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.)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The principal brief of Defendants-Appellees New Jersey Institute of Technology and Clara Williams (collectively, "Defendants" or "NJIT") centers on their argument that Plaintiffs-Appellants Daniel Golden and Tracy Locke (collectively, "Plaintiffs") are not entitled to an award of attorney's fees because, in unlawfully withholding the records Plaintiffs requested, NJIT was merely following instructions of the Federal Bureau of Investigation ("FBI"). *See*, *e.g.*, NJIT Br. at 20–23. NJIT does not cite a single statutory provision or New Jersey court decision to support its contention that taking direction from the FBI—or from any other third party—relieves a New Jersey governmental agency of its obligations under New Jersey's Open Public Records Act, N.J.S.A. §§ 47:1A-1, *et seq*. ("OPRA"), including its obligation to pay reasonable attorneys' fees if it is forced, through litigation, to release records it had previously unlawfully withheld. Indeed, NJIT fails to even address, let alone distinguish, analogous caselaw cited by Plaintiffs holding that a requestor is entitled to fees when—following a lawsuit—a New Jersey agency consults with a third party with an interest in the requested records and subsequently releases them. *See* Br. for Pls.'-Appellants at 28–29 (citing *K.L. v. Evesham Township Board. of Education.*, 423 N.J. Super. 337 (App. Div. 2011)).

Failing to address the central legal issues presented in this appeal, NJIT instead casts aspersions on Plaintiffs, including a Pulitzer Prize-winning journalist, and their attorneys, and attempts to rewrite the factual record before the Court.

NJIT's efforts range from mischaracterization of the facts to patently inaccurate claims, such as the assertion that NJIT did not "withhold any documents" in response to Plaintiffs' OPRA Requests. NJIT Br. at 27; *cf.*, *e.g.*, JA070–71 (Letter from Defendant Williams to Plaintiff Locke denying access to all requested records and stating "the records requested are exempt from disclosure under OPRA . . .").

The record is clear. Plaintiffs submitted three OPRA requests to NJIT, a New Jersey governmental agency, seeking records pursuant to New Jersey law (collectively, the "OPRA Requests"). *See* JA044–48 (Verified Complaint); JA005 (Order). NJIT denied the vast majority of Plaintiffs' First Request and denied their Second and Third Requests in their entirety, citing various OPRA exemptions. *See* JA060–63, JA070–71, JA076–77 (letters from Defendant Williams to Plaintiffs responding to their OPRA Requests); JA013–14 (Report and Recommendation). Plaintiffs then initiated this lawsuit against NJIT in New Jersey state court, pursuant to the provisions of OPRA, in order to vindicate their statutory rights of access to NJIT's records under New Jersey law. *See* JA040–77 (Verified Complaint and exhibits). As a result of this lawsuit, NJIT released thousands of pages of records it had previously withheld, providing valuable material for Mr. Golden's acclaimed non-fiction book *Spy Schools*. *See* JA163–65 (Declaration of Daniel Golden).

NJIT fails to seriously grapple with the deficiencies in the district court's Order below, including its failure to conduct an independent, de novo review of the record, and its erroneous interpretation and application of the catalyst theory set forth

by the New Jersey Supreme Court in *Mason v. City of Hoboken*, 196 N.J. 51 (2008). As discussed in detail in Plaintiffs' principal brief, the district court's ruling is not only contrary to New Jersey law, but it also undermines the purpose of OPRA and the intent of its mandatory fee provision. While NJIT posits that there is "nothing to suggest" that the district court's Order will have future effects on OPRA requestors or New Jersey agencies, NJIT Br. at 47, its brief ignores the breadth of the district court's reasoning. And, in fact, the district court's ruling—that an OPRA requestor can be denied attorneys' fees as long as the responding agency asserts that it denied access to records at the direction of a third party—has already been noted by the New Jersey Government Records Council, which is responsible for educating agencies and the public about OPRA. *See* N.J.S.A. § 47:1A-7; *infra* Section IV.

Plaintiffs' entitlement to an award of attorney's fees does not turn on whether or not NJIT relied on or acceded to instructions of the FBI or another third party in denying access to the records Plaintiffs requested under OPRA. NJIT unlawfully withheld non-exempt records in violation of the Act, and Plaintiffs' subsequent lawsuit against NJIT caused their release. Accordingly, Plaintiffs are prevailing parties entitled to reasonable attorneys' fees under OPRA, *see Mason*, 196 N.J. 51; N.J.S.A. § 47:1A-6, and the district court's Order to the contrary should be reversed.

ARGUMENT

I. NJIT misstates facts and the applicable standards of review.

A. This Court's review of the district court's Order is plenary.

NJIT's brief appears to argue for application of an incorrect standard of review to portions of the district court's Order. *See* NJIT Br. at 24, 40. While it is true that an appellate court generally reviews factual determinations for clear error, the issues presented in this appeal—including whether the district court properly interpreted New Jersey law, and whether it properly concluded that Plaintiffs are not "prevailing parties" entitled to an award of attorney's fees under OPRA—are subject to plenary review, as set forth in Plaintiffs' principal brief. *See*, *e.g.*, *Chin v. Chrysler LLC*, 538 F.3d 272, 277 (3d Cir. 2008); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir. 2002); *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 223 (3d Cir. 2017); *Providence Pediatric Med. Daycare Inc v. Alaigh*, 672 F. App'x 172, 176 n.6 (3d Cir. 2016); *Addie v. Kjaer*, 836 F.3d 251, 260 (3d Cir. 2016). NJIT does not address the cases cited by Plaintiffs, all of which make clear that the Court's review in this matter is plenary. *See* NJIT Br. at 24, 40.

B. NJIT's reliance on the "Stipulated Facts" it submitted in opposition to Plaintiffs' motion for attorney's fees is misplaced.

NJIT's brief relies heavily on a set of so-called "Stipulated Facts" that it agreed to with the FBI and filed in support of its opposition to Plaintiffs' motion for

attorney's fees in the district court. *See*, *e.g.*, NJIT Br. at 5–6, 21, 23, 40, 43–44.[1] Such reliance is misplaced at best, and improper at worst; NJIT's "Stipulated Facts" are not binding on Plaintiffs and, in any event, do not supplant the complete factual record in this case, as the magistrate judge below recognized.

First, contrary to NJIT's assertion that the "Stipulated Facts" were "uncontested below[,]" NJIT Br. at 40, Plaintiffs did not agree to—and, in fact, expressly objected to—consideration of the "Stipulated Facts" filed by NJIT in the district court. *See* ECF No. 55 at 3–4 (Plaintiffs objecting to the "Stipulated Facts"); ECF No. 62 at 9 n.4 (same). Because a stipulation is binding only upon those parties "who in fact assented to it[,]" *Kneeland v. Luce*, 141 U.S. 437, 440 (1891), Plaintiffs are not bound by NJIT's "Stipulated Facts," which were agreed to only by NJIT and the FBI. *See United States v. Struble*, 489 F. App'x 599 (3d Cir. 2012) (affirming motion to enforce settlement agreement signed by all parties and rejecting effort to enforce a different agreement signed by only one party); *see also, e.g.*, *Graves Lumber Co. v. Croft*, 20 N.E.3d 412, 420 (Ohio Ct. App. 2014) ("When there are

[1] NJIT's explanation for filing these "Stipulated Facts" with the district court—that Plaintiffs "strenuously objected to any discovery," NJIT Br. at 6—is inaccurate. The FBI, not Plaintiffs, objected to and sought to stay discovery by NJIT. *See* Letter from Karen Stringer to Judge Wettre at 1 (Dec. 16, 2015), ECF No. 3 (FBI requesting "a stay of all discovery pending adjudication of the Government's planned motion to dismiss[]" and noting that Plaintiffs "take no position on the Government's request to stay discovery[]").

multiple parties, a stipulation is not binding upon a party who did not sign it, but remains 'effective and binding' as to the parties who did sign it.") (citation omitted).

Second, NJIT's "Stipulated Facts" do not supplant the entirety of the factual record that was before the district court and that is now before this Court. As an initial matter, the "Stipulated Facts" are incomplete. They do not even address, for example, NJIT's handling of Plaintiffs' Second and Third OPRA Requests, which NJIT denied in their entirety on the basis of asserted OPRA exemptions. *Compare* JA249–55 (NJIT's "Stipulated Facts") *with* JA070–71 (NJIT's response to the Second Request), JA076–77 (NJIT's response to Third Request), *and* JA216–217 (Certification of Defendant Clara Williams setting forth actions taken by NJIT in response to the Second and Third Requests).

Moreover, while some portions of the "Stipulated Facts" are consistent with the record, and thus not disputed by Plaintiffs—such as the date the FBI removed this action to federal court, *see* JA252 at ¶ 15—other portions contradict the record, including representations made by NJIT during the course of this lawsuit. For example, the "Stipulated Facts" state that in responding to Plaintiffs' First Request, NJIT "notified Plaintiffs that it was withholding documents from production consistent with the FBI's direction as described in paragraphs 7 through 9." JA251 at ¶ 10.[2] This claim is belied by the earlier certification of Defendant Clara Williams,

[2] Though NJIT asserts that "[n]owhere in the Stipulated Facts are there any facts which in any way involve plaintiffs or their counsel[,]" NJIT Br. at 5 n.1 (emphasis

who averred that, in responding to Plaintiffs' First Request, *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. *See also* JA060–63 (letter from NJIT in response to the First Request). Indeed, NJIT's brief is replete with misstatements of the factual record in this case that purport to rely on the "Stipulated Facts." *Compare* NJIT Br. at 43 (asserting that "[p]hysical custody of the documents was solely with the FBI") *with* JA213 at ¶ 23 (Defendant Williams certifying that, in response to Plaintiffs' First Request, she and other NJIT employees searched for and located responsive emails on NJIT's mainframe). Simply put, NJIT cannot use the "Stipulated Facts" to re-write the factual record in this case to better fit the arguments it would like to make to this Court; the record is what it is. That NJIT would accuse *Plaintiffs* of attempting to "mislead[]" the Court by citing to and directly quoting from the actual record below, *see* NJIT Br. at 5–6, is beyond the pale.

Finally, the magistrate judge did not "accept[] the Stipulated Facts in her Report and Recommendation[]" wholesale, as NJIT incorrectly suggests. NJIT Br. at 5 n. 1. As noted above, Plaintiffs, who were not a party to the "Stipulated Facts" agreed to by NJIT and the FBI, objected to their consideration by the magistrate judge. *See* ECF No. 55 at 3–4. Noting that objection, the magistrate judge expressly

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removed), a number of paragraphs do, in fact, purport to describe interactions with Plaintiffs or their counsel, including paragraphs 10, 11, 12, and 20. *See* JA250–54.

stated in her report and recommendation that she "relied" only on cited "excerpts" of the "Stipulated Facts[,]" and "solely for undisputed background to this dispute[,]" finding such "limited use of the document appropriate and not prejudicial" to Plaintiffs. JA012 at n.2. Though Plaintiffs objected to any reliance on the "Stipulated Facts" in the magistrate judge's report and recommendation, *see* ECF No. 62 at 9 n.4, it is clear that neither the magistrate judge nor the district court adopted NJIT's "Stipulated Facts" in their entirety. For all these reasons, the "Stipulated Facts" are entitled to little if any consideration by this Court.

C. The district court did not conduct the requisite de novo review.

As set forth in Plaintiffs' principal brief, the district court committed reversible error by failing to conduct a de novo review in response to Plaintiffs' objections to the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 904 (3d Cir. 1992). Contrary to NJIT's argument, the district court's Order on its face does not "address[] all of Plaintiffs' stated objections[,]" NJIT Br. at 36, and it is not sufficient for the district court to simply conduct an "analysis" of the magistrate judge's report, *id.*: it must review the record for itself. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); *Taberer* 954 F.2d at 904; 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"). Upon objection, the district court is required to "consider the *record*"

and make its "own determination *on the basis of that record*[.]" *Taberer*, 954 F.2d at 904 (emphasis added).

Certainly, a district court need not engage in an exhaustive explanation of each and every piece of evidence it examines in response to objections to a report and recommendation, but it must, at a minimum, consider each objection and indicate that it conducted an independent review of the record. All of the cases cited by NJIT in its brief make this clear. *See Spooner v. Jackson*, 321 F. Supp. 2d 867, 869 (E.D. Mich. 2004) ("De novo review in these circumstances entails at least a review of the evidence that faced the magistrate judge [. . . . I]t is sufficient for the Court to say that it has engaged in a de novo review of the record . . ."); *Gen. Elec. Capital Corp. v. Oncology Assocs. of Ocean Cty. LLC*, 2011 WL 6179255, at *4 (D.N.J. Dec. 12, 2011) ("In determining whether to accept, reject, or modify a magistrate judge's recommended decision, a district court judge must look at all of the evidence contained in the record . . ."); *In re Press*, 636 F. App'x 606, 612 n.7 (3d Cir. 2016) ("The panel represented that it adopted the Report and Recommendation after independently reviewing the record and briefs, which satisfies the de novo review requirement."). The district court here did not do so; it "considered" only "Plaintiffs' Objections to the Report and Recommendation, ECF No. 62, and [NJIT's] Opposition to Plaintiffs' Objections to the Report and Recommendation, ECF No. 65[.]" JA004 (Order). For this reason alone, remand is warranted.

II. Under New Jersey law, Plaintiffs are prevailing parties entitled to an award of attorney's fees.

Faced with a clear "factual causal nexus between [Plaintiffs'] litigation and the relief ultimately achieved" by Plaintiffs, *Mason*, 196 N.J. at 76—namely, NJIT's post-litigation release of thousands of pages of previously withheld public records—NJIT attempts to distract, by making incorrect factual assertions that are belied by the record. Indeed, NJIT's brief fails to even address the key legal issues before this Court. Simply put, as set forth in Plaintiffs' principal brief and below, even assuming, *arguendo*, that NJIT was only following the FBI's directions both before and after Plaintiffs filed this lawsuit, as it claims, Plaintiffs' litigation was still responsible for the "relief ultimately achieved," and Plaintiffs are still entitled to an award of attorney's fees under OPRA. *See id*.

A. NJIT was the custodian of the records requested by Plaintiffs under New Jersey law; NJIT's brief misrepresents its pre-litigation conduct, including its denials of Plaintiffs' OPRA requests.

First, NJIT's brief misrepresents its pre-litigation conduct. For example, NJIT claims, without any citations to the record, that in responding to Plaintiffs' OPRA Requests "[t]he only action that NJIT took here was assembling the documents for the FBI[,]" and that NJIT did not "withhold any documents." NJIT Br. at 27. These assertions are incorrect, as even the most cursory review of the record demonstrates. In response to Plaintiffs' First Request NJIT withheld records and portions thereof and cited OPRA exemptions for doing so. As Defendant Williams certified, in

responding to the First Request 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; *see also* JA060–63 (NJIT's response letter). NJIT also refused to provide *any* records in response to Plaintiffs' Second or Third Requests, withholding them in full and citing OPRA exemptions as justification for doing so. *See* JA070 (response to the Second Request stating that "the records requested are exempt from disclosure under OPRA . . ."); JA217 at ¶ 46 (Williams certifying that, in response to Second Request, she "advised no records were being produced in response to the Second Request, [and] cited the OPRA exemptions applicable thereto . . ."); JA076–77 (response to Third Request denying access to all records); JA218 at ¶ 53 (Williams certifying that, in response to the Third Request, she "cited the OPRA exemptions applicable thereto . . ."); *see also* Letter from Karen Stringer to Judge Wettre at 3 n.2 (Dec. 16, 2015), ECF No. 3 (FBI counsel noting that the FBI was considering whether to intervene "in order to address the merits of any records or portions thereof *that have been withheld by NJIT*." (emphasis added)). Based on its assertion of the OPRA exemptions it had identified as "applicable," NJIT denied Plaintiffs access to thousands of pages of public records. *See* JA013–14 (Report); JA044–48 (Verified Complaint). NJIT's claim that it only "assembl[ed]" documents for the FBI, and did not "withhold any documents[,]" NJIT Br. at 27, is false.

Second, NJIT's theory that the FBI acted as "the de facto custodian of records relative to plaintiffs' OPRA requests[,]" NJIT Br. at 28, is both legally and factually baseless. There is no "de facto records custodian" under OPRA; NJIT does not—and could not—identify a single case that has adopted such a theory. OPRA expressly defines an agency's records custodian as "the officer officially designated by formal action of that agency's director or governing body, as the case may be." N.J.S.A. § 47:1A-1.1. NJIT admitted, at the outset of this case, that Williams is its records custodian for the purposes of OPRA. *See* JA208 at ¶ 1 (Williams certifying "I am the Office Administrator for the Office of General Counsel and OPRA Custodian of Records for New Jersey Institute of Technology . . ."). Moreover, the record belies any notion that the FBI was a "de facto" records custodian of the records sought by Plaintiffs, NJIT Br. at 28, or that those records "were FBI documents," *id.* at 27. As set forth above, NJIT's own submissions describe how it searched for and located records responsive to Plaintiffs' OPRA Requests in its own files. JA211–13 (Williams Certification detailing actions by NJIT to locate responsive records). And, notably, at no point did NJIT move to dismiss Plaintiffs' OPRA lawsuit on the basis that it was not in possession of the requested records, or that it was not the custodian of the records sought by Plaintiffs.

NJIT's brief also neglects to mention that, in responding to Plaintiffs' complaint, it *counter-sued Plaintiffs* for allegedly failing to pay $26.65 in outstanding costs it allegedly incurred in connection with responding to the First

Request. JA095–98 (NJIT Counterclaim). NJIT's counterclaim against Plaintiffs alleged, *inter alia*, that the "fee" Plaintiffs allegedly failed to pay was "in compliance with the amount permissible pursuant to N.J.S.A. 47:1A-5.b[,]" JA096—the record duplication fee provision of OPRA. In short, though NJIT now argues to this Court that in responding to Plaintiffs' First Request it merely "assembled" records for the FBI, NJIT previously sued Plaintiffs for allegedly failing to pay NJIT the copying costs for its records that were responsive to that request under OPRA.

B. Plaintiffs' lawsuit caused NJIT to change its position.

NJIT also fails to grapple with its post-lawsuit actions, including that it (1) forced the FBI's participation in this litigation, by suing the FBI for indemnification after it declined to intervene in this OPRA lawsuit, (2) agreed to a process whereby the FBI, acting as a "consult[ant]" to NJIT, reviewed the records requested by Plaintiffs, and (3) subsequently produced to Plaintiffs thousands of pages of records it had previously withheld, abandoning the OPRA exemptions it had cited to deny Plaintiffs' OPRA requests. *See* JA099–102 (NJIT Third Party Complaint); JA136–37 (Joint Status Report); 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). Simply put, NJIT's bald assertion that "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[,]" NJIT Br. at 45 (emphasis removed), is wrong. And NJIT's brief

does not make any attempt to explain why these "change[s] (voluntary or otherwise) in [its] conduct[,]" *Spectraserv, Inc. v. Middlesex Cty. Utilities Auth.*, 416 N.J. Super. 565, 583 (App. Div. 2010) (citation omitted), do not satisfy the causal nexus prong of the catalyst theory as established by the New Jersey Supreme Court.

As set forth in detail in Plaintiffs' principal brief, NJIT post-litigation actions closely mirror those described in *K.L. v. Evesham Township Board of Education,* 423 N.J. Super. 337, which NJIT makes no effort to address—let alone distinguish. In *K.L.*, after the requestor was denied access to a requested record and filed suit, the government agency conferred with a third party that it believed had an interest in the requested record, and released a redacted version of the record following that consultation process. *See* 423 N.J. Super. at 347. The Appellate Division held that because of that process—which resulted in the release of a previously withheld record post-litigation—the requestor was entitled to an award of attorneys' fees under the catalyst theory. *Id.* at 364–65. NJIT makes no effort to explain why the reasoning of *K.L.* should not apply here, where thousands of pages of previously withheld records were released following its post-litigation "consultation" with the FBI. JA147 (Joint Status Report).

C. Because Plaintiffs' OPRA lawsuit caused the relief they ultimately achieved, the catalyst theory is satisfied.

Even assuming, *arguendo*, that NJIT "essentially did nothing other than take direction from the FBI[]" both before and after Plaintiffs' lawsuit was filed, NJIT

Br. at 6, Plaintiffs are still prevailing parties under the catalyst theory. The catalyst theory asks courts to determine whether there is "a factual causal nexus between plaintiff's litigation and the *relief ultimately achieved*[.]" *Mason*, 196 N.J. at 76 (emphasis added). Thus, the catalyst theory is satisfied even if, as the magistrate judge stated below, "[t]he production of the records was a post-lawsuit change in the *FBI's* position to be certain[,]" and NJIT was merely following the FBI's lead. JA024 (emphasis in original). Nowhere does NJIT explain why, if it was "tak[ing] direction from the FBI[,]" NJIT Br. at 6, the FBI's change in position post-litigation, which led to NJIT's production of previously withheld records, does not satisfy the catalyst theory. *Cf.*, *e.g.*, *K.L.*, 423 N.J. Super. at 347 (requestor entitled to attorney's fee award where agency released requested record post-litigation as a result of its consultation with third party). As set forth in Plaintiffs' principal brief, application of the catalyst theory turns on whether or not a requestor's lawsuit achieves its goals. *See* Br. for Pls.'-Appellants at 31–34. Here, because Plaintiffs' lawsuit was responsible for the "relief ultimately achieved"—the release of thousands of previously withheld records by NJIT—Plaintiffs are prevailing parties for the purposes of OPRA's fee provision. *See Mason*, 196 N.J. at 76.

III. There is no "reasonableness" exception to OPRA's mandatory fee provision and, in any event, NJIT actions were inconsistent with its obligations under the Act and cannot be deemed "reasonable."

The magistrate judge's Report and Recommendation, fully adopted by the district court, applies an erroneous interpretation of the catalyst theory established

by the New Jersey Supreme Court in *Mason* to conclude that Plaintiffs are not prevailing parties. The magistrate judge both (1) wrongly concluded that courts should conduct an inquiry into whether an agency acted reasonably in *withholding* records under the catalyst theory, and (2) wrongly concluded that NJIT acted reasonably in this case by unlawfully withholding requested records purportedly at the direction of the FBI.

A. The district court erroneously interpreted the catalyst theory.

Contrary to NJIT's arguments, *see*, *e.g.*, NJIT Br. at 25–35, the New Jersey Supreme Court's decision in *Mason* does not stand for the proposition that if an agency's pre-litigation refusal to release non-exempt records is "reasonable" it can escape OPRA's attorney's fee provision. *See Mason*, 196 N.J. at 79. As discussed in detail in Plaintiffs' principal brief, when read in context and consistently with the mandatory nature of OPRA's attorney's fee provision, it is clear that the Court's reference to "reasonableness" in *Mason* relates to an agency's efforts to *release* records to a requestor before a lawsuit is filed, not whether it had a purportedly "reasonable" basis for denying access. *See id.* Indeed, NJIT makes no effort, whatsoever, to attempt to reconcile its arguments with the New Jersey Legislature's clear decision *not* to include a "reasonableness" requirement in OPRA's attorney's fee provision, *see* N.J.S.A. § 47:1A-6 (a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee"), and to instead place such a requirement only in the civil penalties provision, which is not at issue in this case,

see N.J.S.A. § 47:1A-11 (civil penalties may be imposed on public employees who "knowingly and willfully violate[]" OPRA, if they are "found to have unreasonably denied access under the totality of the circumstances"). Nor does NJIT attempt to address the recent decision from the New Jersey Appellate Division, cited by Plaintiffs in their principal brief, which underscores this point:

> 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. v. Passaic Cty. Prosecutor's Office, No. A-2016-16T1, 2018 WL 3945641 at *12 (emphasis added).

The dicta NJIT cites from *Gannett New Jersey Partners, LP v. County of Middlesex*, 379 N.J. Super. 205 (N.J. Super. Ct. App. Div. 2005) is neither here nor there. It indicates, at most, that interested third parties should be given an appropriate opportunity to weigh in on the issue of whether certain records are exempt under OPRA, *see id.* at 215, a position Plaintiffs have never disagreed with. The Appellate Division's opinion in *Gannett* does not, in any way, address or concern the catalyst theory or application of OPRA's mandatory attorney's fee provision; it certainly does not stand for the proposition that a requestor who successfully pursues OPRA litigation can lose their entitlement to an attorney's fee award under the Act if the New Jersey agency it sued decides to consult with a third party. *See id.*; *cf. Courier News v. Hunterdon Cnty. Prosecutor's Office*, 378 N.J.

Super. 539 (App. Div. 2005); *K.L.*, 423 N.J. Super. at 347. To conclude, as the magistrate judge did below, that courts should conduct a general "reasonableness" inquiry into an agency's justification for denying access to requested records would be inconsistent with, and fundamentally undermine, New Jersey Supreme Court precedent and the clear will of the New Jersey Legislature.

B. NJIT's actions were not reasonable as a matter of law.

Even assuming, *arguendo*, that the reasonableness of an agency's decision to deny access to records is relevant to application of the catalyst theory, it was unreasonable, as a matter of law, for NJIT to agree to, follow, or accede to the direction of the FBI to withhold plainly non-exempt records in response to Plaintiffs' OPRA Requests. Indeed, instead of arguing that it was reasonable for NJIT to withhold the requested records—which is not possible—NJIT argues simply that it was not "within its rights to ignore the [FBI's] direction[]" to withhold records. NJIT Br. at 27. But as Plaintiffs have explained, OPRA *requires* records custodians, even in the face of conflicting direction from third parties, to make up their own mind as to whether or not records must be released under the Act. *See* Br. for Pls.'-Appellants at 31–34; 41–43. As the Appellate Division stated in *Collingswood Board of Education v. McLoughlin*:

> 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.

No. A-2475-14T1, 2016 WL 6134926 at *1 (N.J. Super. Ct. App. Div. Oct. 21, 2016).[3]

While NJIT repeatedly asserts, without citation, the purported "extreme confidentiality associated with the subject documents" requested by Plaintiffs, NJIT Br. at 15, 27, the record reveals numerous instances of NJIT withholding clearly non-exempt, and in some cases already public, information. JA260–66; JA271–302; JA304–37; JA364–66; JA268 (examples of records withheld by NJIT in response to Plaintiffs' Second Request and Third Request). For instance, one record that NJIT withheld in its entirety from Plaintiffs in response to two of their Requests is an email from a dean at NJIT to an FBI agent containing the full text of an article written by Plaintiff Golden. *See* JA261–66. This article (1) is a record of NJIT, (2) has no "dissemination controls or monikers [sic] identifying the documents as confidential," NJIT Br. at 10, and (3) plainly does not fall within the scope of any OPRA exemption. *See* JA261–66. The most cursory examination of that record should have confirmed that any assertion of "extreme confidentiality" by the FBI as to that email was, in NJIT's words, "bunkum." NJIT Br. at 28.

Similarly, another record withheld by NJIT in response to two of Plaintiffs' OPRA Requests—a record that the FBI *did* stamp with one of its "dissemination

[3] NJIT attempts to distinguish *Collingswood* by arguing that it does not address attorney's fee awards. Plaintiffs, however, have cited it for the proposition that a records custodian has non-delegable statutory obligations under OPRA.

control[]" messages—was an email forwarding a report from the American Academy of Arts & Sciences that is publicly available on the Internet. *See* JA270–302 (cover email and article); ECF No. 62 at 26 (providing public URL for same report). Notwithstanding the report's undeniably public nature, the FBI's cover email states that it is "not to be released to the media, general public, or posted on any publicly accessible forum, to include the Internet or public websites." JA270 (underlining original). That NJIT would unquestioningly defer to the FBI's "dissemination control[]" stamp and any assertion of "extreme confidentiality" as to this publicly available report, NJIT Br. at 27, can hardly be called reasonable.

In any event, any purported concerns that either NJIT or the FBI had about the supposed "extreme confidentiality associated with the subject documents" is belied by their post-litigation conduct. After Plaintiffs' lawsuit was filed, the FBI declined to intervene to assert that the requested records were properly withheld, *see* JA015 (Report); the FBI became a party to this lawsuit only after NJIT sued it for indemnification. Moreover, NJIT, following its post-litigation consultation with the FBI, released thousands of pages of the records requested by Plaintiffs, effectively conceding that the records were not exempt from disclosure under OPRA, and should not have been withheld to begin with.

IV. NJIT gives short shrift to the broader implications of the district court's Order.

Arguing that this case "was decided on its own set of unique facts[,]" NJIT Br. at 51, NJIT does not seriously contend with the scope of the district court's decision, which stands for the broad proposition that as long as a New Jersey agency asserts that it is denying an OPRA request at the direction of a third party, the requestor can be deprived of an attorney's fee award under OPRA if she challenges that denial through litigation. *See* JA004–9 (Order); JA010–29 (Report and Recommendation). Indeed, even though this case is ongoing, the district court's Order has already been noted by the New Jersey Government Records Council ("GRC"), which is responsible for educating both the public and records custodians about OPRA. *See* N.J.S.A. § 47:1A-7. The GRC describes the district court's ruling below expansively, as holding that Plaintiffs are not entitled to a fee award under OPRA's mandatory fee provision because "NJIT's decision to adhere to the FBI's demand that NJIT not release the requested records without their approval was reasonable and consistent."[4]

[4] Minutes of the Government Records Council, August 28, 2018 Public Meeting – Open Session, https://www.nj.gov/grc/meetings/minutes/2007pdf/20180925Open Session.pdf, *archived at* https://perma.cc/DCZ7-6J5B. The GRC's characterization of the district court's ruling is not part of the record below because it occurred following issuance of the district court's Order. However, this Court may take judicial notice of it because, as minutes of a New Jersey government agency, it can be "accurately and readily determine from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

The district court's reasoning provides a roadmap for NJIT and other state government entities to avoid responsibility for unlawfully denying access to non-exempt records. One can imagine, for example, an OPRA request made to NJIT—an educational institution—for emails between it and the United States Department of Education concerning grants from the federal government. Under the logic of the district court's Order, NJIT could simply ask the Department of Education for its opinion as to whether the records should be released, and follow its "direction" to withhold those records even if it is clear they are not exempt under OPRA. Likewise, the New Jersey Department of Environmental Protection could rely on the federal Department of Environmental Protection to process its OPRA requests. Requestors faced with denials in that context will be deprived of the certainty that, if they pursue litigation that forces the release of those records, they will be able to recover attorney's fees—certainty that the New Jersey Legislature intended to provide when it made OPRA's fee provision mandatory. The district court's Order, unmoored from the requirements of OPRA, fundamentally undermines New Jersey's strong commitment to open and accountable government. *See*, *e.g.*, N.J.S.A. § 47:1A-1.

In addition, NJIT's repeated suggestions that Plaintiffs should have filed a FOIA request in this matter for NJIT's records and/or sued the FBI as part of their OPRA lawsuit warrant little consideration. *See*, *e.g.*, NJIT Br. at 12, 21, 22, 28, 33, 43, 44, 49. Plaintiffs sought NJIT's records—not those of the FBI—and NJIT's counsel correctly conceded at oral argument below that (1) Plaintiffs did not have to

file a FOIA request with the FBI for these records, *see* JA346 at 34:20–22, and (2) that Plaintiffs could not have sued the FBI under OPRA, *see* JA360 at 48:18–20. *See also* ECF No. 60 at 20:10 (magistrate judge stating at oral argument that Plaintiffs "acted fully in accordance with their rights under OPRA"). And, as Plaintiffs' principal brief points out, the New Jersey Appellate Division has expressly rejected any effort to place additional and unnecessary hurdles on requestors seeking access to New Jersey records under OPRA. *See ACLU of New Jersey v. New Jersey Div. of Criminal Justice*, 435 N.J. Super. 533, 542 (App. Div. 2014) ("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." (internal quotation and citation omitted)).

Finally, NJIT attempts to call into question the validity of Plaintiffs' efforts to seek a fee award in this matter. *See* NJIT Br. at 49 (". . . this begs the question of why plaintiffs would apply for fees if they were represented pro bono."). The New Jersey Supreme Court has spoken unequivocally on this matter, affirming not only that a pro bono attorney in a successful OPRA action is entitled to a full lodestar calculation, but that such representation counsels in favor of an enhancement *above* the lodestar calculation. *See New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr.*, 185 N.J. 137 (2005). New Jersey law encourages pro bono and reduced fee representation as a public good. *See id*; New Jersey Rules of

Professional Conduct, RPC 6.1 ("Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee . . ."). NJIT's baseless suggestion that Plaintiffs or their counsel are somehow acting improperly by asserting Plaintiffs' statutory right to a fee award in this matter is unwarranted.

CONCLUSION

For all the reasons set forth herein and in their principal brief, 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: March 6, 2019

Respectfully submitted,

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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 6,176 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: March 6, 2019

s/ Katie Townsend
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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 13.12), has been run on the file containing the electronic version of this brief and no virus was detected.

Dated: March 6, 2019

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CERTIFICATE OF SERVICE

I certify that on March 6, 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' Reply Brief to be filed with the Clerk's Office of the U.S. Court of Appeals for the Third Circuit via Federal Express.

Dated: March 6, 2019

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