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.)

OPPOSITION BRIEF FOR DEFENDANTS-APPELLEES

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February 13, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Defendants/Appelles New Jersey Institute of Technology ("NJIT") and its records custodian, Clara Williams disclose NJIT is a public institution with no parent corporation.

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JURISDICTIONAL STATEMENT

Defendants-Appellees do not object to the Jurisdictional Statement proffered by Plaintiffs-Appellants.

To be complete, Defendants-Appellees respectfully refer this Court to the record below on the amount of time spent by Plaintiff-Appellant to keep this matter in Federal Court following notification by Defendants-Appellees of their then consideration of the dismissal of their third party complaint against the FBI, which would have deprived the Federal Court of jurisdiction. Defendants-Appellees did not ultimately dismiss their third party complaint and the matter remained in Federal Court. Yet, it bears noting the amount of time and effort expended by Plaintiffs-Appellants, as document in the ECF record below, to keep this matter in Federal court. While Plaintiffs-Appellants feared returning to State Court for the adjudication of their fee application, they fared no better in their preferred forum for which they worked so assiduously to maintain.

STATEMENT OF THE ISSUE

Whether the District Court erred in adopting the Report and Recommendation of the Magistrate Judge denying Plaintiffs-Appellants' motion for attorney's fees under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1, et seq.?

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 filed a verified complaint and order to show cause on September 11, 2015, seeking to have the New Jersey Institute of Technology and its records custodian, Clara Williams (collectively, "NJIT") provide access to public records purportedly supporting the writing of a book by plaintiff Golden about the relationship between federal intelligence agencies, including the FBI and CIA, and colleges and universities. JA041, JA079-083. Plaintiffs' verified complaint was brought pursuant to OPRA, N.J.S.A. 47:1A-1, et seq., and the common-law right of access. JA041. More specifically, plaintiffs allege that between April and August 2015, they made three requests to NJIT under both OPRA and the common-law right of access for email correspondence between NJIT employees and the FBI and/or CIA and that NJIT improperly and unlawfully withheld, in whole or in part, all or a vast majority of the records requested. JA042.

A. Stipulated Facts[1]

The facts below regarding the FBI's role in this matter were fully established based upon undisputed facts, as NJIT and the FBI filed a set of Stipulated Facts which established definitively that the FBI exclusively controlled the review, redaction, and production process respecting plaintiffs' OPRA requests. This cannot be overlooked as plaintiffs, in seeking appellate review of Judge Arleo's Order denying attorneys' fees under OPRA, continue to use language intimating NJIT somehow controlled this process. Following submission of the Stipulated Facts, this manner of argument ceases to have meaning, at best, and can be construed to be designed to mislead, at worst. For example, throughout plaintiffs' appellate brief they make multiple assertions beginning with the phrase "According to NJIT," as follows:

- According to NJIT, it then invited the FBI to review its contemplated production of documents …

[1] Plaintiffs objected before the District Court to the Stipulated Facts submitted by NJIT in opposition to plaintiffs' motion for attorneys' fees on the basis that plaintiffs "did not agree" to the Stipulated Facts. See ECF62 at 9 n.4. Plaintiffs' position in this regard is flawed if for the singular reason that the Stipulated Facts delineate only those actions and communications which occurred by and between NJIT and the FBI. See JA249-255. Nowhere in the Stipulated Facts are there any facts which in any way involve plaintiffs or their counsel. Indeed, any reference to the plaintiffs in the Stipulated Facts concerns only conduct that is undisputed, such as their filing of a lawsuit or their final acceptance of documents pursuant to their OPRA requests. JA252, JA254. Clearly, Magistrate Judge Wettre understood that to be the case in rightfully accepting the Stipulated Facts in her Report and Recommendation. See JA012 ("the Court finds its limited use of the [Stipulated Facts] appropriate and not prejudicial in any way to plaintiffs").

- According to NJIT … 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.
- According to NJIT … the FBI advised NJIT it was going to intervene in the state court proceeding as a means to stand behind its redactions …

See plaintiffs' appellate brief at 5, 8, 17. Simply stated, there is no "According to NJIT" relative to the factual record in this matter. The facts regarding NJIT's conduct and the FBI's involvement were established unequivocally before the trial court and remain unrefuted. It cannot be overlooked NJIT requested to engage in discovery to establish the factual record below; however, plaintiffs strenuously objected to any discovery, therefore leaving NJIT and the FBI to present the actual facts through the Stipulated Facts. That the Stipulated Facts establish the FBI's complete and sole custody and control over the document reviews and productions is, based on the lack of any contrary evidence and the findings below, now a matter of uncontested fact.

Plaintiffs also make multiple references to NJIT "withholding records" and "making productions of responsive records" to them. Again, this too represents a complete misrepresentation of what actually occurred. See plaintiffs' appellate brief at 6, 7, 10, 11, 17, 25, 27, 43. NJIT essentially did nothing other than take direction from the FBI. The FBI controlled the entire document review, redaction, and dissemination process, and this fact is undisputed. Thus, for plaintiffs to suggest that NJIT was responsible for withholding records and making productions of

documents is completely false and counter to the actual, undisputed facts before the court.

On appeal, plaintiffs identify five specific documents (out of approximately 6,000 documents) that, according to plaintiffs, were withheld by NJIT in response to plaintiffs' Second and Third OPRA requests. See plaintiffs' appellate brief at 7-8. Presumably, plaintiffs offer these documents to show that they are either public in nature and/or not confidential and therefore they should have been disclosed, although plaintiffs do not indicate as such. See id. Plaintiffs again miss the mark entirely because it was not NJIT that made the decision to withhold the five documents referenced by the plaintiffs – it was the FBI – thus proffering these documents on appeal is absolutely inconsequential to the validity of Judge Arleo's Order denying attorney's fees. Of far greater import is plaintiffs' failure to address the FBI monikers on the overwhelming majority of the documents which were created by the FBI.

There is no uncertainty regarding the FBI's role in assuming complete control over the subject documents and the manner of review and production in response to plaintiffs' OPRA requests. Indeed, the facts regarding the FBI's involvement are now undisputed and must be considered as such in connection with plaintiffs' motion for attorneys' fees. It simply continues to defy credulity for plaintiffs to repeat their assertions that NJIT was required to ignore the lawful direction of the FBI prior to

the litigation and to ignore the injunctive and declaratory relief asserted by the FBI against NJIT after the litigation ensued. That such facts remain inconvenient to plaintiffs' simple calculus remains clear, which is why they choose to ignore them.

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

On April 8, 2015, at 5:12 p.m., plaintiff Golden submitted the first of three OPRA requests (the "First Request") directly to defendant Williams. JA211. The First Request sought the following records:

> [A]ll e-mail communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am requesting all email communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the people at NJIT. JA212.

Following receipt of Plaintiffs' OPRA requests on April 8, 2015, and in compliance with the time period set forth under New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., NJIT assembled documents to respond. JA250. Williams forwarded the First Request by email to David Ullman, Associate Provost for Information Services & Technology and Chief Information Officer for NJIT, as Ullman was the individual with the authority to authorize access to emails sought in the First Request. JA212. Williams simultaneously contacted Annie

Crawford, Assistant Vice President of the Department of Human Resources for NJIT, and requested the identities of all individuals who held the official titles of police chief, provost, vice provost, vice president, and dean, during the period January 1, 2010 to April 9, 2015, whose emails were sought as part of the First Request. JA212. Upon receipt of the list of individuals holding such titles provided by Ms. Crawford, Williams immediately forwarded same to Ullman to facilitate his search for responsive records. JA212. All of this transpired in less than two hours from the time Williams first received and reviewed the First Request. JA211-212.

In turn, Ullman solicited the assistance of Devin Batra, Database Administrator for the Information Services and Technology Department and NJIT, to search for and retrieve responsive emails. JA213. Batra accessed NJIT's mainframe and performed a search of the email extensions set forth in the First Request and the list of individuals provided by Ms. Crawford. JA213. Batra compiled all emails that were returned on his search and placed them on a DVD, which Batra then delivered and downloaded to Williams' computer on April 13, 2015, just four days after the First Request was received by Williams. JA213.

On receipt of the emails, Williams began printing them. JA213. In light of the massive volume of emails assembled, based on a poorly drafted OPRA request, on April 14, 2015, Williams emailed plaintiff Golden and requested an extension until May 29, 2015, to respond to the First Request. JA213. By email on that same

date, April 14, 2015, plaintiff Golden agreed to Williams' extension request. JA213. Because of the nature of the subject OPRA requests, which specifically sought communications between the FBI and NJIT using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, most of the documents assembled by NJIT originated from the FBI; that is, the assembled documents were created and transmitted by the FBI to NJIT, among others. JA250. Many of the assembled documents contained written dissemination controls or monikers identifying the documents as confidential, limiting their dissemination to only authorized possessors, and prohibiting their disclosure or dissemination absent the permission of the FBI. JA250.

By way of example, one dissemination control advised:

> Although UNCLASSIFIED, this information is property of the FBI and may be distributed only to members of organizations receiving this bulletin, or to cleared defense contractors. Precautions should be taken to ensure this information is stored and/or destroyed in a manner that precludes unauthorized access. JA250.

By way of further example, another dissemination control advised:

> Information contained in this intelligence bulletin is for official use only. No portion of this bulletin should be released to the media, the general public, or over nonsecure Internet servers. Release of this material could adversely affect or jeopardize investigative activities. JA250.

Having concerns about the FBI warnings/prohibitions, NJIT notified the FBI about the subject OPRA request, advised the FBI that documents were assembled in response, and requested the FBI to provide direction on the assembled documents. JA250. In response, Special Agent McHugh advised that the FBI would need to review all of the documents before any disclosure occurred. JA213-214.

On May 22 and 26, 2015, the FBI visited NJIT offices. JA250. On May 26, the FBI reviewed approximately 2,000 pages of documents assembled by NJIT that did not contain dissemination controls. JA250-251. The FBI applied redactions to this set of documents, directed NJIT that the redacted materials were not to be released, and authorized the release of approximately 540 pages of material either in full or partially redacted. JA251. NJIT complied with the FBI's lawful direction to withhold the redacted documents and produced the documents the FBI authorized it to release to plaintiffs. JA251. NJIT did not participate or assist with this document review process in any manner whatsoever, other than making its conference room with the assembled documents available to the FBI. JA251. Further, the FBI informed NJIT that the 4000 pages of documents containing the dissemination controls were the property of the United States Government ("USG") and were not to be distributed. JA251.

On May 27, 2015, the FBI corresponded with NJIT Records Custodian Williams. JA251, JA122. The FBI's correspondence acknowledged that NJIT had

received a request for email communications between certain individuals at NJIT and certain USG entities, the OPRA requests at issue in this case, and advised NJIT that USG email communications and particularly those of the FBI and its personnel, including attachments to those communications, remained the property of the USG "and are not to be further distributed without the FBI's prior written approval." JA251, JA122. The correspondence also requested NJIT to notify the requestor "that he/she may submit a FOIA request for such information either in writing to the FBI or online using www.fbi.gov/foia." JA251, JA122.

On May 29, 2015, NJIT produced approximately 540 pages of documents to plaintiffs. JA251, JA245. Additionally, NJIT notified plaintiffs that it was withholding documents from production consistent with the FBI's direction. JA251. The subject May 27, 2015, FBI correspondence was included in NJIT's May 29, 2015, transmittal of the redacted documents to plaintiffs. JA252. Thus, plaintiffs were aware of the FBI's directives to NJIT regarding their OPRA request at the time that documents were timely provided pursuant to the agreed-upon extension date of May 29, 2015 and prior to the commencement of this litigation. By email dated June 5, 2015, plaintiff Golden acknowledged receipt of NJIT's response to the First Request. JA215. And, despite plaintiffs' receipt of the FBI's May 27, 2015, correspondence advising the plaintiffs to file a FOIA request, no such request was ever filed, this despite a fee shifting provision under FOIA. 5 USCA § 552(a)(4)(E),

and plaintiffs' actual knowledge that the FBI assumed complete control and custody over the requested documents.

The second OPRA request was submitted to Williams by email on July 28, 2015, at 1:26 p.m., by plaintiff Locke (the "Second Request"). JA216. The Second Request sought the following records:

> [A]ll e-mail communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I also request all email communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the people at NJIT. JA216.

Recognizing that the Second Request looked familiar, Williams referred back to the First Request and realized the two requests were identical. JA216. In light of the position taken by the FBI in response to the First Request, together with the prohibition on disclosure set forth in the FBI's letter of May 27, 2015, Williams immediately contacted Special Agent McHugh by telephone and email to discuss the Second Request and the manner in which NJIT should respond to same. JA216-217. On July 29, 2015, just one day after the Second Request was received, Williams sent a letter response to plaintiff Locke by email denying the Second Request, citing to several applicable OPRA exemptions and the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. JA217.

On August 13, 2015, at 4:10 p.m., plaintiff Golden submitted the third OPRA request to Williams by email (the "Third Request"). JA217. The Third Request mirrored the First Request and sought the following records:

> [A]ll e-mail communications since January 1, 2010, to the date of this request, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of technology: the president, chancellor(s), provost(s), vice provost(s), vice president, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am requesting all email communications since January 1, 2010, to the date of this request between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the same people at NJIT. JA217.

Given the similarities between the First and Third requests, Williams immediately emailed plaintiff Golden to ascertain whether the Third Request had been sent in error since it was clearly duplicative of the First Request, which NJIT previously responded to on May 29, 2015. JA218. Plaintiff Golden responded by advising the Third Request was broader than the First Request in that the Third Request sought records through the then-current date of August 13, 2015. JA218. On August 17, 2015, within the time parameters afforded by OPRA, Williams sent a letter response to plaintiff Golden by email citing applicable OPRA exemptions and providing a copy of the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. JA218.

C. Plaintiffs' Lawsuit

Thereafter, on September 11, 2015, plaintiffs filed an Order to Show Cause in the Superior Court of New Jersey, Law Division, Essex County under Docket No. ESX-L-6392-15 (the "State Court Proceeding") seeking to enjoin NJIT from denying them access to FBI records that were the subject of their OPRA requests. JA252. In response to plaintiffs' lawsuit, and at the request of the FBI, NJIT re-assembled the documents. JA252. The FBI retrieved the printed hardcopy set of these documents from NJIT's counsel's offices. JA252. The FBI applied Bates stamps to these documents and did not provide NJIT with a copy of the Bates stamped documents. JA252. NJIT was precluded by the FBI from copying the documents, Bates stamping the documents, and never received a copy of the documents back from the FBI. JA245. After plaintiffs' lawsuit was filed, NJIT's litigation counsel had no alternative but to accede to the lawful direction of the FBI based on the FBI's stated concern over the extreme confidentiality associated with the subject documents and did not use his own copy room or an outside vendor to duplicate the re-assembled documents. JA245-246

The FBI also requested that NJIT's counsel secure an extension of time for NJIT to answer or otherwise move respecting the Order to Show Cause because the FBI intended to intervene in the lawsuit. JA245. The FBI advised that the extension was necessary to afford the FBI time to go through the required administrative

process to intervene. JA245. NJIT's counsel obtained the requested extension and advised plaintiffs' counsel of the reason for same. JA245. Despite the extension of time, the FBI never intervened in the lawsuit. JA245. On November 13, 2015, NJIT filed its opposition to Plaintiffs' Order to Show Cause, Answer, and asserted a Third-Party Complaint naming the FBI as a Third-Party Defendant. JA087-103, JA252. NJIT named the FBI as a third-party defendant because the FBI never intervened in plaintiffs' lawsuit contrary to its prior representation, which is why NJIT sought and obtained the extension to time to file a responsive pleading in response to plaintiffs' Order to Show Cause. JA245.

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

> the issues raised by plaintiffs' order to show cause are premature for adjudication based on (a) the FBI and Department of Justice having advised of their need for additional time to address both the FBI's course of action and to commence their review of the redacted and exempted documents and (b) the Court's recognition of defendant NJIT's compliance with the written direction of the FBI to not produce certain documents[.] JA252.

The Order additionally provided that "the FBI shall forthwith conclude their decision making process on their course of action and also simultaneously commence review of the redacted and exempted documents." JA252. This Order was entered over the objection of Plaintiffs' counsel. By the very terms of this Order,

the plaintiffs were in possession of actual knowledge of (1) NJIT's lack of control over the subject matter documents and, equally importantly, (2) the FBI's complete control over the subject matter documents based on the very terms that the FBI was going to commence their review, actually re-review, of the subject documents. And, perhaps most importantly, Judge Mitterhoff expressly recognized NJIT's compliance with the FBI's lawful direction to it to withhold documents from production.

On December 11, 2015, the FBI filed a Notice of Removal to the United States District Court for the District of New Jersey (ECF 1). JA252. On December 28, 2015, following service by NJIT on the FBI of Requests for Admissions seeking confirmation of the facts now set forth in the Stipulated Facts, which Admissions were issued precisely in an attempt to disabuse the plaintiffs that NJIT had any discretion regarding its course of conduct regarding the subject matter documents, the Honorable Leda D. Wettre, U.S.M.J., entered an Order staying responses to any pending discovery requests pending the outcome of further discussions with the Court. JA253. On February 18, 2016, the FBI filed a Counterclaim against NJIT seeking both declaratory and injunctive relief in the United State District Court for the District of New Jersey. JA253, JA123-134, ECF23. As its first cause of action in its Counterclaim, the FBI sought by way of relief that "NJIT should be enjoined from publically releasing federal records under the continued control of the FBI in

response to Plaintiffs' OPRA request." JA253, JA129. Counts Two through Four contained virtually the identical claim for injunctive relief against NJIT. JA253, JA129-133. A rational actor will conclude the FBI's use of the words "continued control" over the subject matter documents in the context of the injunctive and declaratory relief sought by it against NJIT would have finally disabused plaintiffs of any continuing erroneous belief that NJIT had any control over the documents. This matters on plaintiffs' fee application precisely because plaintiffs were possessed of actual knowledge that NJIT was not in control or possession of the subject matter documents on at least three different occasions: (1) Certainly prior to the filing of this lawsuit based on NJIT's inclusion of the FBI's May 27, 2015, correspondence in its initial OPRA Response, (2) again at the hearing before Judge Mitterhoff and (3) with the FBI's counterclaim asserted against NJIT.

Magistrate Judge Wettre's discovery stay was renewed by a Court Order entered on March 7, 2016, whereby the entire case was stayed and by subsequent Order entered on June 17, 2016. JA253, ECF26, ECF28.

Subsequent to the FBI's replacement of counsel and the involvement by the Department of Justice, the FBI conducted its second review of all of the documents previously assembled by NJIT and which remained in the FBI's possession. JA253. In the course of the FBI's review, the FBI solely made all release and withholding determinations. JA253. After making those determinations, the FBI sent the

documents back to NJIT, in accordance with FBI protocols for consultation requests. JA253. NJIT then transmitted, as in the performance of a clerical non-substantive function, the documents decided solely by the FBI to be produced or withheld. JA253. NJIT made no independent release or withholding determinations during the course of the FBI's second review or at any time. JA253. Based on the FBI's second review, a total of eight (8) supplemental productions of documents were made. JA253. There is absolutely no basis whatsoever to support plaintiffs' assertions that NJIT had any role in this document re-review process.

In an email dated March 1, 2017, to NJIT's counsel, plaintiffs' counsel confirmed acceptance of the documents produced and informed there would be no challenge to any of the remaining redactions/withholdings. JA254. Plaintiffs confirmed in discussions with counsel following this last production by the FBI of their intention to file an application for attorneys' fees.

Plaintiffs did in fact file an application for attorneys' fees under OPRA. The application was denied in a Report and Recommendation filed by Magistrate Judge Wettre on April 25, 2018. Judge Wettre correctly found that plaintiffs had "not carried their burden … of demonstrating that their lawsuit was the factual causal nexus for NJIT's release of records to plaintiffs after the filing of this lawsuit … [and thus] plaintiffs are not entitled to prevailing-party fees under the catalyst theory." JA022. Plaintiffs then filed objections to Judge Wettre's Report and

Recommendation. ECF62. By Order dated August 2, 2018, Judge Arleo adopted Judge Wettre's Report and Recommendation and denied plaintiffs' motion for attorneys' fees under OPRA. JA004-009, ECF66.

SUMMARY OF THE ARGUMENT

The Honorable Madeline Cox Arleo, U.S.D.J., held that there was no causal nexus between plaintiffs' lawsuit and the conduct of defendants NJIT and its records custodian Clara Williams and therefore no attorneys' fees under OPRA could be awarded. Judge Arleo also found that plaintiffs were not prevailing parties entitled to attorney's fees under OPRA and that NJIT acted reasonably relative to plaintiffs' OPRA requests because the Federal Bureau of Investigation ("FBI") usurped NJIT's role as records custodian when it became aware that plaintiffs sought confidential FBI documents from NJIT.

Judge Arleo's holding remains correct because what began as a simple request for records morphed into a complex matter involving directives from the FBI expressly prohibiting dissemination by NJIT based on the FBI's position that such records constituted property of the United States of America, the confidential and privileged nature of which prohibited disclosure. The FBI assumed total control of the documents assembled by NJIT subjugating NJIT with its unambiguous direction as confirmed in its May 27, 2015, correspondence and after the litigation commenced by seeking injunctive and declaratory relief prohibiting NJIT from

doing that which Plaintiffs allege NJIT should have done, namely releasing the documents over the clear objection and direction of the FBI to specifically not release the documents. Certainly, after receipt of the FBI's May 27, 2015, correspondence, Plaintiffs were well aware of both the FBI's connection to the subject documents and also the instruction by the FBI for the requestor to issue a FOIA request. Had Plaintiffs issued such a FOIA request either before the litigatoin commenced in accordance with the FBI's September 27, 2015, correspondence or following the first court appearance before Judge Mitterhoff, as certainly intimated, Plaintiffs could have litigated this case against the real party in interest and pursued its fee application against that party.

Through the Stipulated Facts, the FBI has admitted to its controlling role in as the sole entity which reviewed, redacted, and produced documents to the Plaintiffs. As such, there can be no causal nexus between plaintiffs' OPRA action and the production of documents such that NJIT is liable for any attorneys' fees in this matter. The FBI's interest in the confidentiality of the documents precluded NJIT from producing the very documents the FBI directed NJIT to withhold from production and for which the FBI went so far as to seek before the District Court both injunctive and declaratory relief precluding NJIT from releasing any documents. Plaintiffs' appeal fails to acknowledge and address this relief sought by the FBI, which precluded NJIT from taking the very action plaintiffs' have

repeatedly, though incorrectly, argued was available to NJIT, which was to ignore the FBI and produce the documents.

Despite numerous opportunities to file a FOIA request for the very documents at issue and for which fees are recoverable against the FBI, plaintiffs refused to do so, both on receipt of the FBI's May 27, 2015, correspondence advising plaintiffs to issue a FOIA request and also at the first Court appearance in this matter before the Superior Court of New Jersey wherein Judge Stephanie Mitterhoff, J.S.C., asked plaintiffs' counsel directly why no FOIA request was issued. No substantive response was provided. And, for reasons remaining unknown, after this matter was removed to Federal Court by the FBI and plaintiffs were possessed of facts confirming the representations made by NJIT's counsel to the effect the FBI remained in complete control over the subject matter documents, plaintiffs remained steadfast in their refusal to name the FBI as a direct party defendant, despite knowing the initial document review and the post-commencement of litigation re-review of the documents was done solely by the FBI. These critically important facts are dispositive and are overlooked entirely by Plaintiffs on appeal.

The oft-repeated mantra of Plaintiffs that NJIT was the records custodian, made independent decisions to withhold documents, participated in the review and subsequent second review and actually made productions of documents, as in made the determination of what to withhold and what to produce, remains 100% expressly

contradicted by the Stipulated Facts. That this Stipulation presents an inconvenient truth does not excuse plaintiffs' counsel from attempting to rely on her own submissions as somehow constituting the facts of what transpired between NJIT and the FBI. The misstatements and erroneous characterizations of the actual facts are legion in plaintiffs' appellate papers and really are more of the same that were asserted by plaintiffs' counsel before the trial court. Like Magistrate Judge Wettre , Judge Arleo rejected plaintiffs' counsel's misstatements and erroneous characterizations of the facts. No legitimate reason has been proffered to disturb the District Court's ruling.

Thus, the very simple calculus that plaintiffs wish to apply here – OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys' fees – is most certainly not applicable to the facts at bar. Judge Arleo recognized this very fact in denying plaintiffs' application for attorney's fees under OPRA. Plaintiffs have offered no legal or factual basis that would in any way discredit or undermine Judge Arleo's ruling, which must otherwise be affirmed.

STANDARD OF REVIEW

A District Court's review of a Magistrate Judge's Report and Recommendation is de novo. See Cataldo v. Moses, 361 F.Supp.2d 420, 425-26 (D.N.J. 2004) ("The Magistrates Act … and Fed.R.Civ.P. 72(b) … provides that a

de novo standard of review should be used by the district court when considering a magistrate judge's report and recommendation and subsequent objections by the parties"). It is important to recognize that "[d]e novo review does not imply that an additional hearing is required … but rather the court, at its discretion, may rely on the record developed by the magistrate judge, or it may conduct a new hearing, receive further evidence, recall witnesses, or send the matter back to the magistrate judge with additional instructions." Id. at 426.

Further, a Circuit Court of Appeals' review of a District Court's legal conclusions is plenary; its review of factual findings is under the clearly erroneous standard. Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989); Quinn v. Monroe County, 330 F.3d 1320, 1328 (11th Cir. 2003) ("The district court's decision (or non-decision) about whether collateral estoppel applies is reviewed de novo … The district court's factual determinations underlying its legal conclusion are upheld unless clearly erroneous"); Taylor v. Domestic Remodeling, Inc., 97 F.3d 96, 98 (5th Cir. 1996) (Court of Appeals applies the same standard of review to the findings and conclusions of the magistrate that it would apply to a decision of the district court. Conclusions of law made by the magistrate judge are therefore subject to de novo review while findings of fact made by the magistrate judge are upheld unless such findings are clearly erroneous); United Steel Workers Local 12-369 v. United Steel Workers Intern., 728 F.3d 1107, 1114 (9th Cir. 2013) ("In reviewing the district

court's judgment … we review its findings of fact for clear error and its conclusions of law de novo").

Finally, a federal court is not free to impose its own view of what state law should be; rather, it must apply state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before it. Gares v. Willingboro Tp., 90 F.3d 720, 725 (3d Cir. 1996). In the absence of guidance from the state's highest court, the federal court is to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule. Id.

ARGUMENT

POINT I

THE ACTIONS OF NJIT WERE REASONABLE UNDER THE GIVEN CIRCUMSTANCES

Plaintiffs cannot deny that the reasonableness of an agency's conduct is a necessary and relevant consideration in the context of an OPRA request. The New Jersey Supreme in Mason recognized this very fact. See Mason, 196 N.J. at 79 ("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"). In fact, plaintiffs cite to Mason and the precise language relied upon by NJIT and the trial court relative to the causal nexus requirement for an award of attorney's fees. See plaintiffs' appellate brief at 36 ("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 decision, and viewing each matter on its merits").

Plaintiffs nevertheless argue that "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." See plaintiffs' appellate brief at 34. With this argument, plaintiffs attempt to flip the script of what the law here actually requires. NJIT has never proffered that unreasonableness or bad faith must be found to award OPRA attorney's fees; rather, NJIT has stated unequivocally that the reasonableness of its conduct, based upon the totality of the circumstances, demonstrates that there is no causal nexus between plaintiffs' lawsuit and the production of requested documents by the FBI. Indeed, NJIT advised plaintiffs in no uncertain terms – both before and after their lawsuit was filed – that the documents they sought were FBI documents and that the FBI explicitly directed NJIT to not do anything with the documents unless and until directed to do so by the FBI. The FBI took charge of the entire OPRA process, and NJIT was left with no reasonable choice under the circumstance.

When the nation's premier law enforcement and investigative body provides a lawful instruction, it remains a fool's errand to speciously state that NJIT was

within its rights to ignore the direction; yet, this is precisely the basis for Plaintiffs' fee application against NJIT. NJIT relies on the FBI and works cooperatively with it to assist in securing the safety of its campus filled with over 11,000 students and almost 2,000 faculty and employees. The only action that NJIT took here was assembling the documents for the FBI. NJIT was excluded from the document review process and therefore did not review any documents. Nor did NJIT withhold any documents. In fact, NJIT was precluded by the FBI from copying the documents, Bates stamping the documents, and never received a copy of the documents back from the FBI. After this lawsuit was filed, NJIT's litigation counsel acceded to the lawful direction of the FBI based on the FBI's stated concern over the extreme confidentiality associated with the subject documents and did not use his own copy room or an outside vendor to duplicate the re-assembled documents. And, lest there be any doubt about the tying of NJIT's hands, once the FBI became involved in this litigation, it filed a counterclaim against NJIT seeking both declaratory and injunctive relief, JA123-134, which prevented NJIT from doing that which Plaintiffs' counsel seems to believe was in NJIT's power to do, namely, produce the documents against the prior oral and written direction of the FBI.

Through their application for attorneys' fees, plaintiffs ignore an inconvenient truth: The documents at issue were created by and disseminated by the FBI and were FBI documents, and as such the FBI exercised dominion and control over them as

the de facto custodian of records relative to plaintiffs' OPRA requests. In fact, in each of the productions of documents forwarded to the plaintiffs following the FBI's second review of the subject documents, NJIT's litigation counsel specifically incorporated by reference the February 18, 2016, correspondence from the FBI to NJIT which indicated that the return of documents was done in in accordance with FBI protocol. JA246. Thus, it was solely the FBI driving and controlling the document review and production process and Plaintiffs through their counsel were well of this undisputed fact. One is left to wonder why no FOIA request was ever made on Plaintiffs' behalf.

What also must not be overlooked is that once the FBI filed its Counterclaim for declaratory and injunctive relief seeking to enjoin NJIT from "publically releasing federal records under the continued control of the FBI in response to Plaintiffs' OPRA request," NJIT was bound not to act. Thereafter, plaintiffs dealt directly with the Department of Justice regarding, inter alia, what documents were going to be re-reviewed and the time frame for the re-review and production of additional documents. Thus, to state as plaintiffs do that NJIT did not act reasonably under the circumstances is bunkum. See plaintiffs' appellate brief at 38 ("NJIT's conduct was unreasonable as a matter of law").

Plaintiffs also assert that NJIT disregarded its express, statutory duties by following the directives of the FBI, and NJIT's "actions were patently inconsistent

with the requirements placed on records custodians" by OPRA. See plaintiffs' appellate brief at 38, 39. This is a gross mischaracterization of what occurred here. NJIT never disregarded its duties under OPRA, and its actions were consistent with what the law requires in this fact-sensitive context. NJIT was directed by the FBI to not act, other than gathering the requested documents for FBI review. This fact is uncontroverted. Lest plaintiffs forget, the Appellate Division has already spoken, albeit in dictum, on this subject and Judge Arleo recognized that very fact:

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

Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005) (emphasis added); JA008.

Notably, plaintiffs make only brief mention of Gannett in their appellate papers and for an incorrect proposition, suggesting that "consultation with a third-party (presumably the FBI) does not absolve the records custodian of their [sic] non-delegable responsibilities under OPRA[.]" See plaintiffs' appellate brief at 39. Plaintiffs' position is entirely inconsistent with Gannett if for the singular reason that NJIT was not "consulting" with the FBI, but rather following FBI directives

regarding FBI documents. Thus, the facts here align exactly with Gannett as NJIT was in no position to act as a records custodian in light of the FBI's directives and confidentiality interest in its own documents.

Moreover, Judge Arleo correctly held that NJIT acted reasonably in properly balancing the competing interests implicated here:

- Judge Wettre properly found NJIT's conduct reasonable in light of the FBI's repeated demand that NJIT not release records without its approval, NJIT's consistent position to Plaintiffs that it would not do so, and its attempts to facilitate a resolution for Plaintiffs.

- Judge Wettre properly found that, in the face of the FBI's demand that NJIT not release records to Plaintiffs without the FBI's approval, NJIT acted in a manner encouraged by OPRA, seeking to facilitate a prompt response to Plaintiffs' requests by recommending Plaintiffs serve a FOIA request directly upon the FBI and impleading the FBI as a third-party defendant.

JA007, JA008 (emphasis added).

Plaintiffs cite to Courier News v. Hunterdon County Prosecutor's Office, 378 N.J. Super. 539 (App. Div. 2005), to support an award of attorneys' fees. See plaintiffs' appellate brief at 32-33. However, Courier News is factually inapposite. In Courier News, the Courier News newspaper made requests to the Hunterdon County Prosecutor's Office under OPRA for a copy of a 911 tape in connection with a then-active criminal investigation. The requests were denied by the prosecutor's office and ultimately, on appeal, the Appellate Division found that the 911 tape was subject to disclosure under OPRA. See Courier News v. Hunterdon County

Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) ("Courier I"). As the prevailing requestor in Courier I, plaintiff moved before the Appellate Division for an award of counsel fees pursuant to N.J.S.A. 47:1A-6. Given the novelty of the question, the Appellate Division remanded the matter and suggested that the trial judge "invite the joinder of the State, if the County contends that the State should be responsible, in whole or in part, for counsel fees." 378 N.J. Super. at 541. The County did so contend, which led the trial court to grant the application to join the State as a third-party defendant. Id.

The trial judge ruled that the State was responsible for plaintiff's counsel fee award, because the prosecutor's office had been performing a state law enforcement function when it denied plaintiff access to the tape. 378 N.J. Super. at 541. The State appealed this ruling, and both the State and prosecutor's office also appealed from the amount awarded. Id. On appeal, the Appellate Division reversed, holding that as the custodian of the government record at issue, the prosecutor's office was responsible under OPRA to pay plaintiff's counsel fees:

> Here, it is undisputed that the [prosecutor's office] was the custodian of the 9-1-1 tape. The [prosecutor's office] assumed administrative responsibility to safeguard this audio record the minute it took custody of it. The fact that the [prosecutor's office] assumed this custodial role in connection with a then-active criminal investigation is of no moment. Its liability to plaintiff, in the form of counsel fees, flows exclusively from the provisions of OPRA, not from its constitutional status as a law enforcement agency.

Id. at 546 (emphasis added).

Clearly, the holding in Courier News is distinguishable. There, the Appellate Division, in holding that the prosecutor's office had to pay the attorney's fees under OPRA, stressed that the prosecutor's office "assumed administrative responsibility" to safeguard the 911 tape as the custodian. Here, the FBI – and not NJIT – assumed absolute responsibility over the records requested by the plaintiffs. The FBI took immediate possession of the documents and undertook the review, redaction, and exemption of the documents and specifically directed NJIT on how to proceed vis-à-vis plaintiffs' OPRA request. Thus, NJIT's role here was completely counter to that of the prosecutor's office in Courier News.

Plaintiffs' reliance on the unpublished decision in Paff v. W. Deptford Twp., 2010 WL 546587 (App. Div. February 18, 2010), is similarly misplaced. See plaintiffs' appellate brief at 33-34. In Paff, the Appellate Division simply held that a consent order to maintain confidentiality of discovery materials that are provided to litigants in a lawsuit could not nullify an entity's obligations under OPRA. 2010 WL 546587 at *2. This ruling is inapposite as there is no consent order to maintain confidentiality here, nor is same even at issue in this action. In relying on Paff, plaintiffs assert that "a records custodian cannot avoid [its] obligations, including OPRA's mandatory fee-shifting provision … because it 'promised' a third party that it would keep records confidential." See plaintiffs' appellate brief at 34 (citing Paff, 2010 WL 546587 at *2). This assertion is simply wrong given that there was no

agreement or consent order or promise between NJIT and the FBI relative to plaintiffs' OPRA requests. Rather, the FBI seized control of the assembled documents. Thus, Paff does nothing to advance plaintiffs' position regarding the award of attorneys' fees.

In an odd twist, plaintiffs suddenly express interest in relying upon FOIA on appeal by trying to draw analogy to FOIA case law to support their position. See plaintiffs' appellate brief at 39-41. Notwithstanding that plaintiffs completely disregarded both the FBI's admonition and Judge Mitterhoff's intimation to make a FOIA application at the outset of this matter, their reliance on FOIA is entirely misplaced in the context of this OPRA action. In a word, case law interpreting FOIA has no relevance whatsoever to the interpretation of OPRA's attorney's fees provision.

Plaintiffs also cite to Collingswood Board of Education v. McLoughlin, 2016 WL 6134926 (App. Div. October 21, 2016) ("McLoughlin"), as support for their attorneys' fees motion. See plaintiffs' appellate brief at 41. Plaintiff's reliance on McLoughlin is misplaced. In McLoughlin, after an OPRA request was made, the Collingswood Board of Education filed a declaratory judgment action to prevent the release of an investigative report prepared for the Board by a retained independent investigator. The trial court denied the requesters' motion for summary judgment

dismissing the declaratory judgment complaint. The requesters appealed that ruling, as well as the trial court's partial award of attorneys' fees to the requesters.

On appeal, the Appellate Division reversed, holding that "a records custodian may not bring a declaratory judgment action against a record requestor to enforce its right to withhold records." 2016 WL 6134926 at *3. The Court also pointed out that an entity subject to an OPRA request cannot use a declaratory judgment action to avoid making a decision regarding whether a record must be produced or whether the records falls within an exception to OPRA. Id. The McLoughlin Court did not address the award of attorneys' fees in any manner whatsoever, and simply remanded the matter to the trial court on that issue. Id. Because the Court in McLoughlin addressed an issue not germane to this action – the use of declaratory judgment action to counter an OPRA request – the ruling is entirely inapposite.

Plaintiffs also reference that public universities around the country released records to plaintiff Golden pursuant to his public records requests. See plaintiffs' appellate brief at 41-42. This argument is specious. Other States' public records laws are not at issue here and the specific provisions of those laws may differ dramatically from OPRA. It is the interpretation of OPRA under New Jersey law that is relevant here and not inapplicable statutory provisions of other States' public records laws or requests made by Plaintiffs to other out of State entities, for which

no record below was ever established, other than through the argument of Plaintiffs' counsel, which remains improper.

Because the fact-sensitive inquiry here demonstrates that there is no causal nexus between plaintiffs' lawsuit and the production of documents by the FBI, plaintiffs are not prevailing parties as a matter of law. NJIT acted reasonably under the unique circumstances. The Order denying plaintiffs' motion for attorney's fees under OPRA must be affirmed.

POINT II

THE DISTRICT COURT'S ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DENYING PLAINTIFFS' MOTION FOR ATTORNEY'S FEES SHOULD BE AFFIRMED

Plaintiffs claim that Judge Arleo, in adopting Magistrate Judge Wettre's Report and Recommendation and denying their motion for attorneys' fees, "did not conduct the required de novo review of those portions of the Report objected to by Plaintiffs, as required by law." See plaintiffs' appellate brief at 21. Plaintiffs assert that "[n]owhere 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" Judge Wettre and that "the only items 'considered' by the district court were the Report itself, Plaintiffs' objections to the Report, and NJIT's opposition to

those objections." Id. (emphasis in original). Plaintiffs' position on this issue is unfounded and without merit.

As set forth supra, the standard of review of Magistrate Judge Wettre's Report and Recommendation is de novo. See Cataldo, 361 F.Supp.2d at 425-26. Although plaintiffs argue that Judge Arleo's Order adopting Judge Wettre's Report is infirm because the Order itself does not "otherwise indicate that it conducted any independent review of the Report or any portion of the record that was before the magistrate judge[,]' see plaintiffs' appellate brief at 21, there is no such requirement under the law. Fed.R.Civ.P. 72(b) states, in relevant part, that upon receiving written objections to a Magistrate Judge's report, the District Court:

> shall make a de novo determination on the record, or after additional evidence, of any portion of the magistrate judge's disposition.... The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

There is nothing in this Rule that explicitly states that the District Court's Order must indicate that an "independent review" was conducted. Indeed, it is inherent in Judge Arleo's Order itself that Her Honor did conduct a de novo review. The Order is not simply a cursory one-line statement adopting the Report; rather, it represents a comprehensive, methodical analysis of Judge Wettre's Report that addresses all of Plaintiffs' stated objections. To wit, plaintiffs objected to Judge Wettre's Report on the following grounds:

- The Report misinterprets the "catalyst theory" recognized by the New Jersey Supreme Court.
- Plaintiff's lawsuit caused NJIT to change its position relative to their OPRA requests.
- NJIT's actions were motivated by trying to avoid an attorney's fee award, and the Report wrongly concluded that NJIT acted reasonably.
- The Report will have a chilling effect by discouraging parties from resolving their disputes and avoiding their obligations under OPRA.

See ECF 62 at 10-32.

Judge Arleo's Order makes reference to and addresses each of plaintiffs' objections:

- Plaintiffs argue they are "prevailing parties" under the catalyst theory outlined by the New Jersey Supreme Court in Mason v. City of Hoboken …

- [T]he "catalyst theory" provides that a plaintiff is considered a prevailing party, even if an action to enforce OPRA rights is resolved before a court's adjudication of the merits, if the plaintiff can demonstrate: (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimate[ly] secured by plaintiffs had a basis in law.

- [D]etermination of the causal nexus prong requires the Court to conduct a fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions, and viewing each matter on its merits.

- [T]he burden rests on the litigant seeking fees to show a causal nexus.

- Judge Wettre properly found NJIT's conduct reasonable in light of the FBI's repeated demand that NJIT not release records without its approval, NJIT's consistent position to Plaintiffs that it would not do so, and its attempts to facilitate a resolution for Plaintiffs.

- Judge Wettre properly found that NJIT's stance both before and after Plaintiffs filed this action – that it would not produce records unless and until authorized by the FBI – never wavered.

- Judge Wettre properly found that, in the face of the FBI's demand that NJIT not release records to Plaintiffs without the FBI's approval, NJIT acted in a manner encouraged by OPRA, seeking to facilitate a prompt response to Plaintiffs' requests by recommending Plaintiffs serve a FOIA request directly upon the FBI and impleading the FBI as a third-party defendant.

- Judge Wettre properly found that … there was no change in conduct by NJIT brought about by the lawsuit.

- [T]he mere production post-lawsuit of documents is not a sufficient basis per se to award fees under the catalyst theory.

- Judge Wettre properly found that Plaintiffs thus failed to demonstrate a sufficient causal nexus between Plaintiffs' lawsuit against NJIT and the ultimate relief obtained by Plaintiff from the FBI. (emphasis in original)

- Judge Wettre properly found the Plaintiffs are thus not "prevailing parties" against NJIT entitled to an award of attorney's fees under OPRA.

See JA004-009; ECF 66 at 4-6.

Moreover, it is important to note that Judge Arleo "may rely on the record developed by the magistrate judge," Cataldo, 361 F.Supp.2d at 426, in adopting a Report and Recommendation. Here, Judge Arleo's Order makes specific reference to the following record documents that were before Judge Wettre:

- Plaintiffs' Motion for Attorney's Fees (ECF 53).
- Judge Wettre's Report and Recommendation (ECF 61).
- Plaintiffs' Objections to the Report and Recommendations (ECF 62).
- Defendants' Opposition to Plaintiffs' Objections to the Report and Recommendations (ECF 65).

See JA004; ECF 66 at 1. Judge Arleo specifically indicated that she "considered Plaintiffs' Objections to the Report and Recommendation, ECF No. 62, and … Defendants … Opposition to Plaintiffs' Objections to the Report and Recommendation, ECF No. 65[.]" See id. Thus, for plaintiffs to assert Judge Arleo did not conduct a de novo review is wrong and belied by the record.

Further, although plaintiffs take exception to Judge Arleo's reliance on the documents cited in her Order, see plaintiffs' appellate brief at 21 ("the only items 'considered' by the district court were the Report… Plaintiffs' objections, and NJIT's opposition"), there is no requirement for a court to detail specifically the exact documents or record evidence reviewed in adopting a Report and Recommendation. See Spooner v. Jackson, 321 F.Supp.2d 867, 869 (E.D.Mich. 2004) ("If the Court were to adopt a report and recommendation, the Court would not need to state with specificity what it reviewed"); General Elec. Capital Corp. v. Oncology Associates of Ocean County LLC, 2011 WL 6179255 at *4 (D.N.J. December 12, 2011) ("If the Court accepts a Report and Recommendation, the Court is not required to state with specificity what it reviewed"). Moreover, this Court has recognized in this context that a District Court's reliance upon, inter alia, the briefs submitted by the parties below satisfies de novo review. See In re Press, 636 Fed.Appx. 606, 612 n. 7 (3d Cir. 2016) ("The panel represented that it adopted the Report and Recommendation after … reviewing the record and briefs, which

satisfies the de novo review requirement); see also Chatmon v. Winnebago County, 2004 WL 785027 at *1 (N.D.Ill. January 7, 2004) ("Pursuant to Fed.R.Civ.P. 72(b) this court has reviewed de novo the record, briefs, the Report and Recommendation, and the objection. The court accepts the Report and Recommendation …").

Finally, plaintiffs request this Court to "reverse the district court's Order … and remand this matter with instructions to the district court to award Plaintiffs' attorneys' fees under OPRA's mandatory fee-shifting provision." See plaintiffs' appellate brief at 22. Plaintiffs claim that review of Judge Arleo's Order is subject to plenary review. Id. Plaintiffs are only half right. See Bond v. Fulcomer, supra, 864 F.2d at 309 (review of the district court's legal conclusions is plenary; its review of factual findings is under the clearly erroneous standard). Here, Judge Arleo made findings of fact relative to plaintiffs' OPRA requests, particularly respecting the conduct of NJIT and its relationship and interactions with the FBI. Those findings cannot be disturbed unless clearly erroneous, which they are not. The Stipulated Facts detailing the factual history of the interactions between NJIT and the FBI were uncontested below and therefore rightfully accepted by Judge Arleo. Plaintiffs did not, nor could they, offer any rebuttal facts.

Indeed, there is nothing even remotely erroneous – let alone clearly erroneous – about Judge Arleo's (or Judge Wettre's) factual findings supporting the denial of plaintiffs' motion for attorney's fees under OPRA. See United Steel Workers Local

12-369, 728 F.3d at 1114 ("we may set aside [a District Court's] findings of fact as clearly erroneous only if they are illogical, implausible, or without support in inferences that may be drawn from the facts in the record").

Nor does a plenary review of the law when applied to the given facts support reversal of Judge Arleo's Order. As set forth infra, the correct legal standard was applied to conclude that there was no causal nexus supporting an award of attorney's fees, that plaintiffs were not prevailing parties, and that NJIT acted reasonably under the given circumstances. Accordingly, there is absolutely no basis to reverse Judge Arleo's Order for failing to apply a de novo standard of review in adopting Judge Wettre's Report and Recommendation.

POINT III

THERE IS NO FACTUAL OR LEGAL BASIS TO AWARD ATTORNEY'S FEES TO THE PLAINTIFFS UNDER OPRA

It is important to recognize that the Argument portion of plaintiffs' appellate brief addressing their entitlement to attorney's fees under OPRA sets forth approximately three pages of boilerplate law regarding OPRA and its attorney's fee provision before plaintiffs finally claim "there is a factual causal nexus between Plaintiffs' lawsuit and the relief they ultimately achieved" and that "the catalyst theory applies" entitling Plaintiffs to an award of reasonable attorney's fees under OPRA. See plaintiffs' appellate brief at 22-25. Plaintiffs also argue that they are

prevailing parties under the catalyst theory and that their lawsuit caused the release of thousands of pages of public records previously withheld by NJIT. Id. at 24-31. All of these arguments were rejected below because the factual record completely belies these assertions, and both Judge Wettre and Judge Arleo correctly found as such in denying plaintiffs' motion for attorneys' fees under OPRA.

The facts established before the District Court unequivocally prove that there is no factual causal nexus between plaintiffs' lawsuit against NJIT, on the one hand and the role of the FBI/DOJ in controlling, reviewing and producing the documents, on the other hand. In order to award attorneys' fees under OPRA, a factual causal nexus between the litigation and relief ultimately achieved must be shown. See Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). Despite this proof requirement, plaintiffs make several references on appeal to "mandatory" fee-shifting under OPRA, as if attorney's fees are mandatorily awarded ipse dixit once a lawsuit is filed and documents are produced. See plaintiffs' appellate brief at 2, 43 ("Mandatory fee-shifting is a key feature of the Act ...."). This is not the law. The New Jersey Supreme Court in Mason recognized that determining whether a causal nexus exists requires a "fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions, and viewing each matter on its merits." Id. at 79.

It remains uncontested that plaintiffs elected to not issue a FOIA request to the FBI despite the fact that FOIA has a fee-shifting provision permitting a trial court to award reasonable attorney fees and litigation costs to a plaintiff who has "substantially prevailed." See 5 USCA § 552(a)(4)(E). They also chose not to sue the FBI as the known custodian of the documents. Moreover, plaintiffs objected to conducting any discovery before the trial court, and therefore NJIT and the FBI submitted a Stipulation of Facts to establish what actually occurred relative to plaintiffs' OPRA requests. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 551-52 (App. Div. 2005) (recognizing that limited discovery may be permissible under OPRA if legitimate need is demonstrated); accord Pub. Citizen Health Research Group v. FDA, 997 F.Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions"). Plaintiffs eschewed discovery as an option, thus necessitating the submission of Stipulated Facts by NJIT and the FBI. Those Stipulated Facts are uncontested and show, among other things, that:

- The requested documents were created by the FBI and contained the FBI disclaimer/moniker;
- NJIT assembled documents for FBI review;
- NJIT did not review the documents because of the FBI disclaimer/moniker;
- Prior to plaintiffs' lawsuit, NJIT involved the FBI in the document process;
- Physical custody of the documents was solely with the FBI;

- The FBI solely reviewed and redacted all documents and excluded NJIT from the process;
- The FBI made the decision regarding what documents were redacted and what documents were produced.

The undisputed fact remains that NJIT's position never changed at any point in time. Judge Arleo's Order again correctly found no causal nexus because of the involvement of the foremost investigative body in the United States – the Federal Bureau of Investigation:

> Judge Wettre properly found that Plaintiffs thus failed to demonstrate a sufficient causal nexus between Plaintiffs' lawsuit against NJIT and the ultimate relief obtained by Plaintiff from the FBI.

JA009 (emphasis in original).

Plaintiffs attempt to oversimplify the analysis by arguing that their filing of a lawsuit caused the production of requested records and therefore they are a prevailing party entitled to attorneys' fees under the catalyst theory. See plaintiffs' appellate brief at 24-29. This argument is without merit. This was not a "cookie cutter" OPRA case. The simple calculus of "OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys' fees" went out the window once the FBI assumed control over the documents assembled by NJIT, and through its OPRA responses, plaintiffs were apprised of this undisputed fact along with having been furnished with a copy of the FBI's May 27, 2015, letter to NJIT directing them to file a FOIA request, which direction was reiterated by Judge Mitterhoff in New Jersey State

court. Once NJIT was removed from the process, which occurred immediately with the involvement of the FBI, NJIT was no longer the actual custodian of the subject records. These facts remain undisputed and support Judge Arleo's decision to deny attorneys' fees under OPRA.

Plaintiffs nevertheless argue that "[f]ollowing the filing of Plaintiffs' lawsuit, NJIT's conduct changed dramatically," see plaintiffs' appellate brief at 26, and therefore they are prevailing parties under the catalyst theory. See id. at 24. "In determining the propriety of an award of attorney fees, the court must … determine whether one qualifies as a prevailing party." N. Jersey Media Group Inc. v. State, Dep't of Personnel, 389 N.J. Super. 527, 540 (Law Div. 2006) (quoting Dunn v. Dep't of Human Servs., 312 N.J. Super. 321, 332 (App. Div. 1998)) (finding that, despite entitlement to some information within government records, the plaintiff was not considered a prevailing party). "[A] complainant is a prevailing party if he or she achieves the desired result because the complaint brought about change (voluntary or otherwise) in the custodian's conduct." Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565, 583 (App. Div. 2010). Here, there is not a single fact that plaintiffs can identify which remotely demonstrates NJIT changed its position at any time relative to plaintiffs' OPRA requests. Judge Arleo correctly recognized this very fact in denying plaintiffs' motion:

- Judge Wettre properly found NJIT's conduct reasonable in light of the FBI's repeated demand that NJIT not release records without its

approval, NJIT's consistent position to Plaintiffs that it would not do so, and its attempts to facilitate a resolution for Plaintiffs.

- Judge Wettre properly found that NJIT's stance both before and after Plaintiffs filed this action – that it would not produce records unless and until authorized by the FBI – never wavered.

- Judge Wettre properly found that … there was no change in conduct by NJIT brought about by the lawsuit.

JA007, JA008 (emphasis added).

Importantly, a requestor is not a prevailing party simply because the agency produced documents after an OPRA suit was filed. Mason, 196 N.J. at 78. Judge Arleo correctly cited to Spectraserv, supra, in recognizing that there was no change in NJIT's conduct brought about by plaintiffs' lawsuit. JA008. In Spectraserv, the Appellate Division found that a requestor was not entitled to attorneys' fees under OPRA where the production of documents was not causally related to the lawsuit. Importantly, the Appellate Division recognized that the custodian had acted reasonably by acknowledging "its obligation to produce non-exempt documents" and by protecting the confidentiality interests of a third-party in the documents sought to be produced. 416 N.J. Super. at 579-80, 584. See also Paff v. Borough of Garwood, 2012 WL 5512397 (App. Div. November 15, 2012) (denying attorneys' fees under OPRA where failure to produce DVD of illegal conduct was reasonable given police chief's certification stating that disclosure would jeopardize the security of the municipal building and create a risk of safety). Thus, plaintiffs' simple

calculus equating to documents being produced after their lawsuit was filed does not make them prevailing parties entitled to attorney's fees under OPRA.

POINT IV

THE DISTRICT COURT'S ORDER DENYING ATTORNEY'S FEES IS FACT-SENSITIVE AND WILL HAVE NO ADVERSE IMPACT ON FUTURE OPRA MATTERS OR ON THE PUBLIC IN GENERAL

In a desperate attempt to undermine Judge Arleo's Order, plaintiffs present arguments based in equity – namely that the District Court's Order will discourage requestors from pursuing meritorious OPRA litigation that benefits the public and will make requestors "less likely to file … OPRA cases seeking access to records that in any way could be construed as implicating third-party interests." See plaintiffs' appellate brief at 44, 45. Plaintiffs further assert that Judge Arleo's ruling "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." See plaintiffs' appellate brief at 44. In a word, this is nothing more than rank speculation and represents tortured logic.

First, there is absolutely nothing to suggest that future requesters will be disinclined to pursue meritorious OPRA litigation or that governmental entities will seek out third-parties to consult with relative to an OPRA request based upon this singular case. This matter was decided on its own factual construct per New Jersey

Supreme Court precedent. See Mason, supra, 196 N.J. at 79 ("fact-sensitive inquiry on a case-by-case basis … and viewing each matter on its merits") (emphasis supplied). To suggest that it will have a far reaching impact beyond that is speculative at best. Indeed, it smacks of irony that plaintiffs, in their appeal, argue the trial court misapplied an issue of State law, when so much of the time spent on this matter by plaintiffs' counsel was to avoid a remand of this action to State Court. This bears emphasis both in terms of the amount of time spent in numerous submissions to Magistrate Wettre and conference calls, and the certain preference of plaintiffs' counsel to remain in Federal Court. Plaintiffs' billing records and ECF submissions leave no doubt on this point.

Second, the fact that plaintiffs agreed to the FBI's document review process and to not challenge the remaining redactions and withholdings after receiving thousands of pages of responsive records was their own choice in this matter. What should not be overlooked is that plaintiffs' decisions were driven by their own desire to publish a book within a time certain; thus, plaintiffs had their own self-imposed constraints that played directly into their decision making process.

Plaintiffs also point out that requesters often do not have resources to engage in protracted litigation against a government agency, and therefore fee-shifting plays a vital role in fulfilling New Jersey's commitment to open government. See plaintiffs' appellate brief at 43-44. On this point, plaintiffs choose to make footnote

mention of the fact they were only able to engage in this litigation, which they claim caused them to incur nearly $200,000 in attorney's fees, because they were represented pro bono. See plaintiffs' appellate brief at 43 n.4. Of course, this begs the question of why plaintiffs would apply for fees if they were represented pro bono. Moreover, if plaintiffs thought that such a point was truly important on appeal, then it would not be relegated to a footnote. As Justice Clifford stated regarding the use of footnotes: "The whole irritating process points up the soundness of John Barrymore's observation that reading footnotes is like having to run downstairs to answer the doorbell during the first night of the honeymoon." In re Opinion 662 of Advisory Committee on Professional Ethics, 133 N.J. 22, 32 (1993).

Plaintiffs also completely misinterpret Judge Arleo's Order while arguing that they – and not NJIT – "acted in a manner encouraged by OPRA when they pursued meritorious litigation against NJIT to obtain public records[.]" See plaintiffs' appellate brief at 45. Plaintiffs claim that Judge Arleo imposed additional hurdles upon them by concluding that plaintiffs should have submitted a FOIA request to the FBI. Id. Contrary to what plaintiffs assert, Judge Arleo never imposed such hurdles on them. Rather, Judge Arleo was specifically addressing the reasonableness of NJIT's conduct, in view of the FBI's involvement, in addressing Plaintiffs' failure and refusal to have made a FOIA request:

> [I]n the face of the FBI's demand that NJIT not release records to Plaintiffs without the FBI's approval, NJIT acted in a manner

> encouraged by OPRA, seeking to facilitate a prompt response to Plaintiffs' requests by recommending Plaintiffs serve a FOIA request directly upon the FBI and impleading the FBI as a third-party defendant. JA008 (emphasis added).

To be clear, the District Court never directed the plaintiffs to make a FOIA request or to implead the FBI as a third-party defendant. To suggest otherwise, as plaintiffs do, is to blatantly misrepresent the record before this Court. As a result, plaintiffs' reliance on ACLU of New Jersey v. New Jersey Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014), see plaintiffs' appellate brief at 47-48, for the proposition that OPRA requesters should not be burdened with bureaucratic hurdles such as pursuing "additional lawsuits against parties other than the records custodian" is of no moment, as the District Court never imposed any such additional hurdles upon plaintiffs.

Plaintiffs also argue that the District Court's Order "penalizes" them because they agreed to the document review process proposed by the FBI and because they agreed to not challenge the remaining redactions and withholdings after receiving thousands of pages of responsive records. See plaintiffs' appellate brief at 49. According to plaintiffs, they could have disputed these issues but chose not to do so for fear of increased legal costs and the possible delay in the release of records. Id. at 49-50. Thus, they argue that Judge Arleo's Order "will discourage future OPRA plaintiffs from [compromising], in contravention of New Jersey's clear public policy

of promoting settlement during the course of litigation." Id. at 50. Plaintiffs truly have no basis to make such an assertion.

This case was decided on its own set of unique facts. There is absolutely nothing to suggest that future requesters will be disinclined to settle an OPRA action based upon this singular case. The issue presented by these facts remains unique. Remarkably, the appeal fails to note that there is not a single decision under OPRA, analogous State statutes, or under FOIA squarely addressing the rights and obligations of the parties confronted with the lawful direction of a major United States Government Agency or Department.

As set forth supra, the Appellate Division has spoken in dictum to this issue in Gannett, 379 N.J. Super. at 215: "[T]he custodian may not be in a position to discharge this burden if the asserted confidentiality interest in a document is not that of the government agency upon which the document request was made but rather another government agency." It should therefore come as no surprise to plaintiffs that an interested third-party may affect the award of attorneys' fees under OPRA. Moreover, case law specifically relied upon by the plaintiffs herein, namely Courier News, supra, involved the State of New Jersey as a third-party; however, attorneys' fees were awarded against the records custodian regardless. Thus, to also suggest that anytime a third-party's interests are implicated in an OPRA action that attorneys' fees cannot be awarded against another entity is completely without basis.

What remains critical to the inquiry here is that the third-party implicated was the FBI, the foremost investigative body in the United States. The FBI expressly voiced concerns that the requested documents were confidential and producing same may compromise its investigative efforts. This fact certainly changes the dynamic beyond plaintiffs' simplistic argument involving the award of attorneys' fees and any third-party implicated in an OPRA action.

For these reasons, plaintiffs' arguments based in equity should be rejected and the District Court's Order denying plaintiffs' motion for attorney's fees should be affirmed.

CONCLUSION

For the foregoing reasons, Plaintiffs' appeal should be denied and the District Court's Order denying Plaintiffs' motion for attorney's fees under OPRA should be affirmed.

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GARY POTTERS, ESQ.

DATED: February 13, 2019

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: February 13, 2019

By: s/ Gary Potters
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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations of the Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 12,222 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 proportionally spaced typeface using Microsoft Word PC version in 14-point Times New Roman font.

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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 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, Symantic Endpoint Protection, has been run on the file containing the electronic version of this brief and no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on February 13, 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 Defendants-Appellees' opposition brief 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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