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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL GOLDEN and TRACY LOCKE, Plaintiffs, v. NEW JERSEY INSTITUTE OF TECHNOLOGY and CLARA WILLIAMS, in her capacity as Custodian of Records for the New Jersey Institute of Technology, Defendants/Third-Party Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, Third-Party Defendant.	Civil Action No. 2:15-cv-8559-MCA-LDW

DEFENDANTS NEW JERSEY INSTITUTE OF TECHNOLOGY AND CLARA WILLIAMS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs' motion for attorneys' fees under OPRA completely discounts the complexity of this matter. What began as a simple request for records morphed into a complex matter involving directives from the Federal Bureau of Investigation ("FBI") expressly prohibiting dissemination based on the FBI's position that such records constituted property of the United States of America, the confidential and privileged nature of which prohibited disclosure. The FBI assumed control of the OPRA process, while the defendants NJIT and its records custodian, Clara Williams, were subjugated to the FBI. Indeed, the FBI through stipulated facts has admitted to its overriding role in this action as the entity which reviewed, redacted, and produced documents to the plaintiffs pursuant to their OPRA requests. As such, there can be no causal nexus between plaintiffs' OPRA action and the production of documents such that the defendants are liable for any attorneys' fees in this matter. The FBI's interest in the confidentiality of the documents in fact precluded NJIT from producing the very documents the FBI initially instructed NJIT to withhold from production and for which the FBI went so far as to seek before this Court both injunctive and declaratory relief precluding NJIT from releasing any documents. Moreover, despite the issue never having presented itself in New Jersey, the FBI assumed the role of de facto records custodian under OPRA, which again supports that no attorneys' fees can be awarded against the defendants. Nor do plaintiffs qualify as a prevailing party under OPRA because their lawsuit did not cause any change, voluntary or otherwise, in the conduct of the defendants sufficient to impose attorneys' fees under OPRA. Despite numerous opportunities to file a FOIA request for the very documents at issue and for which fees are recoverable against the FBI, plaintiffs refused to do so, even after the suggestion was made at the first Court appearance in this matter before Superior Court of New Jersey Judge Stephanie

Mitterhoff, J.S.C., who asked plaintiffs' counsel directly why no FOIA request was issued. And, for reasons remaining unknown, after this matter was removed to Federal Court by the FBI and plaintiffs were possessed of facts confirming the representations made by NJIT's counsel to the effect the FBI remained in complete control over the subject matter documents, plaintiffs remained steadfast in their refusal to name the FBI as a direct party defendant, despite knowing the initial document review and the post-commencement of litigation re-review of the documents was done solely by the FBI. Thus, the very simple calculus that plaintiffs wish to apply here – OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys' fees – is most certainly not applicable to the facts at bar. As such, plaintiffs' motion for attorneys' fees should be denied.

PROCEDURAL HISTORY/STATEMENT OF FACTS

Plaintiffs filed a verified complaint and order to show cause on September 11, 2015, seeking to have defendants NJIT and Clara Williams, NJIT's Custodian of Records, provide access to public records purportedly supporting the writing of a book by plaintiff Golden about the relationship between federal intelligence agencies, including the FBI and CIA, and colleges and universities. See verified complaint at ¶¶ 1-3. Plaintiffs' verified complaint was brought pursuant to OPRA, N.J.S.A. 47:1A-1, et seq., and the common-law right of access. See verified complaint at ¶ 1. More specifically, plaintiffs allege that between April and August 2015, they made three requests to NJIT under both OPRA and the common-law right of access for email correspondence between NJIT employees and the FBI and/or CIA and that defendants improperly and unlawfully withheld, in whole or in part, all or a vast majority of the records requested. See verified complaint at ¶¶ 4-5.

A. Stipulated Facts

At the outset it is important to recognize that the FBI's role in this matter is now fully established based upon undisputed facts, as the defendants and the FBI have filed a set of Stipulated Facts which prove definitively that the FBI governed the review, redaction, and production process respecting plaintiffs' OPRA requests. This cannot be overlooked as plaintiffs, in moving for attorneys' fees under OPRA, use language which suggests that the defendants somehow controlled this process despite the FBI's overwhelming involvement to the contrary and/or were required to ignore the FBI and release the documents. For example, plaintiffs' state:

- In response to Ms. Locke's OPRA request (the "Second Request"), NJIT refused to provide copies of any responsive records …
- In response to Plaintiffs' final OPRA request (the "Third Request") … NJIT also refused to provide any responsive records.
- [C]ounsel for the FBI informed Plaintiffs that it was in possession of approximately 6,000 pages of documents provided to it by NJIT that NJIT had identified as responsive to Plaintiffs' OPRA Requests.
- NJIT had not agreed to release all requested records to Plaintiffs before this lawsuit was filed …
- Under NJIT's theory of this case, any public agency could abdicate their [sic] responsibility to pay attorney's fees … by (1) either outsourcing its responsibility to respond to an OPRA request … and/or (2) acquiescing to a third party's request or demand to withhold requested records …

See plaintiffs' moving brief at 3, 5, 13, 25-26 (emphasis added)(the 'sic' remains misplaced in the original text.

Because of the Stipulated Facts, there is no uncertainty regarding the FBI's role in assuming complete control over the subject documents and the manner of review and ultimate production in response to plaintiffs' OPRA requests. Indeed, the facts regarding the FBI's involvement are now undisputed and must be considered as such in connection with plaintiffs'

motion for attorneys' fees. It simply continues to defy credulity for plaintiffs to repeat their assertions that NJIT was required to ignore the lawful direction of the FBI prior to the litigation and to ignore the injunctive and declaratory relief asserted by the FBI against NJIT after the litigation ensued. That such facts remain inconvenient to plaintiffs' simple calculus remains clear.

B. The FBI's Response to Plaintiffs' OPRA Requests

On April 8, 2015, at 5:12 p.m., plaintiff Golden submitted the first of three OPRA requests (the "First Request") directly to defendant Williams. See November 11, 2015, Certification of Clara Williams at ¶ 17 (hereinafter "Williams Cert.") (Exhibit B to Potters Cert. in opposition to plaintiffs' motion). The First Request sought the following records:

> [A]ll e-mail communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am requesting all email communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the people at NJIT.

See Williams Cert. at ¶ 18.

Following receipt of Plaintiffs' OPRA requests on April 8, 2015, and in compliance with the time period set forth under New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., NJIT assembled documents to respond. See Stipulated Facts ¶ 1. Williams forwarded the First Request by email to David Ullman, Associate Provost for Information Services & Technology and Chief Information Officer for NJIT, as Ullman was the individual with the authority to authorize access to emails sought in the First Request. See Williams Cert. at ¶ 19.

Williams simultaneously contacted Annie Crawford, Assistant Vice President of the Department of Human Resources for NJIT, and requested the identities of all individuals who held the official titles of police chief, provost, vice provost, vice president, and dean, during the period January 1, 2010 to April 9, 2015, whose emails were sought as part of the First Request. See Williams Cert. at ¶ 20. Upon receipt of the list of individuals holding such titles provided by Ms. Crawford, Williams immediately forwarded same to Ullman to facilitate his search for responsive records. See Williams Cert. at ¶ 21. All of this transpired in less than two hours from the time Williams first received and reviewed the First Request. See Williams Cert. at ¶¶ 17-21.

In turn, Ullman solicited the assistance of Devin Batra, Database Administrator for the Information Services and Technology Department and NJIT, to search for and retrieve responsive emails. See Williams Cert. at ¶ 22. Batra accessed NJIT's mainframe and performed a search of the email extensions set forth in the First Request and the list of individuals provided by Ms. Crawford. See Williams Cert. at ¶ 23. Batra compiled all emails that were returned on his search and placed them on a DVD, which Batra then delivered and downloaded to Williams' computer on April 13, 2015, just four days after the First Request was received by Williams. See Williams Cert. at ¶ 24.

On receipt of the emails, Williams began printing them. See Williams Cert. at ¶ 25. In light of the massive volume of emails, on April 14, 2015, Williams emailed plaintiff Golden and requested an extension until May 29, 2015, to respond to the First Request. By email on that same date, April 14, 2015, plaintiff Golden agreed to Williams' extension request. See Williams Cert. at ¶ 26.

Because of the nature of the subject OPRA requests, which specifically sought communications between the FBI and NJIT using the email domains @ic.fbi.gov, @fbi.gov, or

any other email address, most of the documents assembled by NJIT originated from the FBI; that is, the assembled documents were created and transmitted by the FBI to NJIT, among others. See Stipulated Facts ¶ 2. Many of the assembled documents contained written dissemination controls identifying the documents as confidential, limiting their dissemination to only authorized possessors, and prohibiting their disclosure or dissemination absent the permission of the FBI. See Stipulated Facts ¶ 3.

By way of example, one dissemination control advised:

> Although UNCLASSIFIED, this information is property of the FBI and may be distributed only to members of organizations receiving this bulletin, or to cleared defense contractors. Precautions should be taken to ensure this information is stored and/or destroyed in a manner that precludes unauthorized access. See Stipulated Facts ¶ 4.

By way of further example, another dissemination control advised:

> Information contained in this intelligence bulletin is for official use only. No portion of this bulletin should be released to the media, the general public, or over nonsecure Internet servers. Release of this material could adversely affect or jeopardize investigative activities. See Stipulated Facts ¶5.

Having concerns about the FBI warnings/prohibitions, NJIT notified the FBI about the subject OPRA request, advised the FBI that documents were assembled in response, and requested the FBI to provide direction on the assembled documents. See Stipulated Facts ¶ 6. In response, Special Agent McHugh advised that the FBI would need to review all of the emails before any disclosure occurred. See Williams Cert. at ¶ 28.

On May 22 and 26, 2015, the FBI visited NJIT offices. See Stipulated Facts ¶ 7. On May 26, the FBI reviewed approximately 2,000 pages of documents assembled by NJIT that did not contain dissemination controls. See Stipulated Facts ¶ 7. The FBI applied redactions to this set of documents, informed NJIT that the redacted materials were not to be released, and authorized

the release of approximately 540 pages of material either in full or partially redacted. See Stipulated Facts ¶ 7. NJIT complied with the FBI's direction to withhold the redacted documents and produced the documents the FBI authorized it to release to plaintiffs. See Stipulated Facts ¶ 7. NJIT did not participate or assist with this document review process, other than making its conference room with the assembled documents available to the FBI. See Stipulated Facts ¶ 7. Further, the FBI informed NJIT that the 4000 pages of documents containing the dissemination controls were the property of the United States Government ("USG") and were not to be distributed. See Stipulated Facts ¶ 8.

On May 27, 2015, the FBI corresponded with NJIT Records Custodian Williams. See Stipulated Facts ¶ 9 and copy of May 27, 2015, FBI correspondence, attached as Exhibit I to Certification of Clara Williams in Opposition to plaintiffs' Order to Show Cause filed in the State Court, which Certification is attached as Exhibit B to the Certification of Gary Potters, Esq. as part of NJIT's Opposition to plaintiffs' attorney fee application. The FBI's correspondence acknowledged that NJIT had received a request for email communications between certain individuals at NJIT and certain USG entities, the OPRA requests at issue in this case, and advised NJIT that USG email communications and particularly those of the FBI and its personnel, including attachments to those communications, remained the property of the USG "and are not to be further distributed without the FBI's prior written approval." See Stipulated Facts ¶ 9. The correspondence also requested NJIT to notify the requestor "that he/she may submit a FOIA request for such information either in writing to the FBI or online using www.fbi.gov/foia." See Stipulated Facts ¶ 9.

On May 29, 2015, NJIT produced approximately 540 pages of documents to plaintiffs. See Stipulated Facts ¶ 10. See NJIT's May 29, 2015, correspondence to plaintiff Golden,

attached as Exhibit A to Potters' Certification. Additionally, NJIT notified plaintiffs that it was withholding documents from production consistent with the FBI's direction. See Stipulated Facts ¶ 10. The subject May 27, 2015, FBI correspondence was included in NJIT's May 29, 2015, transmittal of the redacted documents to plaintiffs. See Stipulated Facts ¶ 11. Thus, plaintiffs were aware of the FBI's directives to NJIT regarding their OPRA request at the time that documents were timely provided pursuant to the agreed-upon extension date of May 29, 2015. By email dated June 5, 2015, plaintiff Golden acknowledged receipt of NJIT's response to the First Request. See Williams Cert. at ¶ 39. And, despite plaintiffs' receipt of the FBI's May 27, 2015, correspondence advising the requestor to file a FOIA request, no such request, to our knowledge, was ever filed, this despite a fee shifting provision under FOIA. 5 USCA § 552(a)(4)(E)

The second OPRA request was submitted to Williams by email on July 28, 2015, at 1:26 p.m., by plaintiff Locke (the "Second Request"). See Williams Cert. at ¶ 41. The second request sought the following records:

> [A]ll e-mail communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I also request all email communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the people at NJIT.

See Williams Cert. at ¶ 42.

Recognizing that the Second Request looked familiar, Williams referred back to the First Request and realized the two requests were identical. See Williams Cert. at ¶ 43. In light of the

position taken by the FBI in response to the First Request, together with the prohibition on disclosure set forth in the FBI's letter of May 27, 2015, Williams immediately contacted Special Agent McHugh by telephone and email to discuss the Second Request and the manner in which NJIT should respond to same. See Williams Cert. at ¶¶ 44-45. On July 29, 2015, just one day after the Second Request was received, Williams sent a letter response to plaintiff Locke by email denying the Second Request, citing to several applicable OPRA exemptions and the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams Cert. at ¶ 46.

On August 13, 2015, at 4:10p.m., plaintiff Golden submitted the third OPRA request to Williams by email (the "Third Request"). See Williams Cert. at ¶ 47. The Third Request mirrored the First Request and sought the following records:

> [A]ll e-mail communications since January 1, 2010, to the date of this request, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am requesting all email communications since January 1, 2010, to the date of this request between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the same people at NJIT.

See Williams Cert. at ¶ 48.

Given the similarities between the First and Third requests, Williams immediately emailed plaintiff Golden to ascertain whether the Third Request had been sent in error since it was clearly duplicative of the First Request, which NJIT previously responded to on May 29, 2015. See Williams Cert. at ¶ 49. Plaintiff Golden responded by advising the Third Request was broader than the First Request in that the Third Request sought records through the then-current

date of August 13, 2015. See Williams Cert. at ¶ 50. On August 17, 2015, within the time parameters afforded by OPRA, Williams sent a letter response to plaintiff Golden by email, inter alia, directing plaintiff Golden to the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams Cert. at ¶ 53.

C. Plaintiffs' Lawsuit

Thereafter, on September 11, 2015, plaintiffs filed an Order to Show Cause in the Superior Court of New Jersey, Law Division, Essex County under Docket No. ESX-L-6392-15 (the "State Court Proceeding") seeking to enjoin NJIT from denying them access to FBI records that were the subject of their OPRA requests. See Stipulated Facts ¶ 12. In response to plaintiffs' lawsuit, and at the request of the FBI, NJIT re-assembled the documents. See Stipulated Facts ¶ 12. The FBI retrieved the printed hardcopy set of these documents from NJIT's counsel's offices. See Stipulated Facts ¶ 12. The FBI applied bates stamps to these documents and did not provide NJIT with a copy of the bates stamped documents. See Stipulated Facts ¶ 12.

The FBI also requested that defendants' counsel secure an extension of time for the defendants to answer or otherwise move respecting the Order to Show Cause because the FBI intended to intervene in the lawsuit. See Potters Cert. ¶ 4. The FBI advised that the extension was necessary to afford the FBI time to go through the required administrative process to intervene. See Potters Cert. ¶ 4. Defendants' counsel obtained the requested extension and advised plaintiffs' counsel of the reason for same. See Potters Cert. ¶ 4. Despite the extension of time, the FBI never intervened in the lawsuit. See Potters Cert. ¶ 5.

On November 13, 2015, NJIT filed its opposition to Plaintiffs' Order to Show Cause, Answer, and Third-Party Complaint naming the FBI as a Third-Party Defendant. See Stipulated

Facts ¶ 13. Defendants named the FBI as a third-party defendant because the FBI never intervened in plaintiffs' lawsuit. See Potters Cert. ¶ 6.

On December 3, 2015, the Honorable Stephanie A. Mitterhoff, J.S.C., entered an Order following oral argument on plaintiffs' Order to Show Cause, which provided, among other things, that:

> the issues raised by plaintiffs' order to show cause are premature for adjudication based on (a) the FBI and Department of Justice having advised of their need for additional time to address both the FBI's course of action and to commence their review of the redacted and exempted documents and (b) the Court's recognition of defendant NJIT's compliance with the written direction of the FBI to not produce certain documents[.] See Stipulated Facts ¶ 14.

The Order additionally provided that "the FBI shall forthwith conclude their decision making process on their course of action and also simultaneously commence review of the redacted and exempted documents." See Stipulated Facts ¶ 14. By the very terms of this Order, the plaintiffs were in possession of actual knowledge of (1) NJIT's lack of control over the subject matter documents and, equally importantly, (2) the FBI's complete control over the subject matter documents based on the very terms that the FBI was going to commence their review, actually re-review, of the subject documents. And, perhaps most importantly, Judge Mitterhoff expressly recognized NJIT's compliance with the FBI's lawful direction to it to withhold documents from production.

On December 11, 2015, the FBI filed a Notice of Removal to the United States District Court for the District of New Jersey (ECF 1). See Stipulated Facts ¶ 15. On December 28, 2015, following service by NJIT on the FBI of Requests for Admissions seeking confirmation of the facts now set forth in the Stipulated Facts, which Admissions were issued precisely in an attempt to disabuse the plaintiffs that NJIT had any discretion regarding its course of conduct regarding

the subject matter documents, the Honorable Leda D. Wettre, U.S.M.J., entered an Order staying responses to any pending discovery requests pending the outcome of further discussions with the Court. See Stipulated Facts ¶ 16. On February 18, 2016, the FBI filed a Counterclaim against NJIT seeking both declaratory and injunctive relief (ECF 23) in the United State District Court for the District of New Jersey. See Stipulated Facts ¶ 17. As its first cause of action in its Counterclaim, the FBI sought by way of relief that "NJIT should be enjoined from publically releasing federal records under the continued control of the FBI in response to Plaintiffs' OPRA request." See Stipulated Facts ¶ 17. Counts Two through Four contained virtually the identical claim for injunctive relief against NJIT. See Stipulated Facts ¶ 17. It is reasonable to conclude the FBI's use of the words "continuing control" over the subject matter documents in the context of the injunctive and declaratory relief sought by it against NJIT would have finally disabused plaintiffs of any continuing erroneous belief that NJIT remained in control of the documents. While apparently not the case, this matters on the fee application precisely because plaintiffs were possessed of actual knowledge that NJIT was no longer in control, or possession, of the subject matter documents certainly prior to the filing of this lawsuit and again at the hearing before Judge Mitterhoff and further with the FBI's counterclaim asserted against NJIT.

Judge Wettre's discovery stay was renewed by Order entered on March 7, 2016, whereby the entire case was stayed (ECF 26) and by subsequent Order entered on June 17, 2016 (ECF 28). See Stipulated Facts ¶ 16.

Subsequent to the substitution of counsel for the FBI and the involvement by the Department of Justice, the FBI conducted a second review of all of the documents previously assembled by NJIT and produced to the FBI. See Stipulated Facts ¶ 18. In the course of the FBI's review, the FBI solely made all release and withholding determinations. See Stipulated

Facts ¶ 18. After making those determinations, the FBI sent the documents back to NJIT, in accordance with FBI protocols for consultation requests. See Stipulated Facts ¶ 18. NJIT then transmitted, as in the performance of a clerical non-substantive function, the documents decided solely by the FBI to be produced or withheld. See Stipulated Facts ¶ 18. NJIT made no independent release or withholding determination during the course of this review. See Stipulated Facts ¶ 18. Based on the FBI's second review, a total of eight (8) supplemental productions of documents were made. See Stipulated Facts ¶ 19.

In an email dated March 1, 2017, to defendants' counsel, plaintiffs' counsel confirmed acceptance of the documents produced and informed there would be no challenge to any of the remaining redactions/withholdings. See Stipulated Facts ¶ 20. Plaintiffs confirmed in discussions with counsel following this last production by the FBI its intention to file an application for attorneys' fees.

LEGAL ARGUMENT

POINT I

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES UNDER OPRA FROM DEFENDANTS NJIT AND WILLIAMS

Plaintiffs correctly point out that OPRA permits the award of attorneys' fees to a requester who prevails pursuant to N.J.S.A. 47:1A-6. See plaintiffs' moving brief at 9. Yet, this recitation of the law does not, in and of itself, warrant the award of any such fees here. Plaintiffs completely ignore the factual background of this case as they desperately try to fit a square peg into the proverbial round hole by oversimplifying the facts in seeking to hold the defendants responsible for attorneys' fees under OPRA. This is not the typical "cookie cutter," garden variety OPRA matter. The simple calculus proffered by plaintiff is: "OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after

lawsuit = mandatory award of attorneys' fees." However, this construct fails entirely to account for the facts at bar, which demonstrate that what occurred is far from the norm in terms of OPRA requests. As a result, not only is there no factual nexus between plaintiffs' lawsuit and the production of documents, but plaintiffs ignore that defendants did comply with their initial OPRA request in a timely manner and that the defendants, by virtue of the FBI's involvement, were neither the custodian of records nor were plaintiffs a prevailing party under OPRA. Absent these prerequisites to recovery, no attorneys' fees can be awarded.

If the FBI was never involved in this matter, and the documents sought did not raise confidentiality issues of concern to the FBI, and finally, if NJIT refused to produce documents otherwise subject to production and following the filing of a lawsuit, the requested documents previously withheld were produced, then under those facts – which remain radically different from the facts sub judice – the requestor is entitled to attorneys' fees as the prevailing party. But, this very simply calculus construct presented by plaintiffs in their application ignores the confidential designations on many of the documents, the involvement of the FBI virtually from the inception of the receipt of the subject OPRA requests, the lack of any substantive involvement by NJIT in the initial review of the assembled documents, the oral and written direction by the FBI to NJIT to withhold certain documents from production and the redactions made solely by the FBI, the counterclaim filed by the FBI seeking both injunctive and declaratory relief against NJIT from releasing any documents, the second review of the assembled documents by the FBI and the instructions on release made solely by the FBI based on its review after the litigation was filed.

A. There is no Causal Nexus between Plaintiffs' Lawsuit and the Production of Documents

In order to award attorneys' fees under OPRA, a factual causal nexus between the litigation and relief ultimately achieved must be shown. See Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). The Supreme Court in Mason recognized that determining whether a causal nexus exists requires a "fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions, and viewing each matter on its merits." 196 N.J. at 79.

No showing of a causal nexus can be made here vis-à-vis the defendants. Any factual causal link was completely broken the moment the FBI overtook the review and production of documents and affirmatively directed the defendants to "stand down" in relation to plaintiffs' OPRA requests. Once the FBI stepped in, any causal link to the defendants was forever irreparably broken as the defendants then had no role in the process, other than taking direction from the FBI. The fact-sensitive inquiry here clearly demonstrates that the motivation behind the defendants' decisions was the unequivocal directives from the foremost investigative and law enforcement body in the nation. Thus, the merits of this matter dispel any notion of a causal nexus warranting an award of attorneys' fees against the defendants.

Paff v. Borough of Garwood, 2012 WL 5512397 (App. Div. November 15, 2012), is on point. Plaintiff, a former member of the Garwood Police Department, was charged with committing two disorderly persons' offenses, both of which were recorded by video surveillance cameras. A settlement agreement was reached between the plaintiff and the Borough requiring the plaintiff to resign. Thereafter, the plaintiff submitted a request to the Borough for information under OPRA and his common law right of access to public records. In response, the Custodian of Records provided plaintiff with various documents. In a subsequent request,

plaintiff asked for a DVD copy of the video surveillance that recorded his allegedly illegal conduct. The Custodian advised plaintiff that the request for the DVD was denied because the recording was a "criminal investigatory record as provided in N.J.S.A. 47:1A-1.1" and because the Borough believed that the DVD was subject to nondisclosure by an expungement order previously entered in plaintiff's favor. 2012 WL 5512397 at *1-2.

Plaintiff challenged the denial by way of verified complaint and order to show cause seeking to compel the release of the clerk's office surveillance DVD under OPRA and his common law right of access to public records. Plaintiff also sought an award of attorney's fees and costs. In opposition, the Borough Police Chief confirmed that the DVD plaintiff requested was "a record of and evidence of an investigation of possible criminal activity." Id. at *2. The trial court held that plaintiff could have the DVD under the common law right of access. The trial court also awarded attorneys' fees. On appeal, the Appellate Division upheld access to the DVD, but reversed the award of attorneys' fees. In so doing, the Court recognized that Mason required a fact-sensitive inquiry to determine whether a causal nexus existed warranting the award of fees. 2012 WL 5512397 at *3 (citing Mason, 196 N.J. at 79). The Court thus held:

> In the present matter, plaintiff's initial request for the DVD of the clerk's office was denied based on the police chief's certification which stated, among other things, that disclosure would jeopardize the security of the municipal building and create a risk of safety. In addition, the Borough contends that it could not have responsibly released the DVD until the court authorized its release … because it reasonably believed the DVD was covered by the expungement order and, the disclosure of expunged records is a disorderly persons offense. Under these circumstances … we are satisfied there were rational reasons for the Borough's decision and a counsel fee award was not warranted.

Paff, 2012 WL 5512397 at *4 (emphasis added). No doubt, following the lawful direction of the FBI similarly is a rational course of action for any citizen and public body to undertake.

Spectraserv, Inc. v. Middlesex County Utilities Auth., 416 N.J. Super. 565 (App. Div. 2010), is also on point respecting this issue. There, plaintiff general contractor Spectraserv, Inc., filed a lawsuit under OPRA seeking attorney's fees claiming it was a prevailing party in litigation against defendant Middlesex County Utilities Authority (MCUA), which was responsible for, among other things, wastewater management in Middlesex County and portions of Union and Somerset counties. MCUA was tasked with making modifications to its wastewater treatment plant in Sayreville to reduce the amount of sludge product and minimize transportation. To effect the modifications, MCUA entered into licensing and confidentiality agreement with an engineering firm called R3 Management to use its patented process known as "biopHast duopHase." Among other things, the agreement between MCUA and R3 Management obligated MCUA "to treat as secret and confidential the R3 Management Technology … not at any time to disclose or permit or allow to be disclosed the R3 Management Technology or any part thereof to any third party, except any necessary disclosure to clients and sub-contractors of the MCUA or as required by law or court, governmental or administrative order or directive." Id. at 569.

Spectraserv was eventually awarded the bid for the project and contracted with MCUA to complete the project. Disputes between the parties arose because Spectraserv fell behind schedule on the project. Several agreed-upon extensions were effectuated, and a contract completion date in December 2005, was established. Eventually, MCUA terminated its contract with Spectraserv for default, claiming unexcused completion delays and failure to meet contract specifications. In October 2005, two months shy of the contract's completion deadline, Spectraserv made several OPRA requests of MCUA seeking various documents related to its relationship with R3 Management. MCUA made the requested documents available for

inspection. More than one year later, in January 2007, Spectraserv made a second OPRA request seeking MCUA's "entire project file" on the construction and improvements of the agency's wastewater treatment plant in Sayreville, which was designed in the 1950s. Counsel for MCUA timely responded that the request encompassed hundreds of thousands of documents generated over a period of 50 years, was not limited in time or scope, and contained language that was too broad and expansive, and therefore MCUA could not project when it could produce the records and requested a more tailored and complete request. Id. at 570-71.

Approximately one month after its second OPRA request, in February 2007, Spectraserv submitted its third and final OPRA request. Among other things, the third request again sought the "entire project file" as well as the complete engineering design of the project's improvements, the engineer's "Development of Design Concept," and "any and all documents detailing design, engineering, construction and/or management plans" as to the Spectraserv contract or "prepared in connection with" certain scientific processes named in the Spectraserv contract. Id. at 571. Eight days after it submitted its third OPRA request, Spectraserv filed a lawsuit against the MCUA in the Law Division, asserting various claims arising under the parties' engineering contract (the "construction litigation"). Within six business days of receiving the third request, MCUA responded that the request was unreasonable in requiring the examination of "over nine years worth of files." Id. at 572. Viewing many of the requested documents as confidential, proprietary or trade secrets under its licensing agreement with R3 Management, or otherwise privileged, MCUA expressed its intention to withhold some of the requested records and to produce those it deemed exempt. Id. In light of the construction litigation complaint which had been filed, MCUA proposed a compromise, which entailed a coordinated production of documents, with Bates numbering for tracking compliance, to satisfy

both the OPRA request and the anticipated discovery demands in litigation. Id. Spectraserv rejected MCUA's proposal and instead filed an OPRA action by way of verified complaint and order to show cause, seeking, inter alia, the requested documents and attorney's fees. Id. at 572-73.

Meanwhile, MCUA began identifying, from the estimated 97,000 documents covered by the OPRA request, those it deemed confidential or privileged. Id. at 573. Thereafter, MCUA invited Spectraserv to inspect documents the agency deemed responsive after its review of four filing cabinet drawers of records and ten boxes of shop drawings. Id. Prior to Spectraserv inspecting the documents, the managing director of BiopHast wrote to MCUA objecting to its production of any documents related to the R3 Management technology covered by the confidentiality agreement. Id. As a result of BiopHast's position, the number of documents available for review for Spectraserv was greatly reduced. Id. Subsequently, MCUA was directed to produce confidentiality and privilege logs of all exempted documents, which MCUA eventually provided. Id. MCUA originally withheld, as privileged or confidential, a total of 2444 documents out of approximately 150,000. Id. at 574. BiopHast then wrote the court advising that the licensor generally did not object to Spectraserv's review of these documents subject to the entry of an appropriate protective order. Id. This prompted the court to order that the licensor file a motion to intervene in the pending litigation and that failure to do so would result in a waiver of BiopHast's right to object to the MCUA's production of any records protected under the licensing agreement. Id. The licensor did not intervene. Id.

A special master was appointed to resolve disputes regarding the production of privileged documents. Id. MCUA ultimately produced 2239 of the 2444 documents originally designated as privileged or confidential, with the remaining 205 documents exempt from disclosure. Id. at

575. The special master also found that Spectraserv was entitled to $121,520 in attorneys' fees. Id. The Law Division rejected this finding, and Spectraserv appealed. Id.

The Appellate Division affirmed the trial court's ruling. In so doing, the Court recognized that Spectraserv's OPRA request was non-conforming and that MCUA acted reasonably under the given circumstances. Id. at 583. The Court also recognized the absence of a causal connection between the lawsuit and the production of documents such that Spectraserv could not be deemed a prevailing party under OPRA. Id. at 583-84. On this issue, the Court opined:

> [A]bsent here is any causal connection between Spectraserv's OPRA complaint and the production of documents by the MCUA. From the very inception … the MCUA acknowledged its obligation to produce non-exempt documents and, in fact, made many of these documents available for inspection in advance of any court intervention or directive … The MCUA also immediately took steps to cull and isolate from its voluminous records those it deemed privileged and confidential. As to the latter, as soon as its licensor withdrew its objection by failing to intervene, the MCUA made available all 1848 documents once considered confidential. In fact, in the interim, the court itself allowed the MCUA to withhold these documents while it gave BiopHast forty-five days to intervene and assert confidentiality… Thus, under the circumstances, it cannot be said that Spectraserv's OPRA complaint caused the production of documents that would not have been produced otherwise.

Id. at 584 (emphasis added).

Both Paff and Spectraserv demonstrate that the causal nexus requirement established in Mason does not exist here. Like the defendants in Paff and Spectraserv, defendants NJIT and Williams were faced with issues of security, confidentiality, and the overriding directives from the FBI on how to proceed relative to plaintiffs' OPRA requests. It appears lost on the plaintiffs that so many of the subject documents were created by the FBI and this remains important as this provides the factual basis and nexus for the FBI's interest and ultimate exertion of control over the subject documents. Here, the defendants did nothing to obfuscate or impede any document

production coordinated by the FBI and clearly acted reasonably in connection therewith. Again, it was the FBI that was coordinating everything, while the defendants took orders and stood aside because they were instructed too. From the moment the defendants assembled the documents, the FBI took control and provided directions. Indeed, plaintiffs ignore the entire essence of what this case is truly about: The defendants did not have discretion to ignore the FBI. On this issue, plaintiffs attempt to parallel the circumstances here with their records requests to other universities made pursuant to other State's public records laws. See plaintiffs' moving brief at 23-24. This argument is specious. What other universities did respecting plaintiffs' requests is entirely of no moment here, as other States' laws were implicated and the factual context surrounding the decisions made by those universities is unknown and truly not relevant to this New Jersey action involving OPRA. This matter cannot be litigated under the public records laws of multiple States, which is what plaintiffs essentially seek through this argument.

Moreover, to suggest, as plaintiffs do, that the award of attorneys' fees under OPRA is a simple calculus of "OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys' fees" is not the law. Per both Paff and Spectraserv, there are factors which must be considered in connection with a request for fees in order to determine if an agency's response to an OPRA request is reasonable. Cf. McDonnell v. U.S., 870 F.Supp. 576, 580 (D.N.J. 1994) (reasonableness is a factor in determining if attorneys' fees should be awarded against a defendant under FOIA); Weikamp v. United States Department of Navy, 175 F.Supp.3d 830, 837 (N.D.Ohio 2016) (attorney for government contractor, who substantially prevailed in FOIA action against the Navy, seeking disclosure of documents, was not entitled to attorney's fees or costs; Navy had reasonable basis for withholding documents); Waage v. IRS, 656 F.Supp.2d 1235, 1241

(S.D.Cal. 2009) (IRS had a reasonable basis in law for withholding from a requester of information under FOIA documents relating to its investigation of requester and his law firm, and thus factor of whether governmental agency had a reasonable basis for withholding information weighed against awarding attorney's fees to requester). Indeed, the Supreme Court in Mason specifically identified "reasonableness" as a factor that must be considered in this context. 196 N.J. at 79 ("evaluating the reasonableness of … an agency's decisions").

Plaintiffs cite to Collingswood Board of Education v. McLoughlin, 2016 WL 6134926 (App. Div. October 21, 2016) ("McLoughlin"), as support for their attorneys' fees motion. See plaintiffs' moving brief at 22-23. Plaintiff's reliance on McLoughlin is completely misplaced. In McLoughlin, after an OPRA request was made, the Collingswood Board of Education filed a declaratory judgment action to prevent the release of an investigative report prepared for the Board by a retained independent investigator. The trial court denied the requesters' motion for summary judgment dismissing the declaratory judgment complaint. The requesters appealed that ruling, as well as the trial court's partial award of attorneys' fees to the requesters. On appeal, the Appellate Division reversed, holding that "a records custodian may not bring a declaratory judgment action against a record requestor to enforce its right to withhold records." 2016 WL 6134926 at *3. The Court also pointed out that an entity subject to an OPRA request cannot use a declaratory judgment action to avoid making a decision regarding whether a record must be produced or whether the records falls within an exception to OPRA. Id. The McLoughlin Court did not address the award of attorneys' fees in any manner whatsoever, and simply remanded the matter to the trial court on that issue. Id. Because the Court in McLoughlin addressed an issue not germane to this action – the use of declaratory judgment action to counter an OPRA request – the ruling is entirely inapposite.

Plaintiffs' reliance on Paff v. W. Deptford Twp., 2010 WL 546587 (App. Div. February 18, 2010), to support their position here is similarly misplaced. See plaintiffs' moving brief at 19-20. In Paff, the Appellate Division simply held that a consent order to maintain confidentiality of discovery materials that are provided to litigants in a lawsuit could not nullify an entity's obligations under OPRA. 2010 WL 546587 at *2. This ruling is inapposite as there is no consent order to maintain confidentiality here, nor is same even at issue in this action. In relying on Paff, plaintiffs assert that "the existence of an agreement between a public agency and a third party to withhold certain records in no way relieves the public entity and its records custodian of compliance with OPRA." See plaintiffs' moving brief at 20. This assertion is simply wrong given that there was no agreement between the defendants and the FBI relative to plaintiffs' OPRA requests. Rather, the FBI seized control of the production and orchestrated everything. And, lest there was any doubt concerning the FBI's exertion of total control over the subject matter documents, the FBI's counterclaim seeking both injunctive and declaratory relief precluding NJIT from releasing any of the subject matter documents makes clear the lack of any discretion by NJIT to ignore the lawful direction of the FBI. For these reasons, Paff does nothing to advance plaintiffs' position here.

Because the factors present here demonstrate that there is no causal nexus between plaintiffs' lawsuit and the documents produced pursuant to OPRA, no attorneys' fees can be awarded against the defendants because the defendants' conduct was reasonable under the circumstances.

B. Defendants were not the Records Custodian subject to an Award of Attorneys' Fees under OPRA

The FBI was in fact the records custodian relative to plaintiffs' OPRA request. This fact is confirmed by the FBI's written notice to defendants dated May 27, 2015. In relevant part, the notice stated:

> We understand the New Jersey Institute of Technology (NJIT) received a request for email communications between certain individuals at NJIT and certain United States Government (USG) entities. To the extent that the requestor seeks USG email communications, and more particularly those of Federal Bureau of Investigation (FBI) personnel, those communications and attachments, if any, are not to be released. Those communications are the property of the USG and are not to be further distributed without the FBI's prior written approval, in conformance with federal laws and/or regulations including the Freedom of Information Act (FOIA) … the Privacy Act of 1974 … and, 28 U.S.C. § 534 …
>
> Please notify the requestor that he/she may submit a FOIA request for such information either in writing to the FBI or online using www.fbi.gov/foia/.

N.J.S.A. 47:1A-6

Notably, OPRA's attorney's fee provision refers to the conduct of the "custodian" as the individual denying access and as the person who made the decision to deny access. See ("A person who is denied access … may … institute a proceeding to challenge the custodian's decision[.]"). Clearly, the FBI's May 27, 2015, notice demonstrates that it was denying access to the requested information and that the defendants were simply bystanders to the process. This fact is further confirmed by the FBI's counterclaim filed in this Court (ECF 23). The counterclaim makes clear that the assembled documents were "under the continued control of the FBI." Id. at 7, ¶ 38. It remains beyond dispute that the actions of the FBI placed NJIT in a Hobson's choice of either acceding to plaintiffs' request for records, despite the FBI's notice making clear the subject records should be sought pursuant to a FOIA request and thereby confronting civil and/or criminal exposure in a claim by the FBI for not adhering to its explicit

written direction in both the monikers that appear on so many of the documents and its May 27, 2015, notice, or comply with the proper and lawful directive of the FBI, and thereby confront the exposure on the facts presented here.

There is no New Jersey decision that addresses the issue of a federal government regulatory body providing directives to a New Jersey state body subject to OPRA in which the federal body directs the state body to withhold documents belonging to the federal body. There is language in Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), wherein the Appellate Division expressly recognized, albeit in dicta, that a party with the interest in maintaining the confidentiality of records and explaining the basis for its professed need for confidentiality (in this case, the FBI) may be different than the party in possession of the records. The Appellate Division specifically recognized:

> N.J.S.A. 47:1A-5(g) generally places the burden upon the custodian of a public record to state the 'specific basis' for the denial of access, and N.J.S.A. 47:1A-6 states that 'the public agency shall have the burden of proving that the denial of access to a document is authorized by law.' However, the custodian may not be in a position to discharge this burden if the asserted confidentiality interest in a document is not that of the government agency upon which the document request was made but rather another government agency, in this instance the United States Attorney's Office.

Id. at 215 (emphasis added). Notably, plaintiffs do not cite to Gannon whatsoever in their moving papers. See, generally, plaintiffs' moving brief. There is case law that has criticized other dicta in the Gannon case; however, that part of the criticized Gannett ruling is not relevant here. See Scheeler v. Office of the Governor, 448 N.J. Super. 333, 346 (App. Div. 2017) ("the trial court correctly determined that the Gannett court's discussion of the propriety of Gannett's OPRA request is dicta and not binding precedent").

Because the FBI exercised control over the entire document production process relative to plaintiffs' OPRA requests, the FBI – and not NJIT or Williams – was the records custodian as the governmental agency with the asserted confidentiality interest in the documents.

C. NJIT's Actions Were Reasonable

Plaintiffs take exception to defendants' use of the term "Hobson's choice," setting forth their critique in a footnote reference in their brief. See plaintiffs' moving brief at 21 n.3 ("NJIT appears to be using 'Hobson's choice' to mean that it was given two options, neither of which it found attractive"). If plaintiffs felt this to be of true importance here, it would not be relegated to a footnote. As Justice Clifford recognized regarding the use of footnotes: "[Footnotes] distract. They cause the reader to drop the eyes; to absorb what is usually a monumental piece of irrelevancy or pseudo-scholarship … The whole irritating process points up the soundness of John Barrymore's observation that reading footnotes is like having to run downstairs to answer the doorbell during the first night of the honeymoon." In re Opinion 662 of Advisory Committee on Professional Ethics, 133 N.J. 22, 32 (1993).

On further analysis, the fact remains NJIT was presented with no real choice. When the world's premier law enforcement and investigative body provides a lawful instruction, it remains a fools' errand to speciously state NJIT was within its rights to ignore the direction. The fact is NJIT relies on the FBI and works cooperatively with it to assist in securing the safety of its campus filled with over 11,000 students and almost 2,000 faculty and employees. The only action that the defendants took here was assembling the documents for the FBI. The defendants were excluded from the document review process and therefore did not review any documents. Nor did the defendants withhold any documents. In fact, the defendants were excluded by the FBI from copying the documents, Bates stamping the documents, and never received a copy of

the documents back from the FBI. See, par. 8 of Potters' Certification. As NJIT's litigation counsel, we, as well, acceded to the lawful direction of the FBI based on the FBI's stated concern over the extreme confidentiality associated with the subject documents and did not use our copy room or outside vendor to duplicate the re-assembled documents

Through their application for attorneys' fees, the plaintiffs ignore an inconvenient truth: The documents at issue were created by and disseminated by the FBI and were FBI documents, and as such the FBI exercised dominion and control over them as the de facto custodian of records relative to plaintiffs' OPRA requests. In fact, in the productions of documents forwarded to the plaintiffs, defendants' litigation counsel specifically incorporated by reference the February 18, 2016, correspondence from the FBI to NJIT which indicated that the return of documents was done in in accordance with FBI protocol. See Potters Cert. ¶ 9. Thus, it was solely the FBI driving the document production process.

D. Plaintiffs were not the Prevailing Party under OPRA

Plaintiffs cannot recover attorneys' fees under OPRA because they are not a prevailing party. Notably, a requestor is not a prevailing party simply because the agency produced documents after an OPRA suit was filed. Mason, supra, 196 N.J. at 78. Rather, "a complainant is a prevailing party if he or she achieves the desired result because the complaint brought about change (voluntary or otherwise) in the custodian's conduct." Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565, 583 (App. Div. 2010); Ingris v. Borough of Caldwell, 2014 WL 3437272 at *2 (App. Div. June 16, 2014) ("Merely because the Borough produced documents after the filing of [plaintiff's] lawsuit did not entitle him to compensation … A complainant is the prevailing party only if he or she achieves the desired result because the complaint brought about change (voluntary or otherwise) in the custodian's conduct").

Plaintiffs' complaint had no effect whatsoever on the defendants' conduct because the defendants were at the mercy of the FBI. If anything, the filing by defendants' of their third-party complaint caused the release of records because it brought the FBI into the litigation as a party. The FBI in turn filed a counterclaim seeking to enjoin the production of all records. Since the defendants did not review any documents, made no redactions, did not participate in any decisions about withholding/redacting documents, and were not involved in any manner whatsoever in the re-review of any documents, it is clear that plaintiffs' complaint did not cause any change, voluntary or otherwise, in the conduct of the defendants sufficient to impose attorneys' fees under OPRA. Perhaps, if plaintiffs filed a FOIA request and/or named the FBI as a direct defendant, the outcome would be different. But, plaintiffs' cannot now rightfully claim their lawsuit against NJIT in any manner served as the catalyst for anything.

POINT II

PLAINTIFFS' ATTORNEYS' FEES ARE EXCESSIVE IN THE CONTEXT OF THIS LITIGATION AND SHOULD NOT BE AWARDED

Defendants do not concede that plaintiffs are entitled to any attorneys' fees in this matter, consistent with the arguments set forth in Point I, supra. However, if the court does rule that attorneys' fees are to be awarded to the plaintiffs, defendants contest the amount sought by the plaintiffs as excessive. Indeed, plaintiffs seek fees in the amount of $134,745.74 and seek to add a 25% enhancement to that amount, bringing the total amount of fees to $189,359.00. Certainly, one is left to wonder why plaintiffs believe that a 25% enhancement is warranted given the circumstances that the defendants faced here, namely the FBI usurping any involvement that the defendants had in producing records to the plaintiffs pursuant to their OPRA requests. Here, the plaintiffs are way off base when they state that "there is no dispute that NJIT asserted a blanket

claim of privilege in response to Plaintiffs' Second Request and Third Request." See plaintiffs' moving brief at 37. Plaintiffs are wrong. Any claim of privilege or nondisclosure was directed by the FBI and not the defendants. The Stipulated Facts finally disabuse plaintiffs of their erroneous view of NJIT's extremely limited role in this matter.

Importantly, "enhancements are not preordained, [and] trial courts should not enhance fee awards as a matter of course. Every case will depend upon its facts." New Jerseyans for Death Penalty Moratorium v. New Jersey Dept. of Corrections, 185 N.J. 137, 157 (2005). This matter veered away from "garden variety" once the FBI intervened and directed the document production to the plaintiffs. Plaintiffs speak of the "unusual actions taken by NJIT in this case[.]" See plaintiffs' moving brief at 37. Yet, this is precisely why no enhancement is warranted. The defendants had no control over the circumstances that transpired; therefore, they should not be penalized for such. As one is left to ponder why plaintiffs never filed a FOIA request, which they most certainly could have done had they followed Judge Mitterhoffs' admonition to do so years ago, NJIT continues to remain baffled by plaintiffs' claim that NJIT somehow took any action inimical to plaintiffs' interest in obtaining documents. What is the unusual action to which plaintiffs are referring? Plainly, given the Stipulated Facts, there is none.

Moreover, the documents sought here could have been pursued against the FBI in a FOIA action; however, the plaintiffs never pursued such an action, despite the FBI's invitation to do so in its May 27, 2015, correspondence (the requestor "may submit a FOIA request for such information either in writing to the FBI or online using www.fbi.gov/foia"). See Potters Cert. ¶ 8. This is critical, since "the vast majority of attorney hours expended in this case were expended after NJIT filed its third-party complaint against the FBI, which resulted in the

removal of this action to [the federal court]." See plaintiffs' moving brief at 28. If plaintiffs had pursued a FOIA claim from the outset – rather than having the defendants pursue relief against the FBI – the attorneys' fees generated would be marginal at best and more properly sought against the FBI for the FBI documents at issue. Essentially, the attorneys' fees are as high as they are because plaintiffs consciously chose to disregard FOIA in favor of OPRA despite knowing that the documents they sought were FBI documents. Such a scenario reeks of bad faith and militates against the award of any fees whatsoever.

Finally, plaintiffs argue that the defendants "previously conceded" that they are responsible for plaintiffs' attorneys' fees based upon a comment made by defendants' counsel in a December 17, 2015, letter to the court which references potential exposure for fees and defendants' indemnification claim against the FBI. See plaintiffs' moving brief at 17. To be clear, at no time have the defendants ever conceded that they are responsible for plaintiffs' attorneys' fees here. In fact, the necessity of the present motion speaks directly to this point. Defendants have vigorously opposed plaintiffs' position on the attorneys' fees issue throughout this litigation and to suggest otherwise (as plaintiffs do) is simply disingenuous.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for attorneys' fees should be denied.

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