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Stipulation and Protective Order Regarding Discovery of Confidential Records and Files 07-2-02323-2-76

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FILED
KING COUNTY WASHINGTON

JAN 22 2009

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

The Honorable John P. Erlick

No. 07-2-02323-2 SEA

STIPULATION AND PROTECTIVE
ORDER REGARDING DISCOVERY OF
CONFIDENTIAL RECORDS AND FILES

I. STIPULATION FOR PROTECTIVE ORDER

Pursuant to Civil Rule ("CR") 26(c), Petitioners McCleary, Venema and NEWS and Respondent State of Washington (collectively the "Parties") hereby stipulate and agree to the entry of a Protective Order with the following terms:

Confidential Documents

1. The Parties have made or will make requests for production of documents to each other and to non-parties to this action ("Requests"), including, without limitation, requests for documents that may contain certain confidential and/or personally identifiable information and

STIPULATION AND PROTECTIVE ORDER
REGARDING DISCOVERY OF CONFIDENTIAL
RECORDS AND FILES

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ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
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ORIGINAL

1 education records concerning students; personal and confidential information regarding
2 individual employees and officials; and other materials not in the public domain that may
3 contain proprietary or other highly sensitive information, including information and documents
4 that would be exempt from disclosure under the Public Records Act, Chapter 42.56 RCW
5 (hereinafter, collectively, "Confidential Documents"). This Stipulation and Protective Order
6 shall govern the designation, production, handling and treatment of all Confidential Documents
7 produced in this litigation by the Parties and by any non-party responding to Requests who
8 agrees to be bound by this Order by executing the certification attached as Exhibit A
9 ("Producing Party"). This Stipulation and Protective Order is not intended to restrict the ability
10 of any Party or non-party to use Confidential Documents, that otherwise would be available to
11 them regardless of this action, in the usual and customary course of managing their respective
12 businesses. References in this Stipulation and Protective Order to the words "document" or
13 "documents" mean all written, recorded, electronic, or graphic matter whatsoever.

14 2. Any production of Confidential Documents pursuant to Requests shall be made as
15 follows: For any initial production of original documents for review and selection for copying,
16 Confidential Documents shall be marked by stamping the word "CONFIDENTIAL" upon the
17 face of such document or upon a file, box, electronic disk or other container in which the
18 document is located. This procedure shall apply to paper and electronic documents and files.
19 Upon a requesting party's designation for copying of a Confidential Document, the copy for
20 production of the Confidential Document shall be stamped with the word "CONFIDENTIAL."
21 Any document, electronic disk, or container of documents designated CONFIDENTIAL and all
22 information contained therein shall not be disclosed by any party, or the attorneys, agents, or
23 employees thereof, except in accordance with the terms of this Stipulation and Protective Order.

24 3. A Producing Party may designate documents as CONFIDENTIAL when such
25 party reasonably and in good faith believes the document contains confidential information
26 within the meaning of Paragraph 1 and/or CR 45(c), and not for purposes of harassing the

1 receiving party or to unnecessarily restrict access to information concerning this lawsuit.
2 Except as referenced in Paragraph 1 as to the use of Confidential Documents in the normal
3 course of business, Confidential Documents produced by any Producing Party shall be used
4 solely in the litigation of the above-captioned case, *McCleary v. State of Washington*, King
5 County Cause No. 07-2-02323-2 SEA, and for no other purpose, unless a Producing Party
6 consents in writing to the use of its Confidential Documents for another purpose, or another use
7 is authorized by this Court. If any Confidential Document is used in any other proceeding in
8 connection with this action, it shall not lose its confidential status, unless the Court orders
9 otherwise.

10 4. The production of Confidential Documents subject to this Stipulation and Order is
11 authorized and may occur, to the extent permissible by law, without notice and/or the consent of
12 individuals, their parents or legal guardians in compliance with 20 U.S.C. § 1232g(b)(2)(B) of
13 the Family Educational Rights Privacy Act. Discovery of such Confidential Documents is for
14 the purpose of determining the adequacy of education being provided to Washington public
15 education students under Washington law and for no other purpose or use. A Producing Party
16 may elect to redact confidential information from Confidential Documents, to the extent
17 practicable, prior to production.

18 5. In addition to the designation of documents as confidential in the manner
19 described above, the following documents shall be per se confidential, and shall be deemed
20 designated CONFIDENTIAL, without the need for further identification:

21 (a) Any and all documents containing personally identifiable information of
22 students, students' parents, guardians, or other family members, including, but not limited
23 to names, addresses, telephone numbers, social security numbers, or other personal
24 identifiers.

1 (b) Any documents that are exempt from public disclosure pursuant to RCW
2 Ch. 42.56 *et seq.* Documents designated CONFIDENTIAL pursuant to this subparagraph
3 include, but are not necessarily limited to:

4 (i) Personal information in any files maintained for students in public
5 schools, which meet the definition of exempt records under RCW 42.56.230(1).

6 (ii) Personal information in files maintained for employees,
7 appointees, or elected officials of any public agency, which meet the definition of
8 exempt records under RCW 42.56.230(2).

9 6. Confidential Documents covered by this Stipulation and Protective Order shall be
10 made available only to "Qualified Persons." As used in this Stipulation and Protective Order,
11 "Qualified Persons" means the Court and the following persons:

12 (a) Counsel to any of the Parties in this case including the legal, paralegal,
13 and clerical employees of counsel assisting counsel in this case in such capacity;

14 (b) Any testifying (or non-testifying) experts or consultants, and employees
15 and assistants under the control of such expert or consultant, who are engaged by counsel
16 in this litigation, whether or not such expert or consultant is paid directly by a party, but
17 only to the extent such person needs the Confidential Documents to adequately perform
18 his or her duties in this litigation;

19 (c) Court reporters while in the performance of their official duties, provided
20 that these persons may retain Confidential Documents only as long as is necessary for the
21 conduct of their duties in this case;

22 (d) Employees of outside copy services engaged in connection with this
23 litigation;

24 (e) Third-party contractors, including their employees and agents, involved
25 solely in one or more aspects of graphics or design services for purposes of preparing
26 demonstrative exhibits, organizing, filing, copying, coding, converting, sorting,

1 translating, or retrieving data or designing programs for handling data connected with this
2 litigation, including the performance of such duties in relation to a computerized
3 litigation support system;

4 (f) Any person indicated on the face of a document to be the author,
5 addressee, or copy recipient of the document, or any person reasonably believed to have
6 been an author or recipient of the document;

7 (g) Any other person with the consent of the Producing Party, expressed in
8 writing or stated on the record in a deposition or other proceeding, or by order of the
9 Court.

10 7. Before any Confidential Documents are disclosed to any person other than the
11 Court, a party's counsel identified in Paragraph 6(a), and the court reporters identified in
12 Paragraph 6(c) above, that person first must be given a copy of this Stipulation and Protective
13 Order and agree in writing to abide by all of its terms including, without limitation, the
14 obligation set forth in Paragraph 9 below to return all originals and copies of the Confidential
15 Documents in his or her possession, custody or control, or cause all such documents to be
16 destroyed upon conclusion of the litigation in this case. If, before entry of this Stipulation and
17 Protective Order, any Confidential Documents have been disclosed to any person other than a
18 party's counsel, identified in Paragraphs 6(a) above, that person must, within 21 days after entry
19 of this Order, be given a copy of this Stipulation and Protective Order and agree in writing to
20 abide by all of its terms including, without limitation, the obligation set forth in Paragraph 9
21 below to return all originals and copies of the Confidential Documents in his or her possession,
22 custody or control or cause all such Confidential Documents to be destroyed upon conclusion of
23 the litigation in this case. If said person refuses to agree in writing to the terms of this
24 Stipulation and Protective Order and the obligations in Paragraph 9 below, said Confidential
25 Documents must be immediately returned to the Producing Party.
26

1 8. Absent any specific order from the Court regarding the use of Confidential
2 Documents in connection with any motion or trial of this case, any documents available for
3 public viewing containing copies of one or more of the Confidential Documents or any
4 information therefrom, including but not limited to portions of briefs or deposition transcripts,
5 shall have such copies or information redacted, and a copy of this Stipulation and Protective
6 Order shall be attached thereto or referenced. With respect to any unredacted Confidential
7 Documents filed with the Court, it shall be the responsibility of the party submitting the
8 unredacted Confidential Documents to the Court to ensure that the Confidential Documents are
9 filed under seal in compliance with LR 26(c) and GR 15. If a Confidential Document is used in
10 any deposition testimony, any portion of the deposition transcript reflecting the content of the
11 Confidential Document may be designated CONFIDENTIAL by invoking this Order on the
12 record or by written notification at any time prior to the expiration of the transcript review
13 period, and access thereto shall be limited pursuant to terms of this Order.

14 9. Upon conclusion of the litigation in this case, including any appeal, the Parties
15 and Parties' counsel, and any Qualified Persons identified in Paragraph 6 above to whom the
16 Parties or their counsel have disclosed Confidential Documents, shall return all originals and
17 copies of the Confidential Documents in their possession, custody or control or cause all such
18 Confidential Documents to be destroyed. Without limiting the generality of the foregoing, the
19 Parties and the Parties' counsel's obligation, and the obligation of any of the Qualified Persons
20 identified in Paragraph 6, to return or destroy the Confidential Documents shall include the
21 obligation to erase all images, compilations, copies, summaries, or abstracts of the Confidential
22 Documents from computer storage if permitted by record retention requirements. If a receiving
23 party is not able to erase images, compilations, copies, summaries, or abstracts of the
24 Confidential Documents from computer storage because of record retention requirements, such
25 receiving party is obligated to continue handling the Confidential Documents in a confidential
26 manner. Except as required under record retention requirements, upon the request of a

1 Producing Party's counsel, the receiving party and party's counsel shall confirm that all original
2 and copies of the Confidential Documents in their possession have been returned to Producing
3 Party's counsel or destroyed and that all electronically stored Confidential Documents have
4 been erased.

5 10. Notwithstanding Paragraph 9, counsel for the Parties shall be entitled to retain any
6 Confidential Documents that are made exhibits or specifically referenced in trial, depositions,
7 pleadings, motions, briefs, orders or attorney work product, provided that such counsel, and
8 employees of such counsel, shall not disclose any Confidential Documents to any person or
9 entity outside of the scope of this Order without the express written permission of the Producing
10 Party.

11 11. Any party or Producing Party may seek to modify, expand, cancel, or supersede
12 this Stipulation and Protective Order by stipulation of the Parties or by motion on notice.
13 Nothing in this Stipulation and Protective Order shall:

14 (a) Operate as an admission by any party or Producing Party that any
15 particular discovery material contains personally identifiable information or other
16 personal information;

17 (b) Prejudice in any way the rights of any party or Producing Party to object
18 to the production of documents it considers not subject to discovery;

19 (c) Prejudice in any way the rights of a party or Producing Party to seek a
20 Court determination of whether particular discovery matter shall be produced, or, if
21 produced, whether such material should be subject to the terms of this Order;

22 (d) Prejudice in any way the rights of a party or Producing Party to apply to
23 the Court for further orders relating to any Confidential Documents; or

24 (e) Limit the Court's right to modify this Order, with or without the consent
25 of the Parties, in order to further the administration of justice.
26

1 12. If the receiving party contends that any document has been erroneously
2 designated as a Confidential Document, the receiving party who objects to the designation shall
3 nevertheless treat the document as a Confidential Document unless and until the receiving party
4 either (a) obtains the Producing Party's written permission to do otherwise; or (b) obtains an
5 order of the Court finding that the document does not contain personally identifiable
6 information or other personal information.

7 13. If any party or non-party who obtains Confidential Documents subject to this
8 Protective Order receives a subpoena, other compulsory process or a public records request that
9 purports to require production of Confidential Documents, that party or non-party shall
10 promptly notify in writing the counsel for the Producing Party who designated the Confidential
11 Documents about the subpoena, compulsory process or public records request. Absent the
12 consent of the Producing Party who designated the documents as Confidential Documents, the
13 party or non-party receiving a subpoena, compulsory process or public records request shall
14 refrain to the fullest extent permissible under law from producing the requested Confidential
15 Documents.

16 14. The terms of this Stipulation and Protective Order are subject to modification,
17 extension, or limitation as may hereinafter be agreed to by all Parties, or by order of the Court.

18 **Return of Inadvertently Produced Documents**

19 15. Because the preparation for trial of this action will require the production of a
20 large quantity of documents, information and other material, there is a risk that privileged
21 documents inadvertently may be made available for inspection and copying without any
22 intention on the part of the Producing Party to waive any claim of privilege thereto. Neither the
23 inadvertent production nor the viewing of privileged documents shall result in a waiver, either as
24 to the document or the subject matter contained or reflected therein, of any claim of privilege,
25 including but not limited to the attorney-client privilege, work product doctrine, or other
26

1 privilege or immunity which renders a document immune from discovery by operation of law or
2 agreement of the parties.

3 16. Whenever the Producing Party discovers that a document which it claims to be
4 privileged has been produced for inspection and copying inadvertently, the Producing Party may,
5 upon notice to the inspecting party, remove such document from the set of documents being
6 inspected or copied. The Producing Party shall identify by date, author, addressee and general
7 subject matter all such privileged documents which are withdrawn from production.

8 17. Whenever the Producing Party discovers that a document which it claims to be
9 privileged has been inadvertently produced and a copy thereof already delivered to another party,
10 such Producing Party may demand the immediate return of the document and all copies of the
11 document. The demand must be made promptly upon discovery of the inadvertent production
12 and shall be accompanied by written notice identifying the document, to the extent possible, by
13 date, author, addressee or recipient, general subject matter, and basis for the claim of privilege.

14 18. Whenever a party to whom a privileged document has been inadvertently
15 produced receives a demand from the Producing Party to return the document and all copies of
16 said document, such party shall return those copies, including all copies in the possession of its
17 agents and consultants, immediately.

18 19. If in the course of its document review, a party discovers that another party has
19 produced a document which on its face appears to be subject to a claim of privilege, the
20 receiving party shall notify the Producing Party that such document has been produced. The
21 notification shall be accompanied by a copy of the document. The Producing Party shall
22 promptly determine whether it believes the document is an inadvertently produced privileged
23 document, and if so, it may promptly demand its return in accordance with the provisions of this
24 Stipulation and Protective Order.

1 20. Nothing in this Stipulation and Protective Order shall restrict or preclude any
2 party from seeking judicial review of the legitimacy of a claim that any document is subject to a
3 privilege.

4 **II. PROTECTIVE ORDER**

5 Based on the above Stipulation between Petitioners McCleary, Venema and NEWS and
6 Respondent State of Washington, IT IS THEREFORE ORDERED, ADJUDGED AND
7 DECREED that:

8 1. A Protective Order regarding discovery is entered in this case on the terms
9 approved and agreed to by the Parties in the Stipulation for Protective Order detailed above;

10 2. The terms of this Protective Order, having been approved and agreed to by the
11 Parties, shall govern the production of all designated Confidential Documents by the Parties and
12 all non-parties who agree to be bound by the terms of this Order by executing the certification
13 attached as Exhibit A. ✱

14 DONE IN OPEN COURT this 21st day of January, 2009.

15 
16 _____
17 JOHN P. ERLICK, JUDGE

18 Presented by:

19 ROBERT M. MCKENNA
20 Attorney General

21 
22 WILLIAM G. CLARK, WSBA #9234

23 Assistant Attorney General
24 DIERK MEIERBACHTOL, WSBA #31010
25 Assistant Attorney General
26 Attorneys for Respondent

See
PARAGRAPH
3 Attached

McCleary et al. v. State of Washington
King County Superior Court Cause No. 07-2-02323-2 SEA

Paragraph 3:

All of the above orders are subject to the following:

Each time restrictions on access to records from hearings are sought, courts must follow these steps: first, proponent of closure and/or sealing must make some showing of the need therefor; second, anyone present when closure motion is made must be given an opportunity to object; third, court, proponents and objectors should carefully analyze whether requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened; fourth, court must weigh competing interests of parties and the public and consider the alternative or less restrictive methods; and fifth, order must be no broader in its application or duration than necessary to serve its purpose. *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 640 P.2d 716 (Wash., 1982); *Dreiling v. Jain*, 151 Wash. 2d 900 (2004); *Rufer v. Abbott Labs*, --- P.3d ---, 2005 WL 1528792 (Wash., June 30, 2005)

Therefore, while the parties are free to designate any document not filed with the courts as "sealed" or "confidential" or "protected" and limit its dissemination and use, each document that is to be filed with the court must be subject to the above analysis and treatment and a court order reflecting the same and authorizing sealing of that pleading or file must be obtained. This may be done by motion noted without oral argument. The burden is on the party proposing that the document be sealed to provide the needed information so that the court can determine whether all, a portion or none of the documents may be filed under seal.

1/21/09
Dated

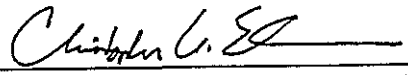


Judge John P. Erlick

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Stipulated to and Approved for Entry and
Notice of Presentation Waived:

FOSTER PEPPER PLLC



THOMAS F. AHEARNE, WSBA # 14844
CHRISTOPHER G. EMCH, WSBA # 26457
Attorneys for Petitioners

1 EXHIBIT A

2 ACKNOWLEDGEMENT
3 OF UNDERTAKING RE PROTECTIVE ORDER

4 I, _____, hereby certify that I have received a copy of the
5 Stipulation and Protective Order Regarding Discovery of Confidential Records and Files
6 ("Protective Order") in this action, *McCleary v. State of Washington*, King County Cause
7 No. 07-2-02323-2 SEA. I have read and understand the provisions of the Protective Order, and
8 agree to be bound by its terms.

9
10 Executed this _____ day of _____, 2009, at _____.

11 _____

12 _____
13
14 Print Name

15 _____
16 Title/Position

17 _____
18
19 City, State and Zip Code