No. 18-3150

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DANIEL GOLDEN AND TRACY LOCKE,
Plaintiffs-Appellants,

v.

NEW JERSEY INSTITUTE OF TECHNOLOGY AND CLARA WILLIAMS, IN HER CAPACITY AS CUSTODIAN OF RECORDS FOR THE NEW JERSEY INSTITUTE OF TECHNOLOGY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
No. 2:15-cv-08559 (Arleo, J.)

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1442 as the Federal Bureau of Investigation, a federal agency, was named as a third-party defendant. It had supplemental jurisdiction over Plaintiffs-Appellants' state law claims pursuant to 28 U.S.C. § 1367. The district court issued an Order adopting the magistrate judge's Report and Recommendation denying Plaintiffs-Appellants' motion for attorneys' fees on August 2, 2018. Plaintiffs-Appellants timely filed a notice of appeal from that Order on September 26, 2018. JA001; *see also* Fed. R. App. 4(a)(1)(B). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the district court's Order was a final, appealable order.

STATEMENT OF THE ISSUE

Whether the district court erred in denying Plaintiffs-Appellants' motion for an award of costs and attorneys' fees under New Jersey law, including by concluding that Plaintiffs-Appellants were not "prevailing parties" under the catalyst theory adopted by the New Jersey Supreme Court in *Mason v. City of Hoboken*, 196 N.J. 51 (2008) for purposes of applying the mandatory attorney's fees provision of the New Jersey Open Public Records Act, N.J.S.A. §§ 47:1A-1, *et seq*. *See* District Court Dkt. 53, 53-1, 54, 55, JA010–29, District Court Dkt. 62, 65, JA004–8.

RELATED CASES AND PROCEEDINGS

Pursuant to L.A.R. 28.1(a)(2), Plaintiffs-Appellants state that this case has not previously been before this Court and they are unaware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal.

STATEMENT OF THE CASE

Plaintiffs-Appellants' OPRA Requests

Daniel Golden is a Pulitzer Prize-winning journalist and currently a Senior Editor at ProPublica. JA163–64 ¶¶ 1, 4 (Declaration of Daniel Golden). Between April and August 2015, Mr. Golden and Tracy Locke (collectively, "Plaintiffs" or "Plaintiffs-Appellants") submitted three public records requests to the New Jersey Institute and Technology and Clara Williams, its Records Custodian (collectively, "NJIT") pursuant to the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, *et seq*., (the "OPRA Requests"). *See* JA044–48 (Verified Complaint); JA005 (Order). The OPRA Requests sought emails between certain persons at NJIT and the Federal Bureau of Investigation ("FBI") or Central Intelligence Agency ("CIA"). *See* JA044–48 (Verified Complaint). The OPRA Requests were made for newsgathering purposes in connection with Mr. Golden's non-fiction book *Spy Schools*—an in-depth look at foreign and domestic intelligence activities at U.S. universities—that was published by Henry Holt and Co. in October 2017. *See* JA041–42. Ms. Locke was, at the time, a publicist with Henry Holt, and assisted Mr. Golden with research for his book. JA042 at ¶ 4.

Mr. Golden submitted the first OPRA request to NJIT on April 8, 2015 (the "First Request"). JA044 at ¶ 1. In response to the First Request, NJIT "accessed NJIT's mainframe and performed a search of the email extensions set forth in the First Request . . . and the list of individuals" relevant to the request. JA213 at ¶ 23

(Certification of Clara Williams). "[A]ll emails that were returned" from that search were compiled and placed on a DVD for review. JA213 at ¶ 23. NJIT's Custodian of Records, Ms. Williams, certified that during her review of those records she came across "several notices" that contained "FBI warnings and prohibitions to the effect that the emails were not to be disclosed to anyone . . . . ." JA213 at ¶ 27. According to NJIT, it then "invited the FBI to review its contemplated production of documents" and, over the course of two days in May 2015, "approximately eight FBI personnel reviewed NJIT's contemplated production of documents." JA118 (Letter from Gary Potters to Judge Wettre). 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." JA118.

Ms. Williams certified that, following the FBI's review, she prepared a letter to Mr. Golden in which she "identified the records being produced by NJIT, as well as the applicable OPRA exemptions pursuant to which certain records had been redacted and/or withheld from production." JA215 at ¶ 37. NJIT subsequently produced approximately 540 pages of responsive records to Mr. Golden—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 the following OPRA exemptions for the redactions and withholdings: Executive Order No. 21, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-9. JA045 at ¶¶ 7–8 (Verified

Complaint); JA060–62 (Letter from Clara Williams). NJIT's production also included a letter to NJIT from the FBI. JA065.

On July 28, 2015, Ms. Locke submitted an OPRA request to NJIT also seeking emails between certain persons at NJIT and the FBI and CIA (the "Second Request"). JA046 at ¶ 12 (Verified Complaint). Ms. Williams certified that, following receipt of the Second Request, she called an FBI agent to "advise the nature of the Second Request and [her] understanding NJIT was prohibited from disclosing the records requested therein[.]" JA216 at ¶ 45. Ms. Williams subsequently "prepared a letter response . . . wherein [she] advised no records were being produced in response to the Second Request, [and] cited the OPRA exemptions applicable thereto . . . ." JA217 at ¶ 46. In response to the Second Request, NJIT refused to provide any responsive records, citing the following OPRA exemptions: Executive Order No. 26, N.J.S.A. 47:1A-1.1, and Executive Order No. 21. JA047 at ¶¶ 14–16 (Verified Complaint); JA070 (email from Clara Williams).

On August 13, 2015, Mr. Golden submitted a third OPRA request to NJIT (the "Third Request"), which sought emails between certain persons at NJIT and the FBI and CIA from a broader time period. JA047–48 at ¶¶ 17–18 (Verified Complaint). Ms. Williams certified that in response to the Third Request she again contacted an FBI agent "to advise the nature of [the] Third Request." JA218 at ¶ 51. She further certified that given "the position previously asserted by the FBI, it appeared that NJIT was prohibited from disclosing any records in response to the

Third Request." JA218 at ¶ 52. Ms. Williams subsequently "prepared a letter . . . wherein [she] advised no records were bring produced in response to the Third Request, [and] cited the OPRA exemptions applicable thereto . . . ." JA218 at ¶ 53. In response to the Third Request NJIT refused to provide any responsive records, citing the following OPRA exemptions: Executive Order No. 26, N.J.S.A. 47:1A-1.1, Executive Order No. 21, and Executive Order No. 9. JA048 at ¶ 21 (Verified Complaint); JA076 (email from Clara Williams).

Among the records withheld by NJIT in response to Plaintiffs' Second Request and Third Request were:

1. An email from a dean at NJIT to an FBI Special Agent forwarding the full text of a publicly available news article written by Mr. Golden, JA260–66;
2. A report from the American Academy of Arts & Sciences that is publicly available on the Internet, JA271–302;
3. A public statement and report delivered by then-Director of National Intelligence James Clapper to the Senate Select Committee on Intelligence on March 12, 2013, JA304–37, which were published online by both the Senate and the Director of National Intelligence, ECF No. 55 at 12 (providing public Internet URLs);
4. An email and attachment from the FBI that states: "This product is UNCLASSIFIED, so please disseminate liberally[,]" JA364–66;

5. An email chain concerning the postponement of the first quarterly meeting of the New Jersey chapter of the FBI National Academy Associates due to a blizzard, JA268.

Proceedings in New Jersey Superior Court and Removal

On September 11, 2015, Plaintiffs initiated this action in the Superior Court of New Jersey Law Division, Essex County, against NJIT pursuant to OPRA and New Jersey common law. *See* JA040. On September 17, 2015, the Superior Court issued an order to show cause directed to NJIT. JA079.

According to NJIT, following the filing of Plaintiffs' lawsuit "the FBI advised [NJIT] it was going to intervene in the [s]tate [c]ourt 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." JA119 (Letter from Gary Potters to Judge Wettre). The FBI, however, did not intervene.

On November 13, 2015, NJIT filed its answer to Plaintiffs' complaint, a counterclaim against Plaintiffs for $26.65 for alleged unpaid copying costs under OPRA, 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* JA087–103.

Now a party to the state court proceeding by virtue of the NJIT Third-Party Complaint against it, the FBI removed this matter to the United States District Court

for the District of New Jersey pursuant to 28 U.S.C. § 1442(a)(1) on December 11, 2015. *See* Notice of Removal, ECF No. 1.

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 the OPRA Requests (the "FBI Counterclaim"). *See* JA123–34.

The Release of Records in Response to Plaintiffs' OPRA Requests

In meet and confer discussions between Plaintiffs, NJIT, and the FBI following the filing of the FBI Counterclaim, counsel for the FBI informed Plaintiffs' counsel 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. JA135–36 (Joint Status Report). The FBI asserted at that time 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)." JA136 (quotation removed, second alteration in original). The FBI proposed "to treat the remaining 2,000 pages[,]" which it conceded were subject to OPRA, "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." JA136. NJIT "agree[d] to the FBI's proposal." JA137.

Given "upcoming publication deadlines for Mr. Golden's [then-]forthcoming book," *Spy Schools*, Plaintiffs agreed to this 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." JA136–37.

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, in response to Plaintiffs' OPRA Requests. *See* JA143 (Joint Status Report). Approximately 296 pages of records were withheld in full. JA143. 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. JA181–93 (letters). Each of the letters from the FBI to Ms. Williams states that it is accompanying records being sent back to NJIT "in response to your request for the FBI's review of records responsive to the [above-referenced case]." JA183, 186, 190, 193.

During meet and confer discussions in June 2016, the FBI stated that, upon further consideration, it would also review, as a request to consult from NJIT, pages of records identified by NJIT as responsive to Plaintiffs' OPRA Requests that the FBI had originally asserted were not subject to disclosure under OPRA. *See* JA143–44 (Joint Status Report). 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* JA147 (Joint Status Report); JA195–206 (letters). Each of the FBI's letters to Ms. Williams, once again, stated that they accompanied records that were being sent back to NJIT "in response to your request for the FBI's review of records responsive to the [above-referenced case]." JA197, 200, 203, 206.

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. JA147 (Joint Status Report). Approximately 1,640 pages were withheld in full, and approximately 362 pages were determined to be duplicates. JA147.

Following NJIT's November 2016 production, Plaintiffs, NJIT, and the FBI engaged in further meet and confer discussions. JA147. As a result of those discussions, "[i]n an attempt to obviate the need for judicial review, or at least narrow the issues for review, 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." JA147. Plaintiffs received that information on December 9, 2016. JA151–52 (Joint Status Report). In a further effort to avoid the necessity of judicial review of the remaining withholdings, Plaintiffs thereafter "provid[ed] NJIT and the FBI with a list of specific documents withheld in part and in full that they [] asked to be revisited." JA152. In response to that request, on February 17, 2016, Plaintiffs were provided additional records

responsive to the OPRA Requests and additional information regarding the specific withholdings they had identified. JA157 (Joint Status Report). Upon review of the additional records and information provided to them, Plaintiffs agreed not to seek judicial review of the remaining withholdings. JA157.

The Magistrate Judge's Report and Recommendation

Thereafter, between March and October 2017, the magistrate judge held a number of status conferences and required the parties to submit a number of filings concerning Plaintiffs' anticipated motion for an award of attorneys' fees under OPRA. *See* JA033–34 (docket sheet). Plaintiffs filed their motion on November 30, 2017, which was opposed by NJIT. *See* JA034. At the time Plaintiffs' motion was filed their OPRA lawsuit had been pending for more than two years; the total amount of the attorneys' fees award sought by Plaintiffs was $197,829.50. Reply Br. in Support of Pls.' Mot. for Attorneys' Fees, ECF No. 55. Following a hearing on March 5, 2018, the magistrate judge issued a Report and Recommendation on April 25, 2018, recommending the district court deny Plaintiffs' motion (the "Report"). JA010–29.

The Report states, among other things, that "[P]laintiffs' lawsuit brought about no change, voluntary or otherwise, in NJIT's conduct as records custodian[,]" JA023, that "NJIT's assertion of OPRA exemptions on behalf of the FBI was unaffected and unchanged by plaintiffs' filing of this lawsuit[,]" JA023, and that it could not "deem NJIT's conduct to have been unreasonable[,]" JA025. The

magistrate judge concluded that "there was no factual causal nexus between the filing of this lawsuit and NJIT's production of documents to the plaintiffs[,]" and therefore recommended to the district court that "it find that plaintiffs are not entitled to fees as a prevailing party under OPRA under the catalyst theory." JA029.

Plaintiffs' Objections and the District Court's Order

On May 9, 2018, Plaintiffs timely filed objections to the magistrate judge's Report with the district court, and submitted additional evidence in support of their objections. *See* ECF Nos. 62, 62-1. NJIT filed a brief in opposition to Plaintiffs' objections on June 1, 2018. ECF No. 65.

On August 2, 2018, the district court issued an order adopting the magistrate judge's Report and denying Plaintiffs' motion for attorneys' fees (the "Order"). JA004–9. At the time of issuance of the Order, NJIT's Third-Party Complaint for indemnification against the FBI was still pending. *See* JA030–36 (docket sheet). On September 26, 2018, Plaintiffs filed a timely notice of appeal from the district court's Order.[1] JA001–2.

[1] Because the FBI was a party to this case below, Plaintiffs had 60 days to file their notice of appeal. Fed. R. App. 4(a)(1)(B). On October 11, 2018, the FBI informed this Court of its intention not to participate in this appeal. ECF Document No. 003113057658.

SUMMARY OF THE ARGUMENT

This case arises from three public records requests submitted by Plaintiffs to NJIT under New Jersey law for emails sent or received by certain NJIT employees. Notwithstanding that Plaintiffs' lawsuit successfully caused the release of thousands of pages of records previously withheld by NJIT, the district court ordered that Plaintiffs are not entitled to an award of attorneys' fees under the mandatory fee-shifting provision of New Jersey's Open Public Records Act, N.J.S.A. §§ 47:1A-1, *et seq.* ("OPRA" or the "Act").

Under New Jersey law, an OPRA requestor who pursues litigation to obtain public records need not secure a judicial order requiring the release of those records to be entitled to reasonable attorneys' fees. Pursuant to the "catalyst theory" adopted by the New Jersey Supreme Court in *Mason v. City of Hoboken*, an OPRA plaintiff is a "prevailing party" entitled to attorneys' fees under OPRA's mandatory fee-shifting provision if there is (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved[,]" and (2) "the relief ultimately secured by plaintiff had a basis in law." 196 N.J. 51, 76 (2008) (internal quotations and citation omitted). The catalyst theory is intended to ensure that an OPRA plaintiff is awarded attorneys' fees in cases like this one, where an agency refuses to release public records in response to an OPRA request—thus forcing the requestor to either abandon that request or pursue litigation—and then, only after a lawsuit has been filed, releases the requested records. *See Mason*, 196 N.J. at 75–76.

The district court, adopting the Report of the magistrate judge, erroneously ruled that the first prong of the test for application of the catalyst theory—"a factual causal nexus between plaintiff's litigation and the relief ultimately achieved[,]" *id*. at 76—was not satisfied in this case. This conclusion misinterprets and misapplies New Jersey law, and it contravenes state public policy in favor of encouraging OPRA requestors to vindicate their right to public records. For the following reasons, the district court's Order should be reversed and this matter remanded to the district court with instructions to grant Plaintiffs' motion for attorneys' fees.

First, as a preliminary matter, the district court erred in adopting the magistrate judge's Report without conducting the requisite *de novo* review. *See* 28 U.S.C.§ 636(b)(1). For that reason alone the Order should be vacated.

Second, the Order—which is subject to plenary review by this Court—should be reversed, and this matter remanded for further proceedings, because Plaintiffs are prevailing parties entitled to a mandatory award of reasonable attorneys' fees under New Jersey law. Plaintiffs' litigation was unquestionably the catalyst for the "relief [they] ultimately achieved[,]" *Mason*, 196 N.J. at 76—namely, the release of approximately 4,000 pages of public records that NJIT had previously withheld in response to their OPRA Requests. Plaintiffs' lawsuit caused NJIT to abandon the OPRA exemptions it had previously asserted as a basis to deny Plaintiffs' OPRA Requests, and to engage in a new process whereby the records Plaintiffs requested were reviewed and ultimately released. Because there is a "factual causal nexus"

between Plaintiffs' lawsuit and NJIT's release of the records sought by Plaintiffs, the first prong of the catalyst theory is satisfied. *Id*.

Second, whether or not NJIT "followed FBI directives," JA238 (Br. in Response to Pls.' Order to Show Cause), in denying Plaintiffs' access to public records before litigation, and whether the FBI agreed to act as a "consult[ant]" to NJIT in connection with the review, and ultimate release, of the NJIT records responsive to Plaintiffs' OPRA Requests following the filing of Plaintiffs' lawsuit, JA136 (Joint Status Report), does not alter the catalyst theory analysis under New Jersey law. The relevant legal test simply asks whether Plaintiffs' lawsuit was the catalyst for the "relief ultimately achieved[.]" *Mason*, 196 N.J. at 76. Any interpretation of New Jersey law to the contrary conflicts with numerous cases holding that records custodians like NJIT cannot avoid their statutory duties under OPRA by arguing that another government entity or other third-party was responsible for its unlawful denial of access.

Third, neither OPRA's mandatory fee-shifting provision nor the catalyst theory permit an agency to avoid an award of attorneys' fees to a successful plaintiff by arguing that their justification for denying access was "reasonable." *See* N.J.S.A. § 47:1A-6; *Mason*, 196 N.J. at 78–79. The district court gave undue consideration to the purported "reasonableness" of NJIT's "decision to deny production of records[.]" JA021 (Report). Such a "reasonableness" exception has no basis in *Mason* or New Jersey law, and is patently inconsistent with the Act. And in any

case, even if NJIT's motivations for refusing access were a valid consideration under the catalyst theory, NJIT's actions in response to Plaintiffs' OPRA requests were unreasonable as a matter of law. According to NJIT, instead of discharging its non-delegable statutory obligations as a records custodian under the Act, it deferred to the FBI; as a result, NJIT withheld records—including publicly available records—that, on their face, clearly could not lawfully be withheld under the Act, and asserted OPRA exemptions it knew did not (or had no reason to believe) applied. While a New Jersey agency may certainly consult with another government agency as to whether records should be withheld and the reasons therefore, New Jersey law does not permit a records custodian to cede its own statutory obligations to another government agency. *See* N.J.S.A. § 47:1A-5.

Finally, the district court's Order is profoundly inconsistent with New Jersey's clear public policy in favor of encouraging meritorious OPRA litigation, minimizing burdens on OPRA requestors, and promoting the informal settlement of legal disputes during the course of litigation. If affirmed, the Order will undercut the New Jersey Legislature's express determination that state agencies—not OPRA requestors—should bear the costs of litigation that successfully forces the release of public records, and it will provide a roadmap for other state agencies to attempt to avoid fee awards by simply "relying" on the advice of third parties to unlawfully withhold public records. That the district court's Order finds it disqualifying for a mandatory attorneys' fee award under OPRA that Plaintiffs did not file a request for

NJIT's records with the FBI pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, or a file a lawsuit against the FBI, likewise runs counter to OPRA. *See* JA008 (Order). And it is contrary to New Jersey public policy to penalize Plaintiffs, as the district court's Order does, for reaching agreement with NJIT and the FBI on disputed legal issues during the course of this litigation, in order to obtain the requested records more quickly, and narrow the legal issues presented to the court. *See* JA024–25 (Report).

Because the district court's Order denying Plaintiffs' attorneys' fees in this matter contravenes established New Jersey law, and the strong state public policy interests underpinning it, Plaintiffs respectfully request that this Court reverse the Order and remand this matter to the district court with instructions to grant Plaintiffs' motion for an award of reasonable attorneys' fees under OPRA.

STANDARDS OF REVIEW

This Court exercises plenary review over questions of law. *See*, *e.g.*, *Chin v. Chrysler LLC*, 538 F.3d 272, 277 (3d Cir. 2008); *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 231 (3d Cir. 2008); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir. 2002). Whether a party is a prevailing party eligible for an award of attorneys' fees is subject to plenary review. *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 223 (3d Cir. 2017) (in considering eligibility for attorneys' fees under the Individuals with Disabilities Education Act, noting that "[the district court's] determination on the 'prevailing party' issue is a legal

conclusion over which our review is plenary."); *Providence Pediatric Med. Daycare Inc v. Alaigh*, 672 F. App'x 172, 176 n.6 (3d Cir. 2016) (in reviewing denial of attorneys' fees under 42 U.S.C. § 1988, stating that "[w]e exercise plenary review over the question of whether a plaintiff is a 'prevailing party.'" (citation omitted)); *Addie v. Kjaer*, 836 F.3d 251, 260 (3d Cir. 2016) (in reviewing denial of attorneys' fees under a Virgin Islands statute, noting that "[t]he determination of whether a party is a 'prevailing party' under the statute is a legal question subject to plenary review."); *Truesdell*, 290 F.3d at 163 (in reviewing denial of attorneys' fees under 42 U.S.C. § 1988, stating that "[w]e exercise plenary review over legal issues relating to the appropriate standard under which to evaluate an application for attorney's fees, including the question whether [plaintiff] was a 'prevailing party'").[2]

When a federal court is "obliged to apply state substantive law[,]" it is "not free to impose [its] own view of what state law should be; [it is] to apply state law as interpreted by the state's highest court. In the absence of guidance from that court [it is] to refer to decisions of the state's intermediate appellate courts for assistance in determining how the highest court would rule." *McKenna v. Pac. Rail Serv.*, 32

[2] New Jersey appellate courts likewise conduct "plenary review" of trial court determinations as to whether a "plaintiff is entitled to attorney's fees[]" under OPRA. *See N. Jersey Media Grp. Inc. v. Passaic Cty. Prosecutor's Office*, No. A-2016-16T1, 2018 WL 3945641 at *2 (N.J. Super. Ct. App. Div. Aug. 17, 2018) (unpublished opinion) (citation omitted).

F.3d 820, 825 (3d Cir. 1994) (internal citations omitted) (discussing rule of federal courts sitting in diversity).

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT A DE NOVO REVIEW OF THE MAGISTRATE JUDGE'S REPORT.

In reviewing a non-binding report and recommendation of a magistrate judge, a district court "*shall* make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C.§ 636(b)(1) (emphasis added); *see also* Fed. R. Civ. P. 72(b)(3) (district courts must determine "de novo any part of the magistrate judge's disposition that has been properly objected to"); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011) ("the standard district courts should apply to such objections is de novo"). Following that de novo review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

Because "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the [district court] judge[,]" *United States v. Raddatz*, 447 U.S. 667, 682 (1980) (first alteration in original, citation omitted), the de novo review required of the district court must include an independent evaluation of the record itself, not merely a facial review of the magistrate judge's determinations. *See*, *e.g.*, 12 Fed. Prac. & Proc. Civ. § 3070.2 (2d ed.) ("for the district judge to act

on the basis of the magistrate judge's findings and recommendations alone establishes that de novo review has not occurred"); *Jones v. Pillow*, 47 F.3d 251, 253 (8th Cir. 1995) (remanding where district court "stated only that it had reviewed the findings and recommendations and [the plaintiff's] objections"). As this Court has stated, "[a] de novo determination requires the district judge to 'consider the record which has been developed before the magistrate and make his *own determination on the basis of that record*, without being bound to adopt the findings and conclusions of the magistrate.'" *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 904 (3d Cir. 1992) (citing H.R.Rep. No. 94–1609, 94th Cong, 2d Sess 3 in 1976 U.S. Code Cong. & Admin. News 6163) (emphasis added).

Here, in adopting the magistrate judge's Report and denying Plaintiffs' motion for attorneys' fees the district court did not conduct the required de novo review of those portions of the Report objected to by Plaintiffs, as required by law. Nowhere does the district court's Order state or otherwise indicate that it conducted any independent review of the Report or any portion of the record that was before the magistrate judge. *See* JA004–9. To the contrary, by the express terms of the Order, the *only* items "considered" by the district court were the Report itself, Plaintiffs' objections to the Report, and NJIT's opposition to those objections. JA004; *cf. Taberer*, 954 F.2d at 904; *Jones*, 47 F.3d at 253. The only non-caselaw citations in the district court's Order are to the magistrate judge's Report. *See* JA004–9. And not a single one of Plaintiffs' specific objections to the magistrate

judge's Report was explicitly noted, addressed, or overruled by the district court. *See* JA004–9.

Because the district court failed to conduct the independent review required of it before adopting the magistrate judge's Report and denying Plaintiffs' motion for attorneys' fees, its Order must be vacated. *See* 28 U.S.C.§ 636(b)(1). For the reasons set forth below, however, this Court should also reverse the district court's Order—which is subject to plenary review—and remand this matter with instructions to the district court to award Plaintiffs' attorneys' fees under OPRA's mandatory fee-shifting provision.

II. PLAINTIFFS ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES UNDER NEW JERSEY LAW.

A. OPRA mandates an award of attorneys' fees to prevailing plaintiffs.

OPRA provides members of the public a statutory right of access to records of New Jersey government entities. *See* N.J.S.A. §§ 47:1A-1 *et seq.* Its 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 omitted). OPRA places specific, non-delegable duties on records custodians and agencies to ensure public access to government records. *See* N.J.S.A. § 47:1A-5 (setting forth variety of responsibilities). Under its provisions, "[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours . . . unless a government

record is exempt . . . ." *Id.* at § 47:1A-5(a). Records custodians "shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record[;]" if they assert any portion of a requested record is exempt from disclosure under the Act, they "shall delete or excise" that portion and "promptly permit access to the remainder of the record." *Id.* at § 47:1A-5(g). "[A]ny limitations on the right of access . . . shall be construed in favor of the public's right of access." *Mason*, 196 N.J. at 65 (citing N.J.S.A. 47:1A–1) (ellipses in original).

OPRA provides robust enforcement mechanisms to ensure compliance with its mandate of openness, including judicial review. Under its provisions, "[a] person who is denied access to a government record by the custodian of the record[]" may challenge that decision by filing an action in Superior Court. N.J.S.A. § 47:1A-6. In such a proceeding the government agency bears "the burden of proving that the denial of access is authorized by law." *Id.*

The Act seeks to encourage requestors facing unlawful denials of access to seek judicial review by requiring that attorneys' fees be awarded to successful OPRA plaintiffs. Specifically, the Act states that a "requestor who prevails in any [such] proceeding *shall* be entitled to a reasonable attorney's fee." *Id.* (emphasis added). OPRA thus "mandate[s], rather than permit[s], an award of attorney's fees to a prevailing party[,]" *Mason*, 196 N.J. at 75, for reasons that the New Jersey Supreme Court has stated clearly:

> Without that fee-shifting provision, 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.

New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr., 185 N.J. 137, 153 (2005) (citation and internal quotation marks omitted).

B. Plaintiffs are prevailing parties under the catalyst theory adopted by the New Jersey Supreme Court.

OPRA "does not restrict fee-shifting to instances of willful violations"—"[a] requestor who prevails in *any* proceeding *shall be entitled to* a reasonable attorney's fee.'" *Smith v. Hudson Cty. Register*, 422 N.J. Super. 387, 398 (App. Div. 2011) (alterations and emphasis in original, citation omitted)). Nor does the Act require that a requestor secure a judicial order requiring the release of records in order to be entitled to a mandatory award of attorneys' fees. Under the so-called "catalyst theory" recognized by the New Jersey Supreme Court in *Mason*, a plaintiff is entitled to attorneys' fees under OPRA when there is (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved" and (2) "the relief ultimately secured by plaintiffs had a basis in law." 196 N.J. at 76 (internal quotations and citation omitted). The reason for this commonsense rule is simple: to hold 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*, 422 N.J. Super. at 395.

Only the first prong of the catalyst theory is at issue in this case. JA020 (Report). NJIT has not contested that the "relief ultimately secured by plaintiffs had a basis in law[,]" *Mason*, 196 N.J. at 76, thus "implicitly conceding that the second prong is met[,]" JA020 (Report). And, as set forth below, contrary to the district court's Order, the first prong is satisfied. Because there is a "factual causal nexus" between Plaintiffs' lawsuit and the relief they ultimately achieved—namely, the release of thousands of pages of public records previously withheld by NJIT—the catalyst theory applies, and Plaintiffs are entitled to an award of reasonable attorneys' fees under OPRA.

1. Plaintiffs' lawsuit caused the release of thousands of pages of public records previously withheld by NJIT.

Under OPRA, a plaintiff "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) (citation omitted). That standard is met here.

The record in this case is clear that prior to the filing of Plaintiffs' lawsuit in New Jersey state court, NJIT largely denied Plaintiffs' First Request, and completely denied Plaintiffs' Second and Third Requests, on the basis of specified OPRA exemptions that NJIT claimed, at the time, allowed it to withhold the requested records. JA013–14 (Report); JA044–48 (Verified Complaint). Specifically, NJIT's custodian of records "identified" and asserted the following OPRA exemptions in

response to Plaintiffs' OPRA Requests: Executive Order No. 9 (Hughes 1963), Executive Order No. 21 (McGreevey 2002), Executive Order No. 26 (McGreevey 2002), N.J.S.A. 47:1A-9, and N.J.S.A. 47:1A-1.1. JA060–62, 070–71, 076–77 (response letters to requests); JA215 at ¶ 37 (Ms. Williams certifying that, in response to the First Request, she "identified . . . the applicable OPRA exemptions pursuant to which certain records had been redacted and/or withheld from production"); JA217 at ¶ 46 (Ms. Williams certifying that, in response to Second Request, she "cited the OPRA exemptions applicable thereto . . . ."); JA218 at ¶ 53 (Ms. Williams certifying that, in response to the Third Request, she "cited the OPRA exemptions applicable thereto . . . ."). Based on its assertion of these OPRA exemptions, NJIT denied Plaintiffs access to thousands of pages of public records that they had properly requested. *See* JA013–14 (Report); JA044–48 (Verified Complaint).

Following the filing of Plaintiffs' lawsuit, NJIT's conduct changed dramatically. Apparently unwilling to defend the applicability of the OPRA exemptions it had cited to deny Plaintiffs' OPRA Requests, NJIT looked to the FBI to intervene. *See* JA119 (Letter from Gary Potters to Judge Wettre). When the FBI did not intervene, NJIT—then seeking to avoid liability for an award of attorneys' fees under OPRA's mandatory fee-shifting provision—sued the FBI for indemnification. JA099–102 (NJIT Third Party Complaint). Thereafter, following removal of this OPRA case to federal court by the FBI, NJIT agreed to a new process

for reviewing and releasing the records it had previously withheld from Plaintiffs in full or in part; pursuant to that process, the FBI, acting as a "consult[ant]" to NJIT, JA136 (Joint Status Report), reviewed all of the records that NJIT had identified as responsive to Plaintiffs' OPRA Requests, and returned them to NJIT. *See, e.g.,* JA137 (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.").

By the end of June 2016 Plaintiffs had received four productions of records from NJIT totaling approximately 1,499 unredacted pages and 379 partially redacted pages responsive to their OPRA Requests. JA143 (Joint Status Report). NJIT thereafter made four additional productions of records responsive to Plaintiffs' OPRA requests. *See* JA195–206 (production letters). In total, as a result of filing this OPRA lawsuit, Plaintiffs received approximately 3,445 unredacted pages of records responsive to their OPRA Requests from NJIT, as well as 379 partially redacted pages. JA147 (Joint Status Report). In releasing these records to Plaintiffs, NJIT explicitly abandoned any reliance on the OPRA exemptions it had previously asserted as the basis for denying Plaintiffs' OPRA Requests; it produced approximately four thousand pages of responsive records that it had previously withheld in full without citing a single exemption under OPRA. *See* JA147 (Joint Status Report); JA181–82, 184–85, 188–89, 191–92, 195–96, 198–99, 201–202,

204–5 (cover letters accompanying productions of responsive records to Plaintiffs from NJIT, citing no exemptions).

NJIT would not have released the withheld records requested by Plaintiffs had Plaintiffs not filed this lawsuit. Indeed, NJIT's pre-litigation position could not have been clearer; it denied Plaintiffs' Second and Third Requests in their entirety. *See* JA014 (Report); JA047–48 (Verified Complaint). By filing this lawsuit, Plaintiffs forced NJIT to abandon that extreme (and unlawful) pre-litigation position and ultimately release thousands of pages of the records it had previously withheld. Thus, not only is there plainly a "factual causal nexus" between this litigation and "the relief ultimately achieved" by Plaintiffs, *Mason*, 196 N.J. at 76, Plaintiffs achieved their "desired result because the complaint brought about change (voluntary or otherwise)" in NJIT's conduct, *Spectraserv*, 416 N.J. Super. at 583.

An analogous situation was considered by New Jersey's Appellate Division in *K.L. v. Evesham Township Board. of Education.*, 423 N.J. Super. 337 (App. Div. 2011). In *K.L.*, the Appellate Division found that the first prong of the catalyst theory was satisfied when, after a requestor filed suit, the responding government agency conferred with a third party whom it believed had an interest in the requested record, and released a redacted record to the requestor after confirming that the third party had no objection to its release. *See* 423 N.J. Super. at 347. In *K.L.*, as here, the record custodian changed its position from denying access to the requested record in its entirety pre-litigation to releasing a redacted version of the record after consulting

with a third party after the requestor had filed suit. *Compare* 423 N.J. Super. at 347 ("The Board notified the parent of the other student. The parent had no objection to disclosure of the record provided that her child's name was redacted from the document.") *with* JA137 (Joint Status Report) (stating NJIT's "agree[ment]" with "the FBI's proposal" to review NJIT's records and send them back to NJIT); JA147 (Joint Status Report) ("After applying those redactions, the FBI sent the documents back to NJIT, in accordance with FBI protocols for consultation requests. NJIT then produced the documents and portions thereof that the FBI asserts are non-exempt to Plaintiffs without applying additional redactions.").

The few cases in which New Jersey appellate courts have concluded that a records custodian's release of previously withheld records after the filing of an OPRA lawsuit did *not* satisfy the first prong of the catalyst theory underscore precisely why the standard is met here. In those cases—unlike here—the government agency did not refuse access to the requested records pre-litigation, and was, in fact, attempting to provide access to the requested records (or had already provided access) when the lawsuit was filed.

For example, in *Mason*, the City of Hoboken had "agreed to [one of the] plaintiff's request *before she even filed suit*," 196 N.J. at 81 (emphasis added), and with respect to her other request the city notified the requester that the records were being corrected and would be available soon; the city's production was slightly delayed because the mother of the city business administrator "was critically ill and

suffered a massive and ultimately fatal heart attack during the relevant time frame, which complicated Hoboken's efforts to respond[.]" *Id.* at 79–80. Likewise, in *Spectraserv*, "[f]rom the very inception, in its initial response . . . the [government agency] *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." 416 N.J. Super at 584 (emphasis added). The agency in that case even offered pre-litigation to coordinate its production of records under OPRA with discovery responses in the requestor's separate lawsuit. *See id.*[3] And in *Stop & Shop Supermarket Co., LLC v. County of Bergen*, the Appellate Division upheld a denial of fees under the catalyst theory because the government agency "voluntarily produced the records before [the requester] filed suit. 450 N.J. Super. 286, 293 (App. Div. 2017) (emphasis in original).

None of these facts or circumstances are present here. NJIT's pre-litigation position was clear—it denied Plaintiffs' OPRA Requests on the basis of specified OPRA exemptions. JA013–14 (Report); JA044–48 (Verified Complaint). Thus, unlike the requestors in *Mason, Spectraserv*, and *Stop and Shop*, Plaintiffs had no choice but to file a lawsuit under OPRA to obtain the records they requested from NJIT. Only in response to Plaintiffs' lawsuit did NJIT change course, abandon its

[3] In *Spectraserv*, the court also determined that the OPRA requests at issue were "overly broad and generalized and therefore improper under OPRA[,]" including by requesting approximately 150,000 documents. 416 N.J. Super. at 578. No such circumstances are present here.

reliance on the OPRA exemptions it had previously asserted, and agree to a process that ultimately led to it releasing thousands of pages of the records Plaintiffs had requested. Accordingly, under the catalyst theory, Plaintiffs are prevailing parties for the purpose of OPRA's mandatory fee-shifting provision. *See Mason*, 196 N.J. at 76; N.J.S.A. 47:1A-6.

2. Whether or not NJIT withheld the requested records at the direction of the FBI is irrelevant; the "relief ultimately achieved" by Plaintiffs' OPRA lawsuit entitles Plaintiffs to attorneys' fees.

NJIT argued, below, that it was simply complying with FBI instructions before and after Plaintiffs' lawsuit was filed, and that its compliance with FBI instructions precludes an award of attorneys' fees to Plaintiffs. *See*, *e.g.*, JA241 (brief of NJIT in opposition to Order to Show Cause). NJIT's stated reliance on the FBI was the basis for the district court's Order denying Plaintiffs' motion for attorneys' fees. *See* JA007–9 (Order); JA023–29 (Report). But Plaintiffs' entitlement to an attorneys' fee award under OPRA does not turn on whether or not NJIT "was acting pursuant to directives from the FBI . . . ." JA019 (Report). The first prong of the catalyst theory looks only to whether there is "a factual causal nexus between [Plaintiffs'] litigation and the relief ultimately achieved"—namely, "the production of requested records." *Mason*, 196 N.J. at 76, 79. The factual record is clear that but-for Plaintiffs' lawsuit, NJIT would not have released the records it ultimately released to Plaintiffs. *See, e.g.*, JA044–48 (Verified Complaint). Accordingly, the first prong of the catalyst theory is satisfied. Whether this post-

lawsuit "change" in NJIT's conduct was "voluntary or otherwise[,]" *Spectraserv*, 416 N.J. Super. at 583, or whether, as the magistrate judge found, it was prompted by a "post-lawsuit change in *the FBI's* position[,]" JA024 at n.5 (emphasis in original), does not affect Plaintiffs' entitlement to an award of attorneys' fees under OPRA.

Moreover, the district court's Order denying Plaintiffs attorneys' fees on the grounds that NJIT deferred to and followed the direction of the FBI, *see* JA007–8, conflicts with New Jersey caselaw soundly rejecting similar attempts by records custodians to avoid responsibility for attorneys' fees under OPRA. In *Courier News v. Hunterdon County Prosecutor's Office*, for example, a requestor sought a recording of a 9-1-1 call in the possession of a local county prosecutor's office (the "County") pursuant to OPRA. *See* 378 N.J. Super. 539, 541 (App. Div. 2005). After determining that the recording was improperly withheld by the County, the Appellate Division remanded the case to the trial court to address attorneys' fees. *See id.* On remand, the County joined the State as a third-party defendant, arguing that the State (not the County) was responsible for the requestor's attorneys' fees under the theory that the County was performing a state law enforcement function when it denied access to the recording. *See id.*

The Appellate Division disagreed. It held that that the County was responsible for the plaintiff's attorneys' fees because it was the custodian of the requested recording. *Id.* at 545–46. Looking to the provisions of OPRA that emphasize the

responsibilities of records custodians, the court held that because the County "was the custodian of the [recording . . . it] assumed administrative responsibility to safeguard [the recording] the minute it took custody of it." *Id.* at 546. The County's obligation to pay attorneys' fees thus flowed "exclusively from the provisions of OPRA[.]" *Id*.

Paff v. West Deptford Township, an unpublished Appellate Division case, is also instructive. *See* No. A-3195-08T2, 2010 WL 546587 (N.J. Super. Ct. App. Div. Feb. 18, 2010). In that case, the plaintiff sought records under OPRA relating to a federal lawsuit involving West Deptford Township (the "Township") that had resulted in a settlement. *See* 2010 WL 546587 at *1. The Township denied access to the records on the grounds that they "were subject to a discovery confidentiality order entered in the federal lawsuit." *Id.* The requestor 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 requestor's attorneys' fees because the confidentiality agreement that it had entered into in connection with the federal lawsuit prohibited it from releasing the requested records. *See id.* The Appellate Division affirmed the award of attorneys' fees and costs, squarely rejecting the argument that a public agency can circumvent the requirements of OPRA—including OPRA's mandatory fee-shifting provision—through such an agreement. *Id.* at *2. As the Appellate Division stated:

> [T]he 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.

Id.

In sum, NJIT's argument that it simply followed the FBI's instructions is not a basis under New Jersey law to deprive Plaintiffs' of their statutory entitlement to an award of attorneys' fees. The obligations of agencies and records custodians, like NJIT, are clearly established by OPRA. *See* N.J.S.A. 47:1A-5–6 (setting forth duties of agencies and records custodians). And New Jersey appellate courts have made clear that a records custodian cannot avoid those obligations, including OPRA's mandatory fee-shifting provision, by contending that it was acting on behalf of another government agency in withholding records, *see Courier News*, 378 N.J. Super at 545–46, or because it "promised" a third party that it would keep records confidential; *Paff*, 2010 WL 546587 at *2. Under the catalyst theory, because Plaintiffs' lawsuit was the catalyst for NJIT's release of previously withheld records, Plaintiffs are prevailing parties under OPRA.

3. Application of the catalyst theory does not require a finding of "unreasonableness" on the part of the records custodian.

OPRA does not make a finding of unreasonableness or bad faith on the part of the responding agency a prerequisite to an award of attorneys' fees. To the contrary, it provides that a "requestor who prevails in *any* proceeding *shall* be

entitled to a reasonable attorney's fee." N.J.S.A. § 47:1A-6 (emphasis added). A separate provision of the Act allows for the imposition of civil penalties for public officials who "knowingly and willfully violate[]" OPRA, if they are "found to have unreasonably denied access under the totality of the circumstances[.]" N.J.S.A. § 47:1A-11. These provisions reflect a clear policy choice on the part of the New Jersey Legislature to mandate fee awards in *all* successful OPRA cases and to impose civil penalties in cases involving "unreasonabl[e]" denials of access. *Compare,* N.J.S.A. §§ 47:1A-6, 47:1A-11 *with, e.g.*, Me. Rev. Stat. tit. 1, § 409 (attorneys' fees may be awarded under Maine's public records law if the requestor substantially prevails and the court "determines that" the agency's "refusal or illegal action was committed in bad faith").

In short, OPRA expressly and purposely "does not restrict fee-shifting to instances of willful violations." *Smith*, 422 N.J. Super. at 397–98 (rejecting New Jersey government agency's argument that it would be "inappropriate . . . to compel [it] to pay counsel fees because [it] had been behaving according to a reasonable interpretation of the statute, and there was no willful violation of OPRA"). As the Appellate Division recently explained:

> If the requestor prevails in an OPRA proceeding, the requestor is entitled to counsel fees even if the custodian acted in good faith, did not willfully violate OPRA, applied a reasonable if erroneous interpretation of the statute, or faced conflicting judicial decisions.

N. Jersey Media Grp., 2018 WL 3945641 at *12.

Here, the district court's Order denying Plaintiffs' motion for attorneys' fees gives paramount consideration to the purported "reasonableness" of NJIT's "decision to deny production of records[.]" *See*, *e.g.*, JA021 (Report) (stating that "[t]he reasonableness of, and motivations for, a public entity's decision to deny production of records is an important consideration in the causal nexus analysis" (citing *Mason*, 196 N.J. at 79)). The district court's "reasonableness" exception to application of the catalyst theory, however, has no basis in New Jersey law; it rests on a misreading of *Mason* and is inconsistent with the Act.

First, the district court's Order misconstrues *Mason*. In adopting the catalyst theory, the New Jersey Supreme Court rejected the alternative argument that there should instead be a rebuttable presumption "that a requestor has 'prevailed' and is entitled to attorney's fees whenever a defendant discloses a requested record after the filing of an OPRA complaint." 196 N.J. at 77. In doing so, the Court reasoned:

> The catalyst theory provides a more sound approach. It empowers courts to award fees when the requestor can establish a "causal nexus" between the litigation and the production of requested records. Trial courts would conduct that 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.

Mason, 196 N.J. at 79.

This reference by the New Jersey Supreme Court to the "reasonableness" of the "agency's decisions," *id*., is not an instruction to courts to consider the "reasonableness of, and motivations for, a public entity's *decision to deny*

production of records" subject to OPRA, JA021 (Report) (emphasis added)—language of the Report adopted by the district court that is found nowhere in *Mason*. Read in context, it is clear that the Court in *Mason* was discussing "reasonableness" as it relates to the efforts made by the responding agency to *comply* with OPRA and *produce* requested records *prior to litigation*. *See id.* at 79–80 (describing agency's efforts to provide records before the lawsuit was filed). As explained above, in *Mason* the government agency did *not* "deci[de] to deny production of records[,]" JA025 (Report), pre-litigation. *See* 196 N.J. at 79–81; *see also supra* Section II(B)(1) (noting cases where agency produced or was attempting to produce records pre-litigation). Simply put, nothing in *Mason* supports the existence of the "reasonableness" exception to the catalyst theory that was adopted in the district court's Order. To the contrary, *Mason* makes clear that the central inquiry is whether there is "a 'causal nexus' between the litigation and the production of requested records." *Id.* at 76.

Second, application of a "reasonableness" exception to the catalyst theory—that looks to an agency's "motivations" for deciding to deny an OPRA request before litigation—is flatly inconsistent with the Act. *Compare* N.J.S.A. § 47:1A-6 (mandatory fee-shifting provision containing no requirement of agency unreasonableness or willfulness) *with* N.J.S.A. § 47:1A-11 (provision for imposing civil penalties if, *inter alia*, government officials are "found to have unreasonably denied access . . ."). Indeed, as noted above OPRA mandates fee-shifting even in

cases where the agency denied access to public records on the basis of a "reasonable if erroneous interpretation of the statute[.]" *N. Jersey Media Grp. Inc.*, 2018 WL 3945641 at *12.

4. In any event, NJIT's denial of Plaintiffs' OPRA Requests was contrary to the Act and "unreasonable" as a matter of law.

Even if an inquiry into the "reasonableness" of NJIT's refusal to release records in response to Plaintiffs' OPRA Requests pre-litigation were warranted, NJIT's conduct was unreasonable as a matter of law. As set forth above, OPRA places specific, non-delegable duties on records custodians, including the duty to determine whether records are exempt from disclosure. *See* N.J.S.A. § 47:1A-5. Here, by its own telling, NJIT disregarded those express, statutory duties and uncritically followed the "directives" of the FBI to withhold thousands of pages of its own records from Plaintiffs, including records—like the full text of an article written by Mr. Golden, JA260–66—that even the most cursory review demonstrate are not exempt under the Act. Moreover, to purportedly justify its denial of Plaintiffs' OPRA Requests, NJIT asserted OPRA exemptions that it knew did not (or, at best, did not have any reason to believe) applied; it abandoned all of those OPRA exemptions once Plaintiffs filed suit under the Act. *See* JA181–82, 184–85, 188–89, 191–92, 195–96, 198–99, 201–202, 204–5 (cover letters accompanying productions of responsive records to Plaintiffs from NJIT citing no exemptions). Simply put, NJIT's actions in this case are not even the result of a "reasonable if

erroneous interpretation of the statute[.]" *N. Jersey Media Grp. Inc.*, 2018 WL 3945641 at *12. NJIT actions were patently inconsistent with the requirements placed on records custodians by the Act and countermand the entire framework of OPRA.

To be clear, Plaintiffs have never taken the position that NJIT was prohibited from consulting with the FBI (or any other third party) either before or after this lawsuit was filed. Indeed, as the Appellate Division has noted, a records custodian "may not be in a position to discharge" their obligation to state the legal basis for a denial of access "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[.]" *Gannett New Jersey Partners, LP v. Cty. Of Middlesex*, 379 N.J. Super. 205, 215 (App. Div. 2005). But consultation with a third party does not absolve the records custodian of their non-delegable responsibilities under OPRA to, among other things, ensure that any records withheld from disclosure fall within the scope of an OPRA exemption. *See* N.J.S.A. § 47:1A-5.

Caselaw arising under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") is instructive. Federal agencies often possess records obtained from third parties that may contain privileged and confidential trade secrets or commercial or financial information that is exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b)(4). Recognizing that federal agencies may not be in the best position to determine whether the records they possess contain such information, *accord*

Gannett, 379 N.J. Super. at 215, Executive Order 12600, instructs agencies to notify the third party with whom the information originated of a FOIA request for that material, and to give the third party an opportunity to submit its recommendation as to whether and to what extent those records should be withheld under FOIA. *See* Executive Order 12600, 52 Fed. Reg. 23781 (Jun. 25, 1987).

Federal courts have made clear that this notification and recommendation process does *not* mean that a federal agency can jettison its independent obligation to determine whether the records fall within the scope of FOIA's Exemption 4. For example, in *Lee v. F.D.I.C.* the U.S. District Court for the Southern District of New York rejected the Office of Comptroller of the Currency's ("OCC's") reliance on a confidentiality recommendation provided to it by Chase Manhattan Bank:

> The OCC's attitude toward disclosure, as evidenced in their letter to Plaintiffs, appears to defer the determination of the propriety of disclosure to Chase. The OCC is required to determine *for itself* whether the information in question should be disclosed, with a strong agency-wide presumption favoring disclosure. Consultation with the financial institution in question, *while appropriate as one step in the evaluation process*, *is not sufficient* to satisfy the OCC's FOIA obligations.

923 F. Supp. 451, 454–55 (S.D.N.Y. 1996) (emphasis added). The U.S. District Court for the District of Columbia has similarly explained that agencies bear "the burden of showing that the withheld information qualifies for an exemption from disclosure," and must make an "*independent* determination" as to whether information identified by a third party is "entitled" to be withheld "under Exemption

4." *Nw. Coal. for Alternatives to Pesticides v. E.P.A.*, 254 F. Supp. 2d 125, 130–31 (D.D.C. 2003) (emphasis added).

In discharging their statutory obligations under the law, records custodians undoubtedly may be forced to make difficult choices. For example, in *Collingswood Board of Education v. McLoughlin* a New Jersey public agency brought an affirmative declaratory relief action after a third party threatened to sue the agency if it released records requested by two reporters pursuant to OPRA by two reporters. *See* No. A-2475-14T1, 2016 WL 6134926 (N.J. Super. Ct. App. Div. Oct. 21, 2016) (unpublished opinion). The agency filed an affirmative action against both the media requestors 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 requestors." *Id.* at *1 (second alteration in original). The Appellate Division rejected the agency's claim, explaining:

> 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 [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 (emphasis added). In short, that an agency faces demands from a third party not to release records does not change its obligations under OPRA. *See id.*

Notably, other public universities around the country made precisely the type of "judgment call" referenced by the Appellate Division in *McLoughlin* in response

to similar public records requests from Mr. Golden. The University of South Florida ("USF"), for example, released emails between its employees and the FBI under Florida's Sunshine Law. JA164–65 at ¶¶ 6–9 (Declaration of Daniel Golden). In a letter to Mr. Golden, USF stated:

> 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.

JA171. 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. JA164 at ¶ 6 (Declaration of Daniel Golden).

NJIT, on the other hand, by its own telling, refused to comply with the statutory obligations placed on it by OPRA. *See* JA341–42 at 29:24–30:1 (NJIT counsel arguing to the magistrate judge that NJIT "absolutely" should "not" have reviewed the documents responsive to Plaintiffs' OPRA Request and "made an independent call"); JA100 at ¶ 13 (NJIT Third-Party Complaint) (alleging that "NJIT, at all times, followed FBI directives vis-à-vie [sic] plaintiffs' OPRA requests . . . ."); JA215 at ¶ 34 (Ms. Williams certifying that "[n]either I, nor anyone else at NJIT, redacted any of the records compiled in response to [Plaintiffs'] First Request. Rather, all redactions and determinations as to which documents were and were not

subject to disclosure were made and dictated solely by the FBI."). In unquestionably and uncritically deferring to the FBI and withholding records at its direction that were not exempt from disclosure under the Act, NJIT acted contrary to OPRA's express requirements and, thus, unreasonably as a matter of law.

III. THE DISTRICT COURT'S ORDER CONTRAVENES OPRA'S PURPOSE AND UNDERCUTS THE STATUTORY SCHEME ENACTED BY THE NEW JERSEY LEGISLATURE.

A. The district court's Order, if affirmed, will discourage requestors from pursuing meritorious OPRA litigation that benefits the public.

Mandatory fee-shifting is a key feature of the Act, the central purpose of which is to promote government transparency. The New Jersey Legislature determined that a mandatory fee-shifting provision is necessary to ensure that requestors, including journalists like Mr. Golden, will pursue meritorious litigation to vindicate their statutory right of access to public records when their OPRA requests are denied. Because requestors often do not have the resources to engage in protracted litigation against a government agency,[4] and require assurance that if they prevail they will be able to recover attorneys' fees, OPRA's mandatory fee-

[4] Plaintiffs were only able to engage in this multi-year litigation, which amounted to nearly $200,000 in attorneys' fees and benefited the public through the release of records concerning the actions of NJIT employees, because they were represented pro bono. See JA165 (Declaration of Daniel Golden discussing use of records); JA173 (Declaration of Katie Townsend) (noting "[a]ll of the legal services provided to Plaintiffs by Reporters Committee attorneys in [this matter] were provided on a no-fee, pro bono basis."); ECF No. 53-4 at 3 (Declaration of Bruce Rosen) (noting that he "represented Plaintiffs in this matter pro bono.").

shifting provision is a "vital means of fulfilling" New Jersey's commitment to open government. *Courier News*, 378 N.J. Super. at 546.

The district court's Order—concluding that Plaintiffs must bear the substantial financial burden of pursuing this successful OPRA lawsuit—ignores legislative intent and undermines the very purpose of the Act. *See id.* The Order provides a blueprint for state government agencies to evade OPRA's fee-shifting requirement, leaving even successful requestors (like Plaintiffs) unable to recover attorneys' fees in litigation they are forced to bring to obtain records they properly requested, and were improperly denied access to, under the Act. Specifically, under the district court's Order adopting the magistrate judge's interpretation of New Jersey law, a records custodian can improperly deny an OPRA request pre-litigation and still avoid an award of attorneys' fees under OPRA if it (1) releases the requested records after a lawsuit is filed, and (2) asserts that it originally denied the OPRA request at the direction of another government agency or third-party. Such a rule will undoubtedly inspire New Jersey government agencies to seek out other government entities and third parties to "consult" when they receive OPRA requests, and encourage the precise type of gamesmanship that the catalyst theory was intended to prevent.

From the perspective of the public and future requestors, the district court's Order injects uncertainty into OPRA's mandatory fee-shifting framework, casting doubt on whether even a clearly meritorious OPRA lawsuit like this one will be

found to be ineligible for an award of attorneys' fees. Requestors will be less likely to file, and lawyers more hesitant to take, OPRA cases seeking access to records that in any way could be construed as implicating third-party interests. Such a result would be contrary to both the intent of the Legislature in enacting a mandatory fee-shifting provision and the catalyst theory adopted by New Jersey's Supreme Court.

B. The added burdens that the district court's Order places on OPRA requestors are facially unreasonable and contrary to the Act.

Contrary to the district court's Order, it was Plaintiffs—not NJIT—that "acted in a manner encouraged by OPRA[]" when they (successfully) pursued meritorious litigation against NJIT to obtain public records that it had withheld in violation of the Act. JA008 (Order). The district court's Order adopting the magistrate judge's Report, however, concludes that Plaintiffs are not entitled to an attorneys' fee award under OPRA in part because Plaintiffs should have submitted a request to the FBI under the federal Freedom of Information Act, 5 U.S.C. § 552, or "implead[ed] the FBI as a third-party defendant[.]" JA008 (Order); *see also* JA024 at n.5, JA026 (Report). These additional hurdles that the district court concluded Plaintiffs should have overcome are both patently unreasonable and contrary to the Act.

As an initial matter, nothing in OPRA, FOIA, or in any other law required Plaintiffs to file a FOIA request with the FBI—let alone file a lawsuit against the FBI—simply to obtain access to public records they properly requested from NJIT, a state government agency, under state law. To the contrary, under OPRA, a

requestor who is denied access to a record by a records custodian and who wishes to challenge that denial in court is *required* to file an action against the records custodian in New Jersey Superior Court. N.J.S.A. § 47:1A-6. That is exactly what Plaintiffs did. JA040–56 (Verified Complaint). NJIT never contended that Plaintiffs' OPRA Requests were improper under state law, nor did it move to dismiss Plaintiffs' OPRA lawsuit as improper; indeed, NJIT's counsel conceded that Plaintiffs were not required to submit a FOIA request to the FBI, JA346 at 34:20–22,[5] and NJIT filed a separate claim for indemnification against the FBI under an implied contract theory solely in order to hold the FBI responsible for any attorneys' fee award to Plaintiffs under OPRA, *see* JA099–102 (NJIT Third-Party Complaint).[6]

Even setting aside that an OPRA *plaintiff* cannot "implead[]" a federal agency "as a third-party defendant," JA008 (Order), in an OPRA action, *see* N.J. Rule 4:8-1(a) (permitting a *defendant* to implead a third-party), Fed. R. Civ. P. 14 (same), that OPRA does not apply to the FBI, JA017 at n.4 (Report) (citing N.J.S.A. § 47:1A-1.1), that the jurisdictional predicates for filing suit against a New Jersey entity under OPRA differ from those applicable to lawsuits against federal agencies under FOIA, *compare* N.J.S.A. § 47:1A-6 *with* 5 U.S.C. § 552(a)(4)(B), and that OPRA's venue

[5] *See also* JA360–61 at 48:18–49:5 (counsel for NJIT conceding, *inter alia*, that Plaintiffs could not have properly sued the FBI under OPRA).

[6] The Report's suggestion that NJIT impleaded the FBI in this action for Plaintiffs' benefit, JA026, is belied by the record. *See* JA099–102 (NJIT Third-Party Complaint).

provision is incompatible with FOIA's venue provision, *compare* N.J.S.A. § 47:1A-6 (requiring an action to be brought in New Jersey Superior Court) *with* 5 U.S.C. § 552(a)(4)(B) (requiring FOIA lawsuits to be brought in federal district court), the New Jersey Appellate Division has made clear that OPRA requesters should not be subjected to such "bureaucratic hurdle[s]" simply to vindicate their statutory right to access public records under state law. *See ACLU of New Jersey v. New Jersey Div. of Criminal Justice*, 435 N.J. Super. 533, 541 (App. Div. 2014).

In *ACLU*, the Appellate Division considered the lawfulness of a "policy" adopted by a New Jersey state agency whereby it would redact information inside a responsive document if it determined the information "was outside the scope of the request." *Id.* at 354. The trial court held that the policy was permissible because it was "not unreasonable to ask the requestor to make a follow[-]up request," for the redacted information, or engage in follow-up discussions with the records custodian. *Id.* at 535 (edit in original).

The Appellate Division reversed, soundly rejecting that proposition:

> Equally troubling is the court's decision to place the "onus" on the requestor to clarify or engage in negotiations with the custodian as a jurisdictional prerequisite to instituting legal action to enforce his or her rights to access public information. This extra hurdle the requestor must clear before getting to the courthouse doors is not only untethered to any provision in OPRA, but contravenes the clear public policy expressed by the Legislature in OPRA, directing the courts to construe "any limitations on the right of access . . . in favor of the public's right of access." *N.J.S.A.* 47:1A–1.
>
> [. . .]

> Shifting the burden to the requestor to make a follow-up request, as suggested by the trial court here, imposes a bureaucratic hurdle that runs counter to our State's strong public policy favoring "the prompt disclosure of government records." [*Mason,* 196 *N.J.* at 65; N.J.S.A. § 47:1A–1].

ACLU, 435 N.J. Super at 538–42.

The added hurdles contemplated by the district court's Order here are likewise "untethered to any provision in OPRA," and undermine the purpose of the Act. *Id*. at 536–37. OPRA does not require requestors to make additional public records requests or to pursue additional lawsuits against parties other than the records custodian simply to be eligible for an award of attorneys' fees in meritorious OPRA litigation. *See id.*

C. The district court's Order will discourage future OPRA requestors from agreeing to informally resolve disputed legal issues once in litigation.

Under the catalyst theory, a requestor is entitled to an award of attorneys' fees if the OPRA request is fulfilled pursuant to a settlement reached during the course of litigation. *See Schmidt v. City of Gloucester City*, 2012 WL 3064254 (App. Div. July 30, 2012) (unpublished opinion); *Mason*, 196 N.J. at 74 ("A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters."); *Teeters v. Div. of Youth & Family Servs.*, 387 N.J. Super. 423 (App. Div. 2006) (holding requestor was a prevailing party under the catalyst theory when she entered into a partial settlement agreement with the agency during litigation). As

the Appellate Division has explained, there is a "strong public policy of [New Jersey] favoring settlements. A result that places a claimant in a distinctly worse position economically if she settles than she would be by carrying the matter to a successful litigation conclusion disserves that policy." *Teeters*, 387 N.J. Super at 432 (internal and other citations omitted).

Notwithstanding this clear public policy, the district court's Order penalizes Plaintiffs for (1) agreeing, in the course of this litigation, to the "consult[ation]" and review process proposed by NJIT and the FBI, in order to get records responsive to their OPRA Requests as quickly as possible, and (2) agreeing, after receiving thousands of pages of responsive records, and informally obtaining additional relief as to certain redactions that Plaintiffs viewed as critical, not to challenge the remaining redactions and withholdings. *See* JA024–25 (Report) (noting that "here, the production of documents post-lawsuit was unrelated to any action taken by the Court"); JA026 (Report) ("plaintiffs determined not to challenge the FBI's remaining redactions and withholdings, having obtained through this process information that [Mr.] Golden was able to use in his book").

Certainly, Plaintiffs could have refused to do either of these things. They could have insisted that the parties brief all disputed legal issues in order to obtain a judicial ruling automatically entitling them to an award of attorneys' fees under OPRA's mandatory fee-shifting provision. Doing so, however, would have only increased costs and attorneys' fees, required additional party and court resources,

and further delayed release of the records Plaintiffs sought. By unfairly penalizing Plaintiffs for being willing to compromise and informally reaching agreement as to certain disputed legal issues after this lawsuit was filed, the district court's Order will discourage future OPRA plaintiffs from doing so, in contravention of New Jersey's clear public policy of promoting settlement during the course of litigation. *See Teeters*, 387 N.J. Super. at 432.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court vacate the district court's Order and remand this matter for further proceedings with instructions to find Plaintiffs' were prevailing parties under OPRA.

Dated: January 14, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: January 14, 209

s/ Katie Townsend
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

The foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,110 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac Version 16.19 (181109) in 14-point Times New Roman font.

Dated: January 14, 209

s/ Katie Townsend
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CERTIFICATE OF COMPLIANCE WITH L.A.R. 31.1(c)

I hereby certify that this brief complies with L.A.R. 31.1(c). The text of this electronic brief is identical to the text of in the paper copies of this brief filed with the Clerk of the U.S. Court of Appeals for the Third Circuit. A virus detection program, Avast Security (Version Number 13.11), has been run on the file containing the electronic version of this brief and no virus was detected.

Dated: January 14, 209

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CERTIFICATE OF SERVICE

I certify that on January 14, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

I further certify that I caused the required number of copies of Appellants' Opening Brief and the parties' Joint Appendix to be filed with the Clerk's Office of the U.S. Court of Appeals for the Third Circuit via Federal Express.

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