

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/Third-Party
Defendants,*

v.

FEDERAL BUREAU OF
INVESTIGATION,

*Third-Party Defendant/
Third-Party Plaintiff.*

HON. MADELINE C. ARLEO

Civ Action No.
2:15-cv-08559-MCA-LDW

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES

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INTRODUCTION

Pursuant to the Court’s October 20, 2017 Order, ECF No. 52, Plaintiffs Daniel Golden and Tracy Locke (collectively, “Plaintiffs”) respectfully submit this brief in support of their motion for an award of attorneys’ fees under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.* (“OPRA” or the “Act”) from Defendants/Third-Party Plaintiffs/Third-Party Defendants the New Jersey Institute of Technology and its Custodian of Records, Clara Williams (collectively, “NJIT”). As set forth in detail below, because Plaintiffs’ lawsuit was successful—resulting in the release of thousands of pages of records previously withheld in full or in part by NJIT—they are “prevailing part[ies]” entitled to reasonable attorneys’ fees under OPRA’s mandatory fee-shifting provision. *See* N.J.S.A. 47:1A-6. Accordingly, the Court should grant Plaintiffs’ motion and enter an order requiring NJIT to pay Plaintiffs’ reasonable attorneys’ fees in connection with this long-running OPRA lawsuit in the amount of \$189,359.00.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs’ Requests

This case concerns three public records requests submitted to NJIT by Plaintiffs between April 8 and August 13, 2015, for emails between certain persons at NJIT and the Federal Bureau of Investigation (“FBI”) or Central Intelligence Agency (“CIA”) (collectively, the “OPRA Requests”). *See* Verified Complaint,

ECF No. 1-1 (“Golden Compl.”). Mr. Golden is a Pulitzer Prize-winning journalist and currently a Senior Editor at ProPublica. *See* Ex. 1 (hereinafter “Golden Decl.”) ¶¶ 1, 4. The OPRA Requests were made by Plaintiffs for newsgathering purposes in connection with Mr. Golden’s non-fiction book *Spy Schools*, concerning foreign and domestic intelligence activities at U.S. universities, that was recently published by Henry Holt and Co. *See id.* ¶ 6; Amazon, *Spy Schools: How the CIA, FBI, and Foreign Intelligence Secretly Exploit America’s Universities*, <https://www.amazon.com/Spy-Schools-Intelligence-Secretly-Universities/dp/1627796355>. Tracy Locke is a publicist with Henry Holt that assisted Mr. Golden with his research. Golden Compl. ¶ 4.

In response to Mr. Golden’s first OPRA request (the “First Request”), NJIT produced approximately 540 pages of responsive records—the vast majority of which were either fully or heavily redacted—and withheld approximately 3,949 pages of other responsive records in their entirety, citing Executive Order No. 21, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-9. Golden Compl., Background & Factual Allegations ¶¶ 7–8 & Ex. B; *see also* NJIT Verified Ans. to Pls.’ Verified Comp., Affirmative Defenses, Countercl., Third-Party Compl., Designation of Trial Counsel and Certification Pursuant to R. 4:5-1 & R. 4:6-1(D) (hereinafter, “NJIT Ans.”), ECF No. 2, Background & Factual Allegations ¶¶ 7–8.

According to NJIT, after it received the First Request, it “invited the FBI to review its contemplated production of documents” and, over the course of two days in May of 2015, “approximately eight FBI personnel reviewed NJIT’s contemplated production of documents.” Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5, at 1. According to NJIT, “[b]ased on this review, the FBI (1) made a number of redactions to several documents and (2) directed NJIT to withhold from production approximately 4,000 pages of documents.” *Id.*

In response to Ms. Locke’s OPRA request (the “Second Request”), NJIT refused to provide copies of any responsive records, citing Executive Order No. 26, N.J.S.A. 47:1A-1.1, and Executive Order No. 21. Golden Compl. ¶¶ 12–16; NJIT Ans. ¶¶ 12–16. In response to Plaintiffs’ final OPRA request (the “Third Request”), which, *inter alia*, expanded the date range for emails initially requested by Mr. Golden, NJIT also refused to provide any responsive records. Golden Compl. ¶¶ 17–23; NJIT Ans. ¶¶ 17–23. NJIT’s response to the Third Request also cited Executive Order No. 26, N.J.S.A. 47:1A-1.1, and Executive Order No. 21.

II. Proceedings in New Jersey Superior Court and Removal

Following NJIT’s denial of their Third Request, on September 11, 2015, Plaintiffs filed this action in the Superior Court of New Jersey Law Division, Essex County, against NJIT pursuant to OPRA and New Jersey common law. *See*

Golden Compl. On September 17, 2015, the Superior Court issued an order to show cause directed to NJIT. *See* ECF No. 1-2.

Plaintiffs were informed by NJIT's counsel that thereafter, in or about October of 2015, NJIT provided copies of all records responsive to Plaintiffs' OPRA Requests to the FBI. *See* Ex. 2 (hereinafter "Townsend Dec."), Ex. C. According to NJIT, following the filing of Plaintiffs' lawsuit "the FBI advised [NJIT] it was going to intervene in the State Court proceeding as a means to stand behind its redactions and direction to withhold from production in response to the OPRA request the approximately 4,000 pages of documents." Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5, at 2.

The FBI, however, did not intervene.¹ And, on November 13, 2015, NJIT filed its answer to Plaintiffs' complaint, a counterclaim against Plaintiffs for \$26.65,² and a third-party complaint against the FBI for indemnification in the event that an award of attorneys' fees was entered against NJIT based on Plaintiffs' OPRA and common law claims (the "NJIT Third-Party Complaint"). *See* NJIT

¹ Plaintiffs agreed to a delay of proceedings in the state court, at the request of NJIT, to give the FBI an opportunity to intervene. *See* Letter from Gary Potters to Judge Mitterhoff (October 8, 2015), ECF No. 1-3; Letter from Gary Potters to Judge Wettre (December 17, 2015), ECF No. 5 ("Initially, the FBI advised it was going to intervene in the State Court proceeding . . . [t]oward that end, the FBI requested me to obtain an extension of time, which I did and to which plaintiffs' counsel consented.").

² NJIT's counterclaim against Plaintiffs was dismissed by stipulation on December 3, 2015. ECF No. 1-4.

Ans., p. 13–17. Now a party to Plaintiffs’ OPRA lawsuit as a result of the NJIT Third-Party Complaint, on December 11, 2015, the FBI removed this matter to this Court pursuant to 28 U.S.C. § 1442(a)(1). *See* Notice of Removal, ECF No. 1.

Thereafter, on February 18, 2016, the FBI filed a counterclaim against NJIT seeking declaratory and injunctive relief to prevent NJIT from releasing responsive records to Plaintiffs in response to their OPRA Requests. *See* ECF No. 23 (the “FBI Counterclaim”).

III. The Release of Records in Response to Plaintiffs’ OPRA Requests

In meet and confer discussions after the filing of the FBI Counterclaim, counsel 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. Joint Status Report, ECF No. 24, at 1–2. The FBI’s position at that time was that “approximately 4,000 [of those] pages are federal records, controlled by the FBI, and not subject to disclosure under [OPRA], regardless of whether or not they are subject to any exemption(s).” *Id.* at 2 (quotation removed, second alteration in original). The FBI proposed “to treat the remaining 2,000 pages as a request to consult from NJIT[,]” which would entail reviewing them “at a rate of 500 pages per month[.]” and “sendi[ng] the documents back to NJIT.” *Id.* at 2. Given the “upcoming publication deadlines for Mr. Golden’s forthcoming book,” Plaintiffs agreed to the FBI’s proposal, but made

clear that they did “not concede and do not agree with, *inter alia*, the FBI’s position that the remaining approximately 4,000 pages of documents responsive to Plaintiffs’ request are not subject to OPRA, and reserve all rights.” *Id.* at 2–3. NJIT “also agree[d] to the FBI’s proposal.” *Id.* at 3. The parties also jointly proposed “a stay of all deadlines,” *id.*, and the Court entered a stay with respect to the filing of all responsive pleadings and/or motions in connection with both the FBI Counterclaim and the NJIT Third-Party Complaint on March 7, 2016. Order, ECF No. 26, at 1–2.

Between March 2016 and the end of June 2016, NJIT sent four productions of records to Plaintiffs, releasing approximately 1,499 pages in full and 379 pages in part that were responsive to Plaintiffs’ OPRA Requests. *See* Joint Status Report, ECF No. 27, at 1–2. Approximately two-hundred and ninety-six pages of records were withheld in full. *Id.* Each production from NJIT to Plaintiffs included a cover letter from NJIT’s counsel, as well as a copy of a letter from the FBI to Ms. Williams, NJIT’s Custodian of Records. *See* Townsend Decl. Ex. C. The letters from the FBI to Ms. Williams state that they are accompanying CDs of records being provided “in response to your request for the FBI’s review of records responsive to the [above-referenced case].” *See id.*

During meet and confer discussions in June 2016, the FBI stated that, upon further examination, it would also review documents identified by NJIT as

responsive to Plaintiffs' OPRA Requests that the FBI had originally asserted were not subject to disclosure under OPRA. *See* Joint Status Report, ECF No. 27, at 2–3. Accordingly, the parties jointly proposed to the Court that the “current stay remain in place until the FBI completes its review of these documents and any responsive, non-exempt ones are subsequently produced to Plaintiffs through NJIT.” *Id.* at 4. The Court subsequently entered an order continuing the stay. Order, ECF No. 28.

Between August 2016 and the beginning of November 2016, NJIT made four additional productions of responsive records to Plaintiffs, each of which, as before, included a cover letter as well as a copy of a letter from the FBI to Ms. Williams. *See* Townsend Decl. Ex. D; *see also* Joint Status Report, ECF No. 29. The FBI's letters to Ms. Williams, once again, stated that they accompanied attached CDs of records being provided “in response to your request for the FBI's review of records responsive to the [above-referenced case].” Townsend Decl. Ex. D. In total, over the course of the eight productions described above, Plaintiffs received approximately 3,445 unredacted and 379 partially redacted pages of records responsive to their OPRA Requests from NJIT. Joint Status Report, ECF No. 29, at 2. Approximately 1,640 pages were withheld from Plaintiffs in full, and approximately 362 pages were determined to be duplicates. *See id.*

Following NJIT's November 2016 production, the parties met and conferred concerning records that had been withheld in whole or in part. The "FBI and NJIT [] agreed to provide Plaintiffs with additional information regarding the documents being withheld in full, as well as a limited number of documents being withheld in part." *Id.* Plaintiffs received that information on December 9, 2016 and, based on that information, agreed not to challenge the majority of the withholdings. *See* Joint Status Report, ECF No. 32, at 2. Plaintiffs did, however, "provid[e] NJIT and the FBI with a list of specific documents withheld in part and in full that they [] asked to be revisited." *Id.*

In response to that request, on February 17, the FBI provided additional records responsive to the OPRA Requests and additional information regarding the specific withholdings identified by Plaintiffs. Joint Status Report, ECF No. 34, at 3. Upon review of the records and information provided, and in light of the publication deadlines for Mr. Golden's book, Plaintiffs informed the parties that they would not seek judicial review of the remaining withholdings. *Id.* Notwithstanding extensive discussions between the parties concerning Plaintiffs' entitlement to an award of reasonable attorneys' fees under OPRA, they have been unable to reach any agreement on that issue. *See id.* at 3–5.

ARGUMENT

I. Because Plaintiffs' lawsuit successfully caused the release of records OPRA's mandatory fee-shifting provision requires that they be awarded reasonable attorneys' fees from NJIT.

Under OPRA, a person denied access to a government record by the custodian of the record may bring an action challenging that decision, and a “requester who prevails in any [such] proceeding *shall* be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6 (emphasis added). Thus, unlike some other state public records laws, OPRA “mandate[s], rather than permit[s], an award of attorney’s fees to a prevailing party[.]” *Mason v. City of Hoboken*, 196 N.J. 51, 75 (2008). A requester need not secure a judicial order requiring the release of records to be entitled to fees; it is sufficient to show that her or his lawsuit was the catalyst behind the release of records. *Id.* at 76.

Here, as explained below, Plaintiffs are “prevailing part[ies]” under the catalyst theory recognized by the New Jersey Supreme Court. Accordingly, they are entitled to recover their reasonable attorneys’ fees from NJIT.

A. Plaintiffs are prevailing parties under the catalyst theory for the purpose of OPRA’s mandatory fee-shifting provision.

In determining whether a requester has prevailed for purposes of OPRA’s mandatory attorneys’ fee provision absent a judicial ruling in his or her favor, New Jersey courts apply the so-called “catalyst theory.” *See Mason*, 196 N.J. at 76. In order to qualify as a prevailing party under the catalyst theory a plaintiff/requestor

need only show “(1) a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law.” *Id.* at 76 (internal quotations and citation omitted). In other words, “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 Cty. Utilities Auth.*, 416 N.J. Super. 565, 583 (App. Div. 2010). The reason for this commonsense approach is simple: “[t]o rule otherwise would allow a defendant to change its behavior at the eleventh hour and still escape the obligation to pay attorney’s fees, even though the plaintiff’s complaint was the catalyst for the change.” *Smith v. Hudson Cty. Register*, 422 N.J. Super. 387, 395 (App. Div. 2011).

1. Plaintiffs’ litigation was responsible for the release of records.

The record in this case makes clear that a factual causal nexus exists between Plaintiffs’ litigation and the relief they ultimately achieved. *Cf. Mason*, 196 N.J. at 76. Prior to the filing of Plaintiffs’ lawsuit, NJIT responded to the First Request by releasing only a few hundred pages of records, the vast majority of which were partially or heavily redacted. Golden Compl., Background & Factual Allegations ¶¶ 7–8 & Ex. B. NJIT denied Plaintiffs’ Second Request and Third Requests in their entirety, refusing even to release records it had previously disclosed. *Id.* ¶¶ 12–23 & Exs. E, G.

In initially denying Plaintiffs access to records responsive to their OPRA Requests, NJIT cited a variety of exemptions under New Jersey law, including Executive Order No. 21 (McGreevey 2002), Executive Order No. 26 (McGreevey 2002), Executive Order No. 9 (Hughes 1963), N.J.S.A. 47:1A-9, and N.J.S.A. 47:1A-1.1. *See* Golden Compl. Exs. B, E, G. After this lawsuit was filed, however, NJIT abandoned any reliance on those exemptions, and made clear that it did not stand by any of its redactions or withholdings. *See* NJIT Ans.; Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5. Instead, NJIT sued the FBI for apparently advising NJIT to withhold records in response to Plaintiffs' OPRA Requests, conceding, in the process, that by denying Plaintiffs access to the records they requested NJIT was "expose[d]" to liability for Plaintiffs' attorneys' fees under OPRA. *See* Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5 (stating, *inter alia*, that "Under OPRA, a public entity to whom the request is directed may be assessed a sanction in the form of attorneys' fees and costs[]" and that "NJIT and Williams confront such exposure[.]").

Following removal to this Court, NJIT agreed to engage in a new process whereby the FBI, acting as a "consult[ant]" for NJIT, Joint Status Report, ECF No. 24, would re-review all records that were in the possession of NJIT that were responsive to Plaintiffs' OPRA Requests, including those that had been previously withheld by NJIT in full or in part. *See* Joint Status Report, ECF No. 24, at 1-3;

id. at 3 (stating “FBI and NJIT will complete the processing and production of non-exempt, responsive information to Plaintiffs of no fewer than 1,500 of the 2,000 pages of responsive documents discussed above on or before June 1, 2016.”). Pursuant to that process, by the end of June 2016 Plaintiffs had received four productions from NJIT totaling approximately 1,499 unredacted pages and 379 partially redacted pages responsive to their OPRA Requests. *See* Joint Status Report, ECF No. 27, at 1–2. NJIT thereafter made four additional productions of records responsive to Plaintiffs’ OPRA requests. *See* Townsend Decl. Ex. D. In total, Plaintiffs received approximately 3,445 unredacted pages of records responsive to their OPRA Requests from NJIT, as well as 379 partially redacted pages, as a result of this litigation. *See* Joint Status Report, ECF No. 29, at 2.

Had Plaintiffs not filed this lawsuit, they would not have obtained the thousands of previously withheld pages of records they now have. Indeed, the pre-litigation position of NJIT was so extreme that in response to Plaintiffs’ Second and Third Requests NJIT refused to even provide copies of records *it had already released*. Golden Compl., Background & Factual Allegations ¶¶ 12–23. The record is clear that NJIT changed its position only after Plaintiffs’ Complaint was filed and NJIT was faced with the prospect of having to justify its actions to a court. Thus, not only did Plaintiffs ultimately “achieve the desired result because the complaint brought about change[,]” *Spectraserv*, 416 N.J. Super. at 583, but

there is a clear “factual causal nexus” between this litigation and the result Plaintiffs achieved, *Mason*, 196 N.J. at 76.

The New Jersey Supreme Court’s decision in *Mason* underscores why the catalyst theory applies here. There, in contrast, a requester did not satisfy the first prong of the catalyst theory as to one request because the defendant had “agreed to plaintiff’s request *before she even filed suit*,” *Mason*, 196 N.J. at 81 (italics added). Similarly, she did not satisfy the first prong as to her second request because the agency responded a mere one day beyond the statutory limit, and the mother of one of the defendants “was critically ill and suffered a massive and ultimately fatal heart attack during the relevant time frame, which complicated [their] efforts to respond.” *Id.* at 80. Here, on the other hand, NJIT had not agreed to release all requested records to Plaintiffs before this lawsuit was filed; nor were they simply in the process of preparing them for release; nor were there any unusual circumstances that merely delayed their planned compliance. *Compare id. with* Golden Compl., Background & Factual Allegations ¶¶ 1–23. NJIT’s pre-litigation position was clear—it was denying Plaintiffs’ OPRA Requests, including on the basis of various asserted exemptions. *See id.* ¶¶ 4, 8, 15, 20–21 & Exs. B, E, G. Thus, this case is similar to *K.L. v. Evesham Township Board. of Education*, where the Appellate Division found that a requester satisfied the causal nexus prong of the catalyst theory test when, *after his lawsuit was filed*, the responding

government agency conferred with a third party who it believed had an interest in the records, and then released a redacted document to the requester. *See* 423 N.J. Super. 337 (N.J. App. Div. 2011). There, as here, because the requester’s “OPRA lawsuit was the catalyst for disclosure[,]” 423 N.J. Super. at 364, he was entitled to recover reasonable attorneys’ fees.

2. The relief secured by Plaintiffs had a basis in law because they properly requested government records of a New Jersey state entity under OPRA.

The second prong of the catalyst theory test—that release of the records “ultimately secured by [P]laintiffs had a basis in law”—is also satisfied here. *Mason*, 196 N.J. at 76 (internal quotation and citation omitted). Custodians of government records in New Jersey are required to provide access to those records upon request, unless they are specifically exempted. *See* N.J.S.A. 47:1A-5. The definition of “government record[s]” under OPRA is broad, and includes

any . . . information stored or maintained electronically . . . or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

N.J.S.A. 47:1A-1.1. Emails “fall within the scope of this expansive provision.”

McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 614 (App. Div. 2010). *See also Paff v. Galloway Twp.*, 229 N.J. 340 (2017) (affirming importance and right of the

public to access to email metadata under OPRA). And the Appellate Division has affirmed that correspondence from third parties to government entities “that have been received and kept on file in the course of their official business[]” must be produced “upon request, unless they are exempt from disclosure under OPRA.” *Scheeler v. Office of the Governor*, 448 N.J. Super. 333, 343 (App. Div. 2017).

Here, Plaintiffs properly requested a specified set of email correspondence between certain employees of NJIT—a state government entity that, it is undisputed, is subject to OPRA under N.J.S.A. 47:1A-1.1, Golden Compl. ¶ 10, NJIT Ans. ¶10—and certain federal agencies. *See* Golden Compl. There can be no dispute that the records requested by Plaintiffs are “government record[s]” within the meaning of OPRA that NJIT was required to disclose. *See* N.J.S.A. 47:1A-1.1; *McGee*, 416 N.J. Super. at 614; *Scheeler*, 448 N.J. Super. at 343. Indeed, NJIT even went so far as to file a counterclaim against Plaintiffs for \$26.65 for Plaintiffs’ alleged failure to pay copying fees under OPRA in connection with one of the OPRA Requests at issue. NJIT Ans., Counterclaim ¶¶ 4–5 (stating that such fee “is in compliance with the amount permissible pursuant to N.J.S.A. 47:1A-5b.”). NJIT was in possession of the records responsive to Plaintiffs’ OPRA Requests, *see* Townsend Decl. Ex. E at 4–8 (Certification of Defendant Clara Williams, hereinafter “Williams Cert.”), and, after this lawsuit was filed, released the vast majority of them to Plaintiffs. Joint Status Report, ECF No. 24, at

2. Accordingly, because Plaintiffs' relief has a "basis in law[,]" under the catalyst theory Plaintiffs are entitled to recover reasonable attorneys' fees from NJIT.

Mason, 196 N.J. at 76.

B. As the custodian of the records requested by Plaintiffs under OPRA, NJIT is required to pay reasonable attorneys' fees.

The New Jersey Appellate Division has repeatedly held that the public agency that is the custodian of the requested records bears responsibility for the fees of a prevailing party in an OPRA action. *See Courier News v. Hunterdon County Prosecutor's Office*, 378 N.J. Super. 539 (App. Div. 2005); *Paff v. W. Deptford Twp.*, No. A-3195-08T2, 2010 WL 546587 (N.J. Super. Ct. App. Div., Feb. 18, 2010) ("*Paff*"). The provision of OPRA setting forth a requester's right to challenge a denial of access places special emphasis on the responsibility of the records custodian and the corresponding public agency to which a request is directed. *See* N.J.S.A. 47:1A-6 (stating that "[a] person who is denied access to a government record *by the custodian of the record*," may "institute a proceeding to challenge *the custodian's decision*[,]" and in such a proceeding, the "*public agency* shall have the burden of proving that the denial of access is authorized by law" (emphasis added)). Thus, even if there are multiple government entities involved in litigation arising out of a denial of access to records, or an agreement between a public agency and a third party to keep requested records confidential, it is always the public agency that is the custodian of the records requested that is required to

pay the requester's attorneys' fees under OPRA. *See Courier News*, 378 N.J. Super. 539; *Paff*, 2010 WL 546587.

Here, it is undisputed that Plaintiffs submitted their OPRA Requests to NJIT and that NJIT is the custodian of the records that were requested by and ultimately released to Plaintiffs. *See* Golden Compl; Joint Status Report, ECF No. 24; Townsend Decl. Exs. C–D; Williams Cert. Accordingly, NJIT is responsible for Plaintiffs' reasonable attorneys' fees. *See* N.J.S.A. 47:1A-6; *Courier News*, 378 N.J. Super. at 546. Indeed, it previously conceded as much. *See* Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5, at 2 (acknowledging that “[u]nder OPRA, a public entity to whom the request is directed may be assessed a sanction in the form of attorneys' fees and costs” and that “NJIT and [Ms.] Williams confront such exposure” in this litigation).

Notwithstanding the clear record before this Court, and the clarity of New Jersey law, Plaintiffs understand that NJIT intends to contest Plaintiffs' entitlement to an award of reasonable attorneys' fees in this case. *See, e.g.*, Joint Status Report, ECF No. 34, at 4 (stating that NJIT will “vigorously oppose” Plaintiffs' motion for attorney's fees). As far as Plaintiffs can discern—despite NJIT's prior admission of responsibility for Plaintiffs' attorneys' fees through its indemnification claim against the FBI—NJIT's theory appears to be that because the “redactions and documents withheld from production [in response to Plaintiffs'

OPRA Requests to NJIT] were made by and at the direction of the FBI[,]” NJIT Ans. at 7, OPRA’s mandatory fee shifting provision does not apply. Plaintiffs are unaware of *any* legal authority supporting NJIT’s position. Indeed, as set forth herein, both the text of the statute itself, and New Jersey decisional law interpreting it establishes the opposite. As much as NJIT might wish otherwise, OPRA does not permit a government entity to sidestep OPRA’s mandatory fee shifting provision by effectively outsourcing its responsibilities to process and release requested records to a third-party. *See* N.J.S.A. 47:1A-6.

To be clear, OPRA “does not restrict fee-shifting to instances of willful violations. Rather, ‘[a] requestor who prevails in *any* proceeding *shall be entitled to* a reasonable attorney’s fee.’” *Smith*, 422 N.J. Super. at 398 (alterations and emphasis in original). And, under OPRA, it is the government agency that is the custodian of the records requested that is responsible for any attorneys’ fee award.

Courier News, which involved an OPRA request for a recording of a 9-1-1 call in the possession of a local county prosecutor’s office (the “County”), is instructive. *See* 378 N.J. Super. at 541. After determining that the record was improperly withheld, the Appellate Division remanded the case to the trial court to address the issue of attorneys’ fees. *See id.* On remand, the County joined the State, contending that the State was responsible for some or all of the attorneys’ fees due to the requestor under the theory that the County was performing a state

law enforcement function when it denied access to the requested recording. *See id.* The trial court agreed. *See id.* On appeal, the Appellate Division reversed, holding that that the County—not the State—was required to pay the requesters’ attorneys’ fees because it was the custodian of the requested recording. *Id.* at 545–46. Looking to the many provisions of OPRA that emphasize the responsibility of the records custodian, the Court held that because the County “was the custodian of the [record . . . it] assumed administrative responsibility to safeguard [the record] the minute it took custody of it.” *Id.* at 546. Thus, regardless of how the County came to have custody of the record or its role at the time, its duty to pay the prevailing requesters’ attorneys’ fees “flow[ed] exclusively from the provisions of OPRA[.]” *Id.*

In so holding, the Appellate Division in *Courier News* explained how OPRA’s clear, mandatory fee-shifting provision serves as a “vital means of fulfilling” the State’s commitment to open government; without it:

the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the *custodian of the government record* responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.

Id. (emphasis added).

Paff is likewise instructive. *See* 2010 WL 546587. In that case, the plaintiff sought records under OPRA relating to a federal lawsuit involving West Deptford

Township that had resulted in a settlement. *See id.* at *1. The Township denied access to the requested records “because they were subject to a discovery confidentiality order entered in the federal lawsuit.” *Id.* The requester filed suit and the trial court ordered the Township to disclose the records and to pay the requestor’s attorneys’ fees and costs. *Id.* On appeal, the Township argued that it should not have to pay the requester’s attorneys’ fees because it had entered into a confidentiality agreement in the federal court litigation that prohibited it from releasing the records at issue. *See id.* The Appellate Division affirmed the award of attorneys’ fees and costs. *Id.* at *2. In doing so, it flatly rejected the notion that a public agency can circumvent the requirements of OPRA—including OPRA’s mandatory fee provision—in such a manner:

Manifestly, the Township could not exempt itself from the requirements of OPRA, or other State law, by entering into a consent order to maintain confidentiality of discovery materials it provides to litigants in a lawsuit. The confidentiality order did not nullify the Township’s obligations under OPRA. If the Township had any doubts about its recourse, it should have obtained leave or clarification from the federal court to meet its statutory obligations under OPRA.

Id.

The Appellate Division’s decision in *Paff* makes abundantly clear that 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 id.* Under OPRA it is the custodian of a

requested government record that is responsible for providing access to it, and it is the public agency's burden to show that any denial of access is authorized by law. N.J.S.A. 47:1A-5-6.

In short, NJIT cannot escape its responsibility for Plaintiffs' attorneys' fees under OPRA by arguing that it was merely in possession of another government entity's files, *cf. Courier News*, 378 N.J. Super. at 545-46, or that it entered into an agreement with the FBI to withhold certain of its records from the public, *cf. Paff*, 2010 WL 546587, at *2. NJIT is required to comply with the law and must bear responsibility for its failure to do so.

Another theory NJIT has suggested it may advance in opposition to Plaintiffs' motion for an award of reasonable attorneys' fees is that NJIT is exempt from OPRA's mandatory fee-shifting provision in this case because it faced a purported "Hobson's choice."³ Br. of Defendants, New Jersey Institute of Technology and Clara Williams, In Resp. to Pls.' Order to Show Cause, at 2 (attached to Townsend Decl. as Exhibit F). According to NJIT,

³ NJIT has repeatedly invoked this phrase throughout this lengthy litigation, but its use of the phrase is puzzling. NJIT appears to be using "Hobson's choice" to mean that it was given two options, neither of which it found attractive. A Hobson's choice, however, is a situation in which one is presented with the *illusion* of choice when there is actually only one course of action. *See, e.g.,* Nina Rastogi, *Sophie's Choice and Other Choice Choices*, Slate (Jul. 12, 2011), <http://slate.me/2fUqAwB>; Thomas Ward, *England's Reformation: A Poem*. 373 (1853), available at <https://archive.org/stream/englandsreformat00warduoft> ("Where to elect there is but one, / 'Tis Hobson's choice: take that or none[.]").

NJIT has a duty under OPRA to produce any and all responsive records not otherwise subject to potentially applicable exemptions. On the other hand, however, NJIT not only lacked authority, but was expressly prohibited by another [sic] federal agency in writing from disclosing such records

Id.

Even setting aside the fact that there is no legal authority, whatsoever, to support the proposition that a New Jersey state entity can be “prohibited” from complying with New Jersey law through an oral instruction or letter from a federal agency, that a dilemma like the one purportedly faced by NJIT can excuse a state government agency’s compliance with OPRA is a theory that was considered and squarely rejected by the Appellate Division in *Collingswood Board. of Education. v. McLoughlin*. See No. A-2475-14T1, 2016 WL 6134926 (N.J. Super. Ct. App. Div. Oct. 21, 2016) (“*McLoughlin*”). In that case, a New Jersey public agency brought an affirmative declaratory relief action after a third party threatened to sue if the agency released records requested under OPRA by two reporters. See *id.* The public agency decided to file an affirmative action against *both* the media requesters and the third party, asserting that “releasing the document may expose it ‘to potential litigation and damages’ from [the third party], and a ‘failure to release the [report]’ could expose it to the same risk from the media requesters.” *McLoughlin*, 2016 WL 6134926, at *1 (second alteration in original).

The Appellate Division rejected the agency's argument that it could escape its obligations under the statute in this way, explaining that

OPRA requires the governmental body to make precisely that judgment call: either the report is a governmental record that must be released, or it belongs within an exception carved out by statute. The [public agency] must make that difficult judgment, relying on its legal counsel and prior court decisions as well as those of the Government Records Council.

Id. at *3.

Here, NJIT's argument is similar to the one rejected by the Court in *McLoughlin*: with Plaintiffs requesting release of the records, and the FBI requesting that they be withheld, NJIT purportedly faced a "Hobson's choice." Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5, at 2. As the Appellate Division has made clear, however, making such a "choice" is exactly the type of "judgment call" that NJIT was required by law to make. *McLoughlin*, 2016 WL 6134926, at *3. In this case, NJIT chose secrecy; it withheld the records requested by Plaintiffs in contravention of OPRA, forcing Plaintiffs to file this lawsuit. *See* N.J.S.A. 47:1A-1. As a result, NJIT is now statutorily required to take responsibility for that decision.

Tellingly, other state universities across the nation followed their respective public records laws when Mr. Golden requested communications between them and the FBI, even when the FBI "demanded" otherwise. For example, the University of South Florida ("USF") turned over emails between it and the FBI

under Florida's Sunshine Law. Golden Decl. ¶¶ 6–9. In a letter from USF to Mr. Golden, the university stated that

As you can see, the FBI demanded the return of the same emails that were produced with redactions in response to your public records request. USF did not relinquish its custody of the emails based on USF's obligations under Florida's Public Records law.

Golden Decl. ¶ 9 & Ex. A. Other public universities also produced emails between their employees and the FBI to Mr. Golden pursuant to their respective state public records laws, including the University of Florida, the University of California-Davis, the University of Illinois, Arizona State University, and Georgia Tech University. Golden Decl. ¶ 6. In short, NJIT's argument that it was somehow "prohibited" from complying with OPRA because the FBI told it not to is not only legally baseless, but belied by the compliance of other universities who were faced with the same purported "Hobson's choice."

C. Consistent application of OPRA's mandatory fee-shifting provision is necessary for the statute to fulfill its purpose of promoting open government.

"OPRA's purpose is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." *Mason*, 196 N.J. at 64 (citation and quotation omitted). The "fee-shifting provisions in OPRA are a vital means of fulfilling" that commitment to open government. *Courier News*, 378 N.J. Super. at 546.

By mandating an award of attorneys' fees to prevailing plaintiffs, OPRA provides public records requestors with the certainty that if they pursue successful litigation, they will be entitled to a fee award. As the New Jersey Legislature recognized when it enacted such a provision, such certainty is more often than not necessary to ensure that requesters will pursue access to public records that have been wrongfully denied and vindicate the public's right to know. Moreover, consistent application of the mandatory fee-shifting provision of OPRA encourages state government entities to comply with their obligations under the statute. It is thus crucial that OPRA's mandatory fee-shifting provision not be applied selectively or inconsistently, but be read to mean what it says: a requestor who prevails "shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

This Court's acceptance of any argument by NJIT that OPRA's mandatory fee-shifting provision should be disregarded here, and that Plaintiffs should be denied reasonable attorneys' fees in this OPRA case would give rise to uncertainty that the Legislature intended to avoid, and provide state government entities with a roadmap for attempting to avoid their obligations under the statute and their responsibility to pay prevailing requestors' attorneys' fees in future OPRA cases. Under NJIT's theory of this case, any public agency could abdicate their responsibility to pay attorneys' fees under OPRA's mandatory fee-shifting provision by either (1) outsourcing its responsibility to respond to an OPRA

request to a third party, and/or (2) acquiescing to a third party's request or demand to withhold requested records or portions thereof without conducting any independent evaluation of the agency's duties under the Act. Such an outcome would wreak havoc on OPRA and undermine the very purpose of the statute.

II. Plaintiffs' attorneys' fees are reasonable.

“[T]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, a calculation known as the lodestar.” *New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr.*, 185 N.J. 137, 153 (2005) (internal quotation and citations omitted) (hereinafter “*NJDPM*”). When an OPRA plaintiff has achieved “excellent results,” their attorneys should “recover a fully compensatory fee[.]” *Id.* at 154 (citation omitted). In addition, prevailing requesters are eligible for a fee enhancement in certain circumstances. *Id.* at 157.

Here, Plaintiffs seek an award of attorneys' fees from NJIT totaling \$134,745.74, based on the lodestar calculations of the respective hours spent and reasonable hourly rates of their counsel as set forth in the attached declarations of Katie Townsend (“Townsend Declaration”) and Bruce Rosen (“Rosen Declaration”), and exhibits thereto. Additionally, based on the criteria set forth by the New Jersey Supreme Court and the facts of this case, *see infra* Section II(D),

Plaintiffs respectfully request a 25% enhancement of their fees, bringing the total amount sought from NJIT as of the date of this motion to \$189,359.00.

Plaintiffs will supplement these amounts and provide their final fee request in their reply brief to account for additional time expended since the date of this motion. *Cf. Courier News*, 378 N.J. Super. at 547 (“Plaintiff is also entitled to be compensated for the time spent by counsel in preparing a counsel fee petition.”).

A. Plaintiffs’ attorneys’ hours are reasonable in light of the length of this litigation and the work undertaken in connection therewith.

This lawsuit has been pending for almost two and a half years—an unusually lengthy period of time for an OPRA case. During that time, Plaintiffs’ attorneys were required to expend time, *inter alia*, conducting legal research, drafting Plaintiffs’ verified petition, preparing briefs for and appearing in a proceeding before the Superior Court prior to removal, engaging in extensive written and oral meet and confer discussions with counsel for NJIT and the FBI, reviewing and evaluating records released in response to Plaintiffs’ OPRA Requests, drafting and editing numerous status reports to the Court, preparing various letters and briefing per the Court’s orders, appearing at telephonic conferences before the Court, and preparing this fee petition. Moreover, because NJIT asserted a number of novel arguments in this case, including concerning its duties under OPRA and its claims against the FBI, the legal issues that were presented and have been required to be addressed in this litigation went well beyond those seen in a typical OPRA case.

Each task for which Plaintiffs seek to recover reasonable fees, and the amount of time taken to complete them is set forth in detail in the exhibits to the attached Townsend and Rosen Declarations. As set forth therein, Plaintiffs' attorneys' hours for this matter are:

- Bruce Rosen: 32.5 hours;
- Robert Bartkus: 1.5 hours;
- Sarah L. Fehm: 0.3 hours;
- Katie Townsend: 102.2 hours;
- Adam A. Marshall: 135.6 hours;
- Caitlin Vogus: 59.1 hours.

Plaintiffs note that 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 this Court. *See* Townsend Decl. ¶ 15 & Ex. B. Plaintiffs also note that more than 100 attorney hours have been expended since Plaintiffs informed the other parties to this case that they would not challenge any of NJIT's remaining withholdings on March 1, 2017. *See id.* The vast majority of those hours expended since March 1 were spent addressing the issue of Plaintiffs' entitlement to attorneys' fees under OPRA's mandatory fee-shifting provision. *See id.*

B. Plaintiffs' attorneys' hourly rates are reasonable.

“Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Thus, the court should assess the experience and skill of the prevailing party’s attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Rendine v. Pantzer*, 141 N.J. 292, 337 (1995) (citation omitted).

In addition, “[t]o take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates rather than those in effect when the services were performed.” *Id.* at 337. *See also R.M. v. Supreme Court of New Jersey*, 190 N.J. 1, 10 (2007) (“[I]n order to account for the delay inherent in most litigation, the hourly rate should be based either on current rates or by adjusting the fee based on historical rates to reflect its present value.” (citation and quotation omitted)).

As set forth in the exhibits to the attached declarations and below, Plaintiffs have been represented throughout the entirety of this litigation by attorneys with the Reporters Committee for Freedom of the Press and McCusker, Anselmi, Rosen & Carvelli, P.C. (“MARC”), all of whom have provided their services in this

matter *pro bono*.⁴ For the purposes of this fee petition, Plaintiffs' attorneys have differing hourly rates due to their respective experience and location.

Bruce Rosen is a partner at MARC, a firm with offices in New York and New Jersey. Mr. Rosen has more than 25 years of litigation experience, and frequently litigates media law cases, including those arising under OPRA; his full qualifications are set forth in his attached declaration. Mr. Rosen's hourly rate for this matter is \$350, which is a discounted rate for OPRA cases. *See* Ex. 3 ("Rosen Decl."). Mr. Rosen's customary hourly rate is variable, but normally around \$400/hr. Rosen Decl. ¶ 4. Two other attorneys at MARC also provided services in this matter: Robert Bartkus, of counsel, at \$350/hr., and Sarah L. Fehm, an associate, at \$250/hr. Attached as Exhibit 4 is a declaration from John C. Connell, a partner at Archer, attesting that the rates for Mr. Rosen, Mr. Bartkus, and Ms. Fehm are "eminently reasonable and below market." Ex. 4 ¶ 5.

Katie Townsend is the Litigation Director at the Reporters Committee for Freedom of the Press ("RCFP" or "Reporters Committee"), a 501(c)(3) nonprofit based in Washington, D.C.⁵ Adam A. Marshall and Caitlin Vogus are staff attorneys at the Reporters Committee. All legal services provided by Reporters Committee attorneys are provided on a *pro bono* basis. Accordingly, Reporters

⁴ *Pro bono* counsel are entitled to recover reasonable fees under OPRA's fee-shifting provision. *See NJDPM*, 185 N.J. at 156.

⁵ More information about the Reporters Committee is available at <https://www.rcfp.org/about>.

Committee attorneys utilize the Legal Services Index (“LSI”)-updated Laffey Matrix (the “LSI Laffey Matrix”) to calculate reasonable hourly rates for their work for purposes of attorneys’ fee recovery.⁶ Townsend Decl. ¶ 5. A true and correct copy of the mid-1988 to mid-2018 LSI Laffey Matrix is attached as Exhibit A to the Townsend Declaration.

The LSI Laffey Matrix sets forth reasonable hourly rates in Washington D.C. for complex federal litigation, depending on an attorney’s experience, and updated yearly in accordance with the legal services component of the Consumer Price Index, which is produced by the Bureau of Labor Statistics of the United States Department of Labor. Ex. A. It is frequently used to calculate awards of attorneys’ fees in cases under the federal Freedom of Information Act, 5 U.S.C. § 552. *See, e.g., Elec. Privacy Info. Ctr.*, 218 F. Supp. 3d at 48; *Citizens for Responsibility & Ethics in Washington v. United States Dep’t of Justice*, No. 1:11-CV-00374 (CRC), 2016 WL 554772 (D.D.C. Feb. 11, 2016); *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 197 F. Supp. 3d 290 (D.D.C. 2016). The LSI Laffey Matrix has been recognized by numerous courts as representing reasonable rates for the Washington, D.C. market, including the Court of Appeals for the

⁶ “Government or public interest attorneys who do not have a standard billing rate may utilize the so-called Laffey Matrix to establish the prevailing market rate.” *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 218 F. Supp. 3d 27, 47 (D.D.C. 2016).

District of Columbia Circuit, *see Salazar ex rel. Salazar v. D.C.*, 809 F.3d 58, 65 (D.C. Cir. 2015) (“With these numbers and submissions in the record, the district court’s point that ‘the LSI-adjusted matrix is probably a *conservative* estimate of the actual cost of legal services in this area,’ does not appear illogical.” (emphasis in original, citation omitted)), this Court, and the Third Circuit, *see Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 726 F.3d 403, 416 (3d Cir. 2013) (“We thus affirm the District Court’s use of the LSI-updated Laffey Matrix to determine the prevailing rates in the Washington, D.C. market.”).

As set forth in her declaration, Ms. Townsend is the Litigation Director at the Reporters Committee and has more than 10 years of litigation experience, which includes extensive experience with court access and state and federal public records litigation. Townsend Decl. ¶¶ 1, 8–9. Under the LSI Laffey Matrix, Ms. Townsend’s hourly rate is \$636/hr. Mr. Marshall is the Knight Foundation Litigation Attorney at the Reporters Committee; he has three years of experience, primarily in state and federal public records litigation. Townsend Decl. ¶¶ 12–13. Under the LSI Laffey Matrix, Mr. Marshall’s rate is \$358/hr. Ms. Vogus is a staff attorney at the Reporters Committee and has seven years of experience, which also includes significant experience with state and federal public records litigation. Townsend Decl. ¶¶ 10–11. Under the LSI Laffey Matrix, Ms. Vogus’s rate is

\$440/hr. The qualifications of each Reporters Committee attorney are set forth in more detail in the attached Townsend Declaration.

In the alternative, and to the extent the Court believes an adjustment should be made to the rates for Plaintiffs' Washington-D.C.-based attorneys because this case was litigated in New Jersey, Plaintiffs' counsel have calculated a downward adjustment of those rates based on information compiled by the United States Bureau of Labor Statistics on attorneys' salaries in the Newark Metropolitan area from May 2016 (the most recent data available). *See* United States Department of Labor, Bureau of Labor Statistics, *May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates Newark, NJ-PA Metropolitan Division*, https://www.bls.gov/oes/current/oes_35084.htm.⁷ Specifically, Plaintiffs have adjusted their rate as follows: according to the Bureau of Labor Statistics, the mean hourly wage for lawyers in the Washington metropolitan area is \$83.56.⁸ United States Department of Labor, Bureau of Labor Statistics, *May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates Newark, Washington-Arlington-Alexandria, DC-VA-MD-WV Division*, https://www.bls.gov/oes/current/oes_47894.htm. The mean hourly wage for

⁷ The methodology used here is adapted from Generald G. Knapton, *2 Routes to Hourly Rates for Lawyers*, Law 330 (Apr. 15, 2015), <https://www.law360.com/articles/641797/2-routes-to-hourly-rates-for-lawyers>.

⁸ It should be noted that mean hourly wage is not the same as an hourly rate, but rather the average wage. *See* United States Department of Labor, Bureau of Labor Statistics, *Frequently Asked Questions*, https://www.bls.gov/oes/oes_ques.htm.

lawyers in the Newark metropolitan area is \$73.55. United States Department of Labor, Bureau of Labor Statistics, *May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates Newark, NJ-PA Metropolitan Division*, https://www.bls.gov/oes/current/oes_35084.htm. The ratio of the Newark metropolitan area (where this Court is located) to the Washington metropolitan area is thus $73.55/83.57$, or 0.88. Adjusting the LSI-Laffey Matrix rates for Plaintiffs' D.C.-based attorneys in accordance with this ratio yields the following rates:

- Ms. Townsend: \$559.68/hr ($\636×0.88);
- Mr. Marshall: \$315.04/hr ($\358×0.88);
- Ms. Vogus: \$387.20/hr ($\440×0.88).

C. Because Plaintiffs achieved “excellent results,” they are eligible for a full compensatory fee award.

While a court may reduce the lodestar calculation for attorneys' fees under a fee-shifting statute “if the level of success achieved in the litigation is limited as compared to the relief sought[,]” *NJDPM*, 185 N.J. at 154 (quoting *Rendine*, 141 N.J. at 336), if an OPRA plaintiff achieves “excellent results,” their attorney should “recover a fully compensatory fee[.]” *Id.* (citation omitted). *Accord Hammer v. Hair Sys. Inc.*, No. A-1475-14T1, 2017 WL 2535943, at *11 (N.J. Super. Ct. App. Div. June 9, 2017) (stating, in a non-OPRA case, “[i]f the plaintiff obtained ‘excellent results’ despite not succeeding on every claim raised, his or her

attorney ‘should be duly compensated for all time reasonably expended on the litigation’” (citing *Robb v. Ridgewood Bd. of Educ.*, 269 N.J. Super. 394, 405 (App. Div. 1993)).

Here, Plaintiffs achieved “excellent results” by forcing the disclosure of nearly 4,000 pages of government records previously withheld in full or in part by NJIT. See Joint Status Report, ECF No. 29, at 2. Records obtained through this litigation were used by Mr. Golden, a Pulitzer Prize-winning reporter, in his recently published book, *Spy Schools*. See Golden Decl. ¶ 10; Daniel Golden, *Spy Schools: How the CIA, FBI, and Foreign Intelligence Secretly Exploit America’s Universities* (2017). Accordingly, the purpose of Plaintiffs’ litigation was vindicated, and they are entitled to recover the full lodestar amount pursuant to N.J.S.A. 47:1A-6.

Multiplying Plaintiffs’ attorneys’ hourly rates by the number of hours expended in this case yields the following:

Attorney	Rate	Hours	Total/Attorney
Rosen	350	32.5	\$11,375
Barkus	350	1.5	\$525
Fehm	250	0.3	\$75
Townsend	636	102.2	\$64,999.2
Marshall	358	135.5	\$48,509
Vogus	440	59.1	\$26,004
		Total:	\$151,487.2

In the alternative, to the extent the Court believes an adjustment should be made to the rates for Plaintiffs' Washington-D.C.-based attorneys, that downward adjustment yields the following:

Attorney	Rate	Hours	Total/Attorney
Rosen	350	32.5	\$11,375
Barkus	350	1.5	\$525
Fehm	250	0.3	\$75
Townsend	559.68	102.2	\$57,199.296
Marshall	315.04	135.5	\$42,687.92
Vogus	387.2	59.1	\$22,883.52
		Total:	\$134,745.74

D. Plaintiffs should receive a fee enhancement.

The New Jersey Supreme Court has made clear that an enhancement of the lodestar calculation for the purposes of OPRA's mandatory fee-shifting provision is appropriate in certain circumstances. *See NJDPM*, 185 N.J. at 157. "When a prevailing party has faced a substantial risk of nonpayment in its attempt to secure the release of a government record," such as the *pro bono* representation provided in *NJDPM*, "enhancement may be appropriate," subject to certain qualifications. *Id.* In a "garden variety" OPRA case, such as for a "traffic or tax record" where after the lawsuit is filed the record is "promptly produce[d]" and the "economic risk" is minimal, an enhancement of the lodestar "will likely be inappropriate." *Id.* Alternatively, in cases where (1) the "attorney did not receive a fee from his

client[,]” (2) “the risk of failure was high because the [government agency] asserted a blanket claim of privilege[,]” (3) “the documents sought related to an issue of signal [sic] public importance,” and (4) the attorney “achieved an excellent result in [a] case of first impression,” an enhancement of the lodestar is appropriate. *Id.* That enhancement “ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar.” *Id.* at 158.

Here, all the criteria identified by the Court in *NJDPM* as important for an enhancement of the lodestar are satisfied. First, none of Plaintiffs’ counsel received a fee from their clients: all representation was provided *pro bono*. Townsend Decl. ¶ 7; Rosen Decl. ¶ 3. Second, there is no dispute that NJIT asserted a blanket claim of privilege in response to Plaintiffs’ Second Request and Third Request. *See* Golden Compl., Background & Factual Allegations ¶¶ 12–23 & Exs. E, G; NJIT Ans. ¶ 12–23. Third, the records sought by Plaintiffs’ requests relate to an issue of significant public interest, namely, the relationship between state universities and the federal government, and actions of New Jersey government employees. Finally, Plaintiffs secured an “excellent result”, securing the release of records used by Mr. Golden in his book. Golden Decl. ¶ 10. And, as noted above, given the unusual actions taken by NJIT in this case it appears to be one of first impression; Plaintiffs are unaware of any other case in which a New

Jersey entity has sued a federal agency in connection with an OPRA request.

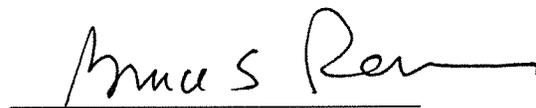
Accordingly, Plaintiffs respectfully request a 25% enhancement of the lodestar amount in this case, *see NJDPM*, 185 N.J. at 157, for a total of \$189,359.⁹

CONCLUSION

For all the reasons herein, Plaintiffs respectfully request that the Court grant their motion for an award of attorneys' fees in the amount of \$189,359 from NJIT.

Dated: November 30, 2017.

Respectfully submitted,



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⁹ In the event that the Court adopts a downward-adjustment for Plaintiffs' Washington, D.C.-based attorneys, a 25% enhancement would total \$168,432.17.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Clerk of the Court using the ECF system, which will automatically send notification of such filing and serve counsel for the following parties:

Gary Potters, Esq. (via ECF)

Attorney for Defendants/Third-Party Plaintiffs/Third-Party Defendants New Jersey Institute of Technology and Clara Williams

Andrew Carmichael, Esq. (via ECF)

Christopher Amore, Esq. (via ECF)

Attorneys for the Federal Bureau of Investigation

This 30th day of November, 2017.

/s/ Bruce Rosen