creating email logs as a response to OPRA requests'"). Today, Respondents and their *amici* argue that they are not required by OPRA to provide the same email logs that were once provided under that "informal policy". In essence, Respondents argue that if they were now required return to disclosing email logs, it would open the floodgate to burdensome requests as well as unmanageable intrusions on privacy. (NJSLOM, at 1-2). Respondents' concerns are not supported by any evidence (for example, they do not claim that these issues arose during the time when they disclosed email logs voluntarily under their 'informal policy').

More importantly however, Respondents' discussion does not relate to the sole issue before this Court - enforcing the "plain language" of OPRA under *N.J.S.A.* 47:1A-1.1. The issues Respondents raise about privacy and burdensomeness are not relevant to this Petition. This case is only about whether Petitioner has requested identifiable "government records," under OPRA's definition that "information stored or maintained

electronically" is a "government record." *N.J.S.A.* 47:1A-1.1. The purported concern about privacy relies on an exemption under OPRA, and an exemption can only be applied to properly requested and identified "government records". Similarly, the issue of "burdensomeness", though not an exemption, is also not a valid consideration until applied to properly requested and identified "government records".[1] Thus, Respondents discussion is irrelevant. Any meaningful discussion of this case must focus on interpreting OPRA's requirement that "information stored or maintained electronically," is a "government record," but Respondents and their *amici* will not discuss it. They instead discussed issues unrelated to the sole issue that is before this Court.[2] This Court must focus on OPRA's plain language, and reverse the decision below.

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[1] Privacy is an exemption. It is applied on a case-by-case basis to specific "government records" once the records have been identified. *Burnett v. County of Bergen*, 198 N.J. 408 (2010). Similarly, burdensomeness may be raised once "government records" have been identified. *See N.J.S.A.* 47:1A-5(c)(permitting a "special service charge" for burdensome requests); *N.J.S.A.* 47:1A-5(g) (permitting a denial of access if a request would "substantially disrupt" agency operations). Here, Respondents dispute that Petitioner has requested "government records,"

[2] The Certification of Captain Doyle from the trial court, discussed by NJSLOM, is emblematic of this confusion. After discussing his concerns regarding confidentiality, Doyle stated "even if this Court were to acknowledge the need for confidentiality of this particular requested email log, *the real concern to the Department is the potential danger if it were to*

POINT II

THIS COURT MUST REVERSE THE ERRONEOUS APPLICATION OF THE "CREATION OF A RECORD" DOCTRINE FROM BELOW

In addition to the plain language of OPRA, this case also concerns the proposition that agencies are not required to "create records" to fulfill OPRA requests. Petitioner is aware of only one prior case that stated OPRA "does not require agencies to create records," but the statement occurred in *dicta*. *Sussex Commons Assocs., LLC v. Rutgers*, 210 N.J. 531, 544 (2012). Thus, *Paff v. Galloway* is the first application of the doctrine to a disputed OPRA request. However, the doctrine cannot bar Petitioner's request, because in all other jurisdictions the doctrine is understood not to bar Petitioner's request. In those jurisdictions that have adopted the "creation of a record" test, and ***including under New Jersey law prior to OPRA***, no jurisdiction considered a request such as Petitioner's to be "creation of a record." *See* Pb9-15. Contrary to the NJSLOM's statements, NJSLOM at 2, the precedents relied on in

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be required to create such logs in the future." (Da128a) (emphasis added). Thus by citing Doyle, NJSLOM somehow asserts that confidentiality (i.e. privacy) concerns make a request such as Petitioner's invalid as a *per se* matter, NSLOM at 2, but there is no explanation or support for this unprecedented position. Again, privacy is not a legal issue that relates to the validity of an OPRA request in any way, but is an exemption that is asserted *vis-à-vis* particular (*and validly requested*) "government records". *Burnett v. County of Bergen, et al*, 198 N.J. 408 (2010).

this Petition are relevant, because this Court should consult persuasive authority in determining this issue of first impression. These authorities show that the decision of Appellate Division is *unprecedented* for its determination under the "creation of a record" doctrine, and impermissible. This Court should grant this Petition to reverse the Appellate Division's decision and preserve OPRA's mandate of transparency.

POINT III

THE APPELLATE DIVISION IMPROPERLY DEFERRED TO THE GOVERNMENT RECORDS COUNCIL ON A SUBSTANTIVE LEGAL QUESTION, NOT ON A PROCEDURAL MATTER

As *Amici* the NJSLOM accurately states, deference to the Government Record Council's ("GRC") "practices and procedures" (NJSLOM Brief, at 2) ***may*** be warranted. However, the Appellate Division did not extend such appropriate deference to the GRC. Instead it paid "substantial deference" to the GRC's interpretation on a *question of law*: the GRC's purported determination that requesting an "email log" does not properly request a "government record" under OPRA. *N.J.S.A.* 47:1A-1.1. Such "substantial deference" to legal determinations of the GRC must not be allowed, because it will nullify *N.J.S.A.* 47:1A-7(e)'s mandate that a "decision of the council shall not have value as a precedent for any case initiated in Superior Court." The issue is itself sufficient reason for this Court to grant

certification, for all of the potential dangers cited in this Petition. (Pb15-18). Therefore, this Court must reject Respondents' assertions that deference to the GRC was appropriate, and grant this Petition to reverse the decision below.

CONCLUSION

For the reasons set forth above as well as those set forth in our Petition, this Court should reject the arguments of Respondents and their *amici* and grant Certification in this matter.

Respectfully submitted,

Walter M. Luers
Raymond Baldino