UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL GOLDEN and TRACY LOCKE,

Plaintiffs,

v.

NEW JERSEY INSTITUTE OF TECHNOLOGY and CLARA WILLIAMS, in her capacity as Custodian of Records for the New Jersey Institute of Technology,

Defendants/Third-Party Plaintiffs/*Third-Party Defendants*,

v.

FEDERAL BUREAU OF INVESTIGATION,

Third-Party Defendant/ Third-Party Plaintiff.

HON. MADELINE C. ARLEO

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

PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE DENYING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

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PRELIMINARY STATEMENT

Plaintiffs Daniel Golden and Tracy Locke (collectively, "Plaintiffs") respectfully submit these objections to the Report and Recommendation of the Magistrate Judge denying their motion for an award of attorneys' fees under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.* ("OPRA" or the "Act").

The Magistrate Judge's Report and Recommendation, ECF No. 61 (the "Report") erroneously concludes that Plaintiffs are not entitled to recover *any* of their attorneys' fees in this litigation—*successful* litigation that Plaintiffs were forced to undertake to obtain records they properly requested from the New Jersey Institute of Technology and its Custodian of Records, Clara Williams (collectively, "NJIT") pursuant to OPRA—under the Act's *mandatory* fee-shifting provision. In doing so, the Report undercuts the clear intent of New Jersey's Legislature, contravenes precedent of the New Jersey Supreme Court on a purely state law issue, and provides a roadmap for New Jersey government entities to evade compliance with OPRA in the future with impunity. It should be rejected by this Court.

The Report's recommendation that Plaintiffs' motion for attorneys' fees be denied rests on numerous factual mistakes and errors of law; the Report, *inter alia*:

- incorrectly concludes that NJIT's position, including its reliance on OPRA exemptions to deny Plaintiffs' requests, did not change as a result of Plaintiffs' filing of this lawsuit;

- misinterprets and misapplies the "catalyst theory" recognized by the New Jersey Supreme Court in *Mason v. City of Hoboken*, 196 N.J. 51 (2008);
- erroneously determines that NJIT's actions were "reasonable," despite NJIT's undisputed refusal to fulfill its statutory obligations under OPRA, and gives undue weight to that incorrect determination;
- undercuts the purpose of OPRA's mandatory fee-shifting provision by creating uncertainty as to the ability of journalists and other members of the public to recover fees in meritorious OPRA litigation; and
- undermines New Jersey's public policy in favor of settlement by penalizing requestors who informally reach agreement with a defendant government entity on disputed legal issues once in litigation.

The Report, if adopted by this Court, will pave the way for substantial financial burdens to be placed on individual requestors, like Plaintiffs, who successfully pursue litigation to vindicate their right of access to government records under OPRA, turning the purpose of OPRA and its mandatory fee-shifting provision on its head. Such a ruling will have far-reaching effects on journalists and members of the public who rely on the Act to require unwilling government entities to release requested records. Accordingly, for the reasons set forth herein, Plaintiffs respectfully request that the Court reject the Magistrate Judge's recommendation.

BACKGROUND AND PROCEDURAL HISTORY[1]

This case concerns three public records requests submitted to NJIT by Plaintiffs between April 8 and August 13, 2015, for e-mails between certain persons at NJIT and the Federal Bureau of Investigation ("FBI") or Central Intelligence Agency ("CIA") (collectively, the "OPRA Requests"). *See* Verified Complaint, ECF No. 1-1 ("Golden Compl."). Mr. Golden is a Pulitzer Prize-winning journalist and currently a Senior Editor at ProPublica. Pls.' Mot. Ex. 1. The OPRA Requests were made for newsgathering purposes in connection with Mr. Golden's non-fiction book *Spy Schools*, concerning foreign and domestic intelligence activities at U.S. universities, that was recently published by Henry Holt and Co. *See id.* ¶ 6; Amazon, *Spy Schools: How the CIA, FBI, and Foreign Intelligence Secretly Exploit America's Universities*, https://www.amazon.com/Spy-Schools-Intelligence-Secretly-Universities/dp/1627796355. Tracy Locke was, at the time, a publicist with Henry Holt that assisted Mr. Golden with his research. Golden Compl. ¶ 4.

In response to Mr. Golden's first OPRA request (the "First Request"), NJIT produced approximately 540 pages of responsive records—the vast majority of which were either fully or heavily redacted—and withheld approximately 3,949 pages of other responsive records in their entirety, citing Executive Order No. 21,

[1] The facts and procedural history of this case is set forth in more detail in Plaintiffs' brief in support of their motion for attorneys' fees ("Pls.' Mot."), ECF No. 53-1, at 1–8, which is incorporated by reference herein.

N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-9. Golden Compl., Background & Factual Allegations ¶¶ 7–8 & Ex. B; *see also* NJIT Verified Ans. to Pls.' Verified Comp., Affirmative Defenses, Countercl., Third-Party Compl., Designation of Trial Counsel and Certification Pursuant to R. 4:5-1 & R. 4:6-1(D) (hereinafter, "NJIT Ans."), ECF No. 2, Background & Factual Allegations ¶¶ 7–8.

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

In response to Ms. Locke's OPRA request (the "Second Request"), NJIT refused to provide any records, citing Executive Order No. 26, N.J.S.A. 47:1A-1.1, and Executive Order No. 21. Golden Compl. ¶¶ 12–16; NJIT Ans. ¶¶ 12–16.

In response to Plaintiffs' final OPRA request (the "Third Request"), which, *inter alia*, expanded the date range for e-mails initially requested by Mr. Golden, NJIT again refused to provide any responsive records. Golden Compl. ¶¶ 17–23; NJIT Ans. ¶¶ 17–23. NJIT's response to the Third Request also cited Executive Order No. 26, N.J.S.A. 47:1A-1.1, and Executive Order No. 21.

Following NJIT's denial of their Third Request, Plaintiffs filed this action in the Superior Court of New Jersey Law Division, Essex County, against NJIT pursuant to OPRA and New Jersey common law. On September 17, 2015, the Superior Court issued an order to show cause directed to NJIT. *See* ECF No. 1-2.

According to NJIT, following the filing of Plaintiffs' lawsuit "the FBI advised [NJIT] it was going to intervene in the State Court proceeding as a means to stand behind its redactions and direction to withhold from production in response to the OPRA request the approximately 4,000 pages of documents." Letter from Gary Potters to Judge Wettre (Dec. 17, 2015), ECF No. 5, at 2. The FBI, however, did not intervene. On November 13, 2015, NJIT filed its answer to Plaintiffs' complaint, a counterclaim against Plaintiffs for $26.65,[2] and a third-party complaint against the FBI for indemnification in the event an attorneys' fees award was entered against NJIT (the "NJIT Third-Party Complaint"). *See* NJIT Ans., p. 13–17.

Now a party to Plaintiffs' lawsuit as a result of the NJIT Third-Party Complaint, the FBI removed to this Court on December 11, 2015. *See* Notice of Removal, ECF No. 1. In meet and confer discussions between all parties following removal, counsel for the FBI informed Plaintiffs that it was then in possession of approximately 6,000 pages of documents provided to it by NJIT that NJIT had

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

identified as responsive to Plaintiffs' OPRA Requests. Joint Status Report, ECF No. 24, at 1–2. The FBI's position at that time was that "approximately 4,000 [of those] pages are federal records, controlled by the FBI, and not subject to disclosure under [OPRA], regardless of whether or not they are subject to any exemption(s)." *Id.* at 2 (quotation removed, second alteration in original). The FBI proposed "to treat the remaining 2,000 pages as a request to consult from NJIT[,]" which would entail reviewing them "at a rate of 500 pages per month[]" and "sendi[ng] the documents back to NJIT." *Id.* at 2.

Given the "upcoming publication deadlines for Mr. Golden's forthcoming book," Plaintiffs agreed to that proposal, but made clear they did "not concede and do not agree with, *inter alia*, the FBI's position that the remaining approximately 4,000 pages of documents responsive to Plaintiffs' request are not subject to OPRA, and reserve all rights." *Id.* at 2–3. NJIT "also agree[d] to the FBI's proposal." *Id.* at 3. The parties jointly proposed "a stay of all deadlines," *id.*, which the Magistrate Judge entered on March 7, 2016. Order, ECF No. 26, at 1–2.

Between March 2016 and the end of June 2016, NJIT sent four productions of records to Plaintiffs, releasing approximately 1,499 pages in full and 379 pages in part that were responsive to Plaintiffs' OPRA Requests. *See* Joint Status Report, ECF No. 27, at 1–2. Approximately 296 pages of records were withheld in full. *Id.* Each production from NJIT to Plaintiffs included a cover letter from NJIT's counsel,

as well as a copy of a letter from the FBI to Ms. Williams, NJIT's Custodian of Records. *See* Townsend Decl. Ex. C. No OPRA exemptions were cited by NJIT in its cover letters accompanying those productions. *See id.*

In June 2016 the FBI stated that, as part of its continuing consultation to NJIT, it would also review those records that the FBI had originally asserted were not subject to OPRA; the parties again agreed that those records would be released to Plaintiffs by NJIT following their review by the FBI. *See* Joint Status Report, ECF No. 27, at 2–3. Between August 2016 and the beginning of November 2016, NJIT made four additional productions of records to Plaintiffs. *See* Joint Status Report, ECF No. 29. Once again, no OPRA exemptions were cited by NJIT in its cover letters. *See* Townsend Decl. Ex. D. In total, Plaintiffs received approximately 3,445 unredacted and 379 partially redacted pages of records responsive to their OPRA Requests from NJIT after filing this lawsuit. Joint Status Report, ECF No. 29, at 2.

Following NJIT's November 2016 production, as a result of meet and confer discussions, "[i]n an attempt to obviate the need for judicial review, or at least narrow the issues for review, the FBI and NJIT [] agreed to provide Plaintiffs with additional information regarding the documents being withheld in full, as well as a limited number of documents being withheld in part." *Id.* Plaintiffs received that information on December 9, 2016. *See* Joint Status Report, ECF No. 32, at 2. Plaintiffs thereafter "provid[ed] NJIT and the FBI with a list of specific documents

withheld in part and in full that they [] asked to be revisited." *Id.* In response to that request, on February 17, Plaintiffs were given additional records responsive to the OPRA Requests and additional information regarding the specific withholdings they had identified. Joint Status Report, ECF No. 34, at 3. Upon review of the records and information provided, in light of the publication deadlines for Mr. Golden's book, Plaintiffs informed the parties that they would not seek judicial review of the remaining withholdings. Joint Status Report, ECF No. 34.

Thereafter, the Magistrate Judge held several status conferences and ordered the parties to submit a series of filings addressing issues related to Plaintiffs' entitlement to attorneys' fees.[3] Following the submission of pre-motion leave letters by the parties, the Magistrate Judge ordered Plaintiffs to file their motion for

[3] Plaintiffs object to the Report's statement that "approximately one-third of the total hours for which plaintiffs seek an award of fees was time spent drafting this fee motion." Report at 9. The hours referenced in Plaintiffs' brief in support of their motion for attorneys' fees, ECF No. 53-1 at 28, were not spent solely on drafting Plaintiffs' fee motion. Those hours include Plaintiffs' attorneys' time spent drafting and responding to pre-motion letter briefing ordered by the Magistrate Judge, as well preparing for and participating in status conferences, all of which related to Plaintiffs' anticipated motion for attorneys' fees, and NJIT's opposition thereto. Among other things, Plaintiffs' counsel participated in a telephonic conference on April 18, 2017, drafted a pre-motion leave letter detailing the "basis for [Plaintiffs'] proposed [attorneys' fees] motion," ECF No. 36, drafted a reply to NJIT's response to that letter, ECF Nos. 28 & 40, and participated in telephonic conferences on May 24, 2017, July 5, 2017, and September 26, 2017. *See* ECF Nos. 42 & 46; Decl. of Katie Townsend, ECF No. 53-3, at Ex. B.

attorneys' fees against NJIT, who opposed it.[4] Following a hearing on March 5, 2018, the Magistrate Judge issued the Report. ECF No. 61.

STANDARD OF REVIEW

This Court must review "de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). *See also* L.Civ.R. 72.1(c)(2) (stating same standard); 28 U.S.C.§ 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011) ("the standard district courts should apply to such objections is de novo."). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

[4] Plaintiffs object to the Report's citation to "Stipulated Facts" provided by NJIT that were apparently agreed to by NJIT and the FBI. A stipulation is binding only upon those parties "who in fact assented to it." *Kneeland v. Luce*, 141 U.S. 437, 440 (1891); *see also Naughton v. Harmelech*, No. CIV. 2:09-05450, 2013 WL 5604344, at *3 (D.N.J. Oct. 11, 2013) (noting that a stipulation is valid "if it is entered into" and approved by the Court. Here, NJIT filed a document titled "Stipulated Facts" with its opposition to Plaintiffs' motion for attorneys' fees. See ECF. No. 54-2. The purported "facts" set forth therein appear to have been stipulated to by NJIT and the FBI, see ECF No. 54-2 at 1, both of whom have an active dispute over who should pay Plaintiffs' attorneys' fees in this case and, thus, had a shared interest in opposing Plaintiffs' motion. Plaintiffs, however, did not agree to those "Stipulated Facts." *See id*. Accordingly, they should be disregarded for purposes of ruling on Plaintiffs' motion for attorneys' fees.

ARGUMENT[5]

I. The Report misinterprets and misapplies the "catalyst theory" recognized by the New Jersey Supreme Court.

Under OPRA, a person denied access to a government record by the custodian of that record may bring an action challenging that decision, and a "requester who prevails in any [such] proceeding *shall* be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6 (emphasis added). OPRA thus "mandate[s], rather than permit[s], an award of attorney's fees to a prevailing party[.]" *Mason*, 196 N.J. at 75. The Act "does not restrict fee-shifting to instances of willful violations. Rather, '[a] requestor who prevails in *any* proceeding *shall be entitled to* a reasonable attorney's fee.'" *Smith v. Hudson Cty. Register*, 422 N.J. Super. 387, 398 (App. Div. 2011) (alterations and emphasis in original, citation omitted)).

Moreover, a requester need not secure a judicial order requiring the release of records to be entitled to fees under OPRA. Under the "catalyst theory" recognized by the New Jersey Supreme Court, a plaintiff need only show "(1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law." *Mason*, 196 N.J. at 76

[5] While the Court "need not . . . conduct a new hearing" with respect to objections to a Magistrate Judge's report, L.Civ.R. 72.1(c)(2), Plaintiffs believe oral argument would be beneficial in this matter.

(internal quotations and citation omitted). Here, the Report erroneously concludes that Plaintiffs' did not satisfy the first prong of that test. *See* Report at 13–20.[6]

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

The Report correctly states that "NJIT asserted OPRA exemptions in response to plaintiffs' three OPRA requests[.]"[7] The Reports' conclusion, however, that "[r]egardless of its reason for asserting these exemptions, NJIT never withdrew them, either formally or informally[,]" and that "NJIT's assertion of OPRA exemptions on behalf of the FBI was unaffected and unchanged by plaintiffs' filing of this lawsuit" is clearly erroneous. Report at 14.

The record in this case is clear that Plaintiffs properly made OPRA requests to NJIT—the custodian of the records sought by Plaintiffs. *See*, *e.g.*, Golden Compl.; Cert. of Def. Clara Williams in Opp. to Pls.' Order to Show Cause, ECF No. 53-3 at Ex. E to Ex. 2. The record is also clear that prior to the filing of Plaintiffs' lawsuit, NJIT largely denied Plaintiffs' First Request, and denied Plaintiffs' Second and Third Requests in their entirety, on the basis of certain specified OPRA exemptions that NJIT asserted, at the time, applied. Report at 5; Golden Compl., Background & Factual Allegations ¶¶ 4–23; NJIT Ans., Background & Factual

[6] As the Report correctly notes, NJIT "conced[ed] that the second prong is met." Report at 11.
[7] Report at 14; *accord* Golden Compl. ¶¶ 7–8, 12–16, 17–23, & Ex. B.

Allegations ¶¶ 4–23.[8]

However, after this lawsuit was filed, and its Third-Party Complaint against the FBI for indemnification was pending, NJIT agreed to a new process whereby the FBI, acting as a "consult[ant]" to NJIT, Joint Status Report, ECF No. 24 at 2, would re-review records responsive to Plaintiffs' OPRA Requests and make recommendations to NJIT as to what the FBI believed should be released to Plaintiffs.[9] As a result of that process, NJIT produced approximately four thousand

[8] Contrary to the Report, the record makes clear that the decision to assert those OPRA exemptions was made by NJIT—not the FBI. *Compare* Report at 14 *with* Cert. of Def. Clara Williams in Opp. to Pls.' Order to Show Cause ¶¶ 37, 46, 53, ECF No. 53-3 at Ex. E to Ex. 2 (stating, *inter alia*, "I prepared a letter response to the First Request, dated May 29, 2015, in which *I 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." (emphasis added)). The Report's conclusion that NJIT asserted OPRA exemptions "on behalf of" the FBI, Report at 14, is not supported by the material cited in the Report. NJIT's third-party complaint discussed the FBI's assertion of federal Freedom of Information Act and Privacy Act exemptions—not OPRA exemptions, *see* ECF No. 2 at ECF p. 16–17, and nowhere in the FBI's Counterclaim against NJIT does the FBI state that it told NJIT to assert OPRA exemptions, *see* ECF No. 23. The Court appears to base its conclusion entirely on a misstatement by Plaintiffs' counsel at the hearing on Plaintiffs' motion for attorneys' fees. *See* Townsend Dec. Ex. C at p. 5–7. Plaintiffs do not contest that the FBI told NJIT to withhold certain records requested by Plaintiffs, *see* ECF 1-1 at Ex. C (ECF p. 29), but there is nothing in the record to suggest that the FBI told NJIT to assert OPRA exemptions, or that NJIT did so on the FBI's "behalf."

[9] Plaintiffs object to the portion of the Report that states: "Following a series of Court conferences . . . the parties jointly requested a stay of the litigation to allow the FBI time to review the records in its possession that were responsive to plaintiffs' OPRA requests, make necessary redactions, and release non-exempt, responsive records. ECF Nos. 24, 25." Report at 8. The Joint Status Report cited in the Report makes explicitly clear that the parties understood the FBI's role to be that of a "consult[ant]"

pages of records it had previously withheld in full in response to Plaintiffs' Second Request and Third Request. *See* Joint Status Report, ECF No. 29, at 2. NJIT produced those records without reference to any OPRA exemption. *See* Exs. C & D to Declaration of Katie Townsend In Support of Plaintiffs' Motion for Attorneys' Fees, ECF No. 52-3 (ECF pages 37–63) (cover letters accompanying productions of responsive records to Plaintiffs from NJIT).[10]

It is impossible to accurately characterize NJIT's pre-litigation denial of Plaintiffs' requests for records on the basis of OPRA exemptions followed, once in litigation, by NJIT's production of the vast majority of those records as anything other than a "withdr[awal of OPRA exemptions], either formally or informally." Report at 14. NJIT's decision to abandon its previous reliance on OPRA exemptions by releasing thousands of pages of records it had previously withheld on the basis of those exemptions was a clear change in NJIT's position that was brought about by Plaintiffs' lawsuit. *See Mason*, 196 N.J. at 76.

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to NJIT: "[t]he FBI informed the parties that it plans to treat the remaining 2,000 pages *as a request to consult* from NJIT[,]" and that "[a]fter applying redactions the FBI will then *send the documents back to NJIT*." *Id.* (emphasis added). In other words, the parties' agreement was not that the FBI would "release non-exempt, responsive records[,]" Report at 8, but that the FBI would review and provide recommendations to NJIT, who would ultimately be responsible for releasing records to Plaintiffs, and for justifying any withholdings.

[10] Plaintiffs are willing to submit copies of any and all of the records produced by NJIT as a result of this litigation at the Court's request.

In short, the Report incorrectly concludes that because "[r]ecords were produced as a result of the FBI's review process, which was agreed to by all parties[,] there was no change in NJIT's position, just in that of the FBI[,]" Report at 15. That NJIT agreed, only after this lawsuit was filed, to a process by which the FBI would "consult[]" with it and provide "recommend[ations]"[11] regarding what records the FBI believed NJIT should and should not release to Plaintiffs, resulting in the release of thousands of pages of records NJIT had previously refused to produce, demonstrates that Plaintiffs' lawsuit "brought about change (voluntary or otherwise) in the custodian's conduct." *Spectraserv, Inc. v. Middlesex Cty. Utilities Auth.*, 416 N.J. Super. 565, 583 (App. Div. 2010).

The facts here are closely analogous to those in *K.L. v. Evesham Township Board. of Education.*, 423 N.J. Super. 337 (App. Div. 2011), which the Report mistakenly gives short shrift. In *K.L.*, the Appellate Division found that the first

[11] Plaintiffs object to the Report's assertion that "[o]ver the course of several months, the FBI continued to review the records, identifying which records and portions of records NJIT *could* release." Report at 8–9 (emphasis added). That assertion is directly contradicted by the record in this case, as the letters from the FBI to NJIT clearly state that the FBI provided "recommend[ations]"—not commands. The letters from the FBI state: "This letter and attached CD is [sic] in response to your request for the FBI's review of records responsive to the above-identified litigation. After reviewing the information, *we recommend that* . . . ." Declaration of Katie Townsend In Support of Plaintiffs' Motion for Attorneys' Fees, ECF No. 52-3, at Exs. C & D (pages 37–63) (emphasis added). Thus, the letters from the FBI to NJIT did not state what records "could" be released, Report at 9, but rather what the FBI "recommend[ed]." *Id.*

prong of the catalyst theory was satisfied when, after a requester filed suit, the responding government agency conferred with a third party who it believed had an interest in the requested record, and released a redacted record to the requester after confirming that the third party had no objection to its release. *See* 423 N.J. Super. at 347. The Report calls Plaintiffs' reliance on *K.L.* "misplaced" because in *K.L.* the court had conducted an *in camera* review of the requested record, Report at 15. Yet there is nothing in the Appellate Division's opinion to suggest that the court ordered release of the record following that *in camera* review; indeed, had the court done so, reliance on the catalyst theory would have been unnecessary. In *K.L.*, as here, there was a causal nexus between the filing of the requester's lawsuit and "the relief ultimately achieved[.]" *Mason*, 196 N.J. at 76.

B. The Report fails to apply the correct legal test for determining whether the first prong of the catalyst theory is satisfied; under New Jersey law, the relevant inquiry is whether Plaintiffs' lawsuit resulted in the "production of requested records."

In any event, even assuming, *arguendo*, that the Report is correct that NJIT's position did not change because of Plaintiffs' litigation—which it is not—the Report still erred in concluding that Plaintiffs are not entitled to recover fees under OPRA. Plaintiffs' litigation was the catalyst for the "relief [they] ultimately achieved": the release of thousands of pages of records previously withheld by NJIT. *Mason*, 196 N.J. at 76. Accordingly, under the New Jersey Supreme Court's decision in *Mason*, the first prong of the catalyst theory is satisfied. The Magistrate Judge's analysis,

which erroneously focuses exclusively on whether Plaintiff's lawsuit caused the records custodian (here, NJIT) to alter its position, is in direct conflict with the holding of New Jersey's highest court on an issue of New Jersey state law. *See* 196 N.J. at 76; *see also State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F.3d 710, 716 (3d Cir. 2000) ("as a federal court sitting in diversity, our task is to apply state law and not to form it . . .").

In *Mason*, the New Jersey Supreme Court set forth the following two-prong test for determining whether a requester is a prevailing party entitled to attorneys' fees under the catalyst theory:

> We therefore hold that requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate: (1) "a factual causal nexus between plaintiff's litigation *and the relief ultimately achieved*"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law."

Mason, 196 N.J. at 76 (citation omitted, emphasis added). The Court in *Mason* further describes the catalyst theory as "empower[ing] courts to award fees when the requestor can establish a 'causal nexus' between the litigation *and the production of requested records*." *Id.* at 79 (emphasis added).

Here, there is no dispute that Plaintiffs' filing of this lawsuit caused the production of requested records—records that would not have been produced but for this litigation. Regardless of whether Plaintiffs' lawsuit caused a change in NJIT's

position or just the FBI's position, as the Magistrate Judge found,[12] or changed the position of both agencies, that change was spurred by Plaintiffs' litigation and resulted in the "production of requested records." *Id.* at 79. Plaintiffs are, accordingly, the prevailing party under the catalyst theory.

The Report ignores the plain language of *Mason* to conclude that "the catalyst analysis here focuses *solely on defendant NJIT's conduct* as records custodian under OPRA." Report at 15 n.5 (emphasis added). As *Mason* clearly states, the relevant inquiry is not "solely" the conduct of the records custodian; the relevant inquiry is whether there is a "'causal nexus' between the litigation and the production of requested records." 196 N.J. at 79. The Report thus misconstrues the applicable test established by the New Jersey Supreme Court.

To be sure, in *Mason* and in other decisions, New Jersey courts have considered the conduct of the records custodian in determining whether the requisite "causal nexus" between the litigation and the release of requested records has been shown. *See*, *e.g.*, *Mason*, 196 N.J. at 79; *Grieco v. Borough of Haddon Heights*, 449 N.J. Super. 513 (Law. Div. 2015); *North Jersey Media Grp. Inc. v. State, Dep't of Law & Pub. Safety*, No. A-5833-13T4, 2016 WL 4216664 (N.J. Super. Ct. App. Div. Aug. 11, 2016). Yet, unlike here, those cases did not involve a third-party from

[12] The Report states that "[t]he production of the records was a post-lawsuit change in the *FBI's* position to be certain." Report at 15 n. 5 (emphasis in original).

which the custodian of records was purporting to take direction. Thus, to the extent that those cases discuss the conduct of the custodian of records (and do not consider the conduct of any third party) it is because there was no third party to discuss.

Put simply, under *Mason*, the conduct of NJIT is simply one among a number of factors that may be considered by the court when determining the dispositive question: whether there is "a factual causal nexus between plaintiff's litigation and the *relief ultimately achieved*." *Mason*, 196 N.J. at 76. The Report's conclusion that the "sole[]" inquiry is whether NJIT, the records custodian, changed its conduct is erroneous as a matter of law. *Compare* Report at 15 n.5 *with Mason*, 196 N.J. at 79. Because Plaintiffs' lawsuit caused the release of records—even if through a change in the FBI's position—Plaintiffs are entitled to attorneys' fees.

II. The Report erroneously denies Plaintiffs' motion for attorneys' fees on the basis of what the Magistrate Judge incorrectly determined were NJIT's "motivations" for and the "reasonableness" of its actions.

A. The record makes clear that NJIT's actions were motivated primarily, if not entirely, by avoiding an attorneys' fee award for violating OPRA, not by a desire to comply with the Act.

The Report cites several cases in which a requester was found to have not satisfied the catalyst theory, all of which involve situations where—unlike here—the custodian of records acknowledged, before any lawsuit was filed, that it was required to produce the requested records under OPRA, and was in the process of doing so when litigation began. In *Mason*, for example, the first prong of the catalyst

theory was not satisfied as to one request because the custodian of records had "agreed to plaintiff's request *before she even filed suit*[.]" 196 N.J. at 81 (emphasis added). Similarly, the *Mason* court concluded that the first prong was not satisfied as to a second request because the agency responded a mere one day beyond the statutory limit, and the mother of one of the defendants "was critically ill and suffered a massive and ultimately fatal heart attack during the relevant time frame, which complicated [their] efforts to respond." *Id.* at 80. In other words, in *Mason*, the agency did not deny access; the record showed that it was motivated by a good faith desire to comply with its obligations under the Act.

Similarly, in *Spectraserv*, "[f]rom the very inception, in its initial response . . . the [agency] *acknowledged its obligation to produce non-exempt documents* and, in fact, made many of these documents available for inspection in advance of any court intervention or directive." 416 N.J. Super. at 584.[13] The agency even offered to coordinate its production of records under OPRA with its discovery responses in the requester's separate lawsuit. *See id.* And, when a third party whom the agency believed had an interest in disclosure of the records declined to intervene to assert those interests, the agency *produced* the records to the requester: "as soon as its

[13] Attorneys' fees were also denied *Spectraserv* because the request was "overly broad and generalized and therefore improper under OPRA," *id.* at 578. That issue is not present here. *See* Report at 11 (NJIT "conced[ed] that the second prong [of the catalyst theory] is met.").

licensor withdrew its objection by failing to intervene, the MCUA made available all 1848 documents once considered confidential." *Id.*

Here, in contrast, NJIT flatly denied Plaintiffs access to requested records before this lawsuit was filed. Indeed, NJIT's pre-litigation position was clear—it was denying Plaintiffs' OPRA Requests, including the Second Request and Third Request in their entirety, and had no intention, whatsoever, of producing responsive records. *See* Golden Compl., Background & Factual Allegations, ¶¶ 4–23 & Exs. B, E, G. After this lawsuit was filed, the record makes clear that NJIT became primarily motivated by a desire to avoid having to pay an award of attorneys' fees under OPRA's mandatory fee-shifting provision as a result of its pre-litigation refusal to comply with OPRA. *See*, *e.g.*, Decl. of Katie Townsend In Support of Pls.' Objections to the Magistrate Judge's Report and Recommendation, Ex. A at 20:1–3 (NJIT's counsel stating at hearing on order to show cause that "the only reason that I standup [sic] to say that is because at some point there may be an application for fees"); Letter from Gary Potters to Judge Wettre, Dec. 17, 2015, ECF No. 5 (stating "it remains critically important for NJIT and Williams to obtain responses to these Admissions[]" because "[u]nder OPRA, a public entity to whom the request is directed may be assessed a sanction in the form of attorneys' fees and costs.").

Indeed, while the Report relies heavily on *Spectraserv* in recommending that Plaintiffs' motion for attorneys' fees be denied, in that case, once the third party

whom the agency believed had an interest in disclosure of the records declined to intervene to assert those interests, *the agency released the records*. 416 N.J. Super. at 584. Here, when the FBI declined to intervene, NJIT: (1) continued to withhold the requested records and (2) sued the FBI for indemnification to avoid paying Plaintiffs' attorneys' fees. *See* NJIT Ans., ECF No. 2, at ECF p. 16–20 (third-party complaint against the FBI stating, *inter alia*, at ¶ 16 that "NJIT seeks to be indemnified and made whole by the FBI for (1) any adverse exposure NJIT confronts under the OPRA statute from and against any adverse judicial determination on the propriety of the redactions and exemptions . . . ."). At no point has NJIT demonstrated that it was "motivated" by anything other than a desire to avoid responsibility for its handling of Plaintiffs' OPRA Requests.

B. The Report wrongly concludes that NJIT acted "reasonably."

As Plaintiffs have consistently stated throughout this litigation, NJIT was free to consult with whomever it chose before responding to Plaintiffs' OPRA requests, including its counsel, the FBI, or any other third party it believed to have an interest in the records' disclosure. The fact that NJIT sought the FBI's advice or assistance is not what rendered its conduct unreasonable. It was NJIT's attempted abandonment of *its* statutory obligations under OPRA that rendered its conduct unreasonable. It is contrary to the New Jersey Legislature's clear commands regarding the responsibilities of a records custodian to permit a New Jersey

government entity to completely outsource its obligations in connection with an OPRA request to a third party. *See*, *e.g.*, N.J.S.A. § 47:1A-5–6.[14] NJIT's attempt to do so cannot be deemed "reasonable."

The Appellate Division's decision in *Courier News*, which involved an OPRA request for a recording of a 9-1-1 call in the possession of a local county prosecutor's office (the "County"), is instructive. *See* 378 N.J. Super. at 541. In that case, after determining that the record at issue was improperly withheld, the Appellate Division remanded the case to the trial court to address the issue of attorneys' fees. *See id.* On remand, the County joined the State, contending that the State was responsible for some or all of the attorneys' fees due to the requestor under the theory that the County was performing a state law enforcement function when it denied access to the recording. *See id.* The trial court agreed. *See id.* The Appellate Division

[14] Stating, *inter alia*: "The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours;" "Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person;" "A custodian shall permit access to a government record and provide a copy thereof in the medium requested . . ."; "A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record[;]" "Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record[;]" "The requestor shall be advised by the custodian when the record can be made available[;]" "A person who is denied access to a government record by the custodian of the record at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ."

reversed, holding that that the County—not the State—was responsible for requesters' attorneys' fees because it was the custodian of the requested recording. *Id.* at 545–46. Looking to the many provisions of OPRA that emphasize the responsibilities of records custodians, the Court held that because the County "was the custodian of the [record . . . it] assumed administrative responsibility to safeguard [the record] the minute it took custody of it." *Id.* at 546. Thus, the County's duty to pay the prevailing requesters' attorneys' fees was found to "flow exclusively from the provisions of OPRA[.]" *Id*.

Paff v. West Deptford Township, is likewise instructive. *See* No. A-3195-08T2, 2010 WL 546587 (N.J. Super. Ct. App. Div., Feb. 18, 2010) ("*Paff*"). In that case, the plaintiff sought records under OPRA relating to a federal lawsuit involving West Deptford Township that had resulted in a settlement. *See id.* at *1. The Township denied access to the requested records "because they were subject to a discovery confidentiality order entered in the federal lawsuit." *Id.* The requester filed suit and the trial court ordered the Township to disclose the records and to pay the requestor's attorneys' fees and costs. *Id.* On appeal, the Township argued that it should not have to pay the requester's attorneys' fees because it had entered into a confidentiality agreement in the federal court litigation that prohibited it from releasing the records at issue. *See id.* The Appellate Division affirmed the award of attorneys' fees and costs. *Id.* at *2. In doing so, it flatly rejected the notion that a

public agency can circumvent the requirements of OPRA—including OPRA's mandatory fee provision—in such a manner:

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

Id. The Appellate Division's decision in *Paff* makes abundantly clear that a relationship between a public agency and a third party that has an interest in the agency's records in no way relieves the agency's obligations to comply with OPRA. *See id*. Under OPRA it is the custodian of a requested government record that is responsible for providing access to it, and it is the public agency's burden to show that any denial of access is authorized by law. N.J.S.A. 47:1A-5–6.

Analogous situations also arise in the context of the federal Freedom of Information Act and its Exemption 4, which concerns trade secrets and commercial or financial information. *See* 5 U.S.C. § 552(b)(4). Federal agencies are often not in the best position to determine whether records they possess contain third-party trade secrets or valuable commercial or financial information. Accordingly, pursuant to Executive Order 12600 agencies will notify the third party who does have that knowledge and give it an opportunity to submit its recommendation as to which records should be withheld under Exemption 4. *See* Executive Order 12600,

52 Fed. Reg. 23781 (Jun. 25, 1987). However, federal courts have made it abundantly clear that this process does not obviate an agency's obligation to make an independent evaluation of whether material is actually covered by Exemption 4.

In *Lee v. F.D.I.C.*, for example, the U.S. District Court for the Southern District of New York rejected the Office of Comptroller of the Currency's ("OCC's") reliance on a confidentiality recommendation provided to it by Chase Manhattan Bank:

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

923 F. Supp. 451, 454–55 (S.D.N.Y. 1996) (emphasis added). The U.S. District Court for the District of Columbia has similarly noted that agencies bear "the burden of showing that the withheld information qualifies for an exemption from disclosure," and must make an "*independent* determination" as to whether information identified by a third party is "entitled to an exemption under Exemption 4." *Nw. Coal. for Alternatives to Pesticides v. E.P.A.*, 254 F. Supp. 2d 125, 131 (D.D.C. 2003) (emphasis added).

Here, NJIT failed to exercise any independent judgement, whatsoever, in denying Plaintiffs access to requested records, rendering NJIT's conduct patently

unreasonable. The unreasonableness of NJIT's conduct is clearly shown by its response to Plaintiffs' Second Request and Third Request, which were denied *in their entirety*. The wholesale denial of those requests included denying access to:

1. Records *already released* to Plaintiffs in response to their First Request, *see* Golden Compl., Backround and Factual Allegations, ¶¶ 12–23 & NJIT Ans. ¶¶ 17–23;
2. An e-mail from a dean at NJIT to an FBI Special Agent forwarding the full text of an article *written by Plaintiff Golden*, Second Townsend Decl., ECF No. 55-1, at Ex. B;
3. An e-mail and attachment from an FBI special agent, where the attachment was a report from the American Academy of Arts & Sciences that is publicly available on the Internet. *Compare id.* at Ex. D *with* http://amacad.org/multimedia/pdfs/publications/researchpapersmonographs/insiderThreats.pdf;
4. A public statement and report delivered by then-Director of National Intelligence James Clapper to the Senate Select Committee on Intelligence on March 12, 2013. *See* Second Townsend Decl., ECF No. 55-1, at Ex. E. That statement and report were published online by both the Senate[15] and

15 https://www.intelligence.senate.gov/sites/default/files/hearings/clapper%20%283%29.pdf

the Director of National Intelligence[16];

5. An e-mail and attachment from the FBI that states: "This product is UNCLASSIFIED, so *please disseminate liberally*." (emphasis added). Decl. of Katie Townsend In Support of Pls.' Objections to the Magistrate Judge's Report and Recommendation, at Ex. B.

The Report fails to address how it was "reasonable" for a New Jersey public agency to deny access to records so obviously *not* within the scope of any OPRA exemption.

The reflexive and unthinking secrecy evidenced in NJIT's response to Plaintiffs' Second Request and Third Request is precisely the opposite type of behavior that should be encouraged by this Court. *See Mason*, 196 N.J. at 65 ("any limitations on the right of access . . . shall be construed in favor of the public's right of access." (citing N.J.S.A. 47:1A-1)). Indeed, the Magistrate Judge's conclusion that requiring NJIT to exercise its own independent judgement (informed by the FBI's recommendations) to determine which records to produce in response to Plaintiffs' requests "would not be consistent with OPRA[,]" Report at 17, was squarely rejected by the Appellate Division in *Collingswood Board. of Education. v. McLoughlin*. *See* No. A-2475-14T1, 2016 WL 6134926 (N.J. Super. Ct. App. Div. Oct. 21, 2016) ("*McLoughlin*"). In that case, a New Jersey public agency

16 https://www.dni.gov/files/documents/Intelligence%20Reports/2013%20ATA%20SFR%20for%20SSCI%2012%20Mar%202013.pdf

brought an affirmative declaratory relief action after a third party threatened to sue the agency if it released records requested under OPRA by two reporters. *See id.* The agency filed an affirmative action against both the media requesters and the third party, asserting that "releasing the document may expose it 'to potential litigation and damages' from [the third party], and a 'failure to release the [report]' could expose it to the same risk from the media requestors." *Id.* at *1 (second alteration in original). The Appellate Division rejected the agency's argument, explaining that

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

Id. at *3 (emphasis added).

In sum, the Magistrate Judge's agreement with NJIT that it should be relieved of any statutory obligation under OPRA to pay Plaintiffs' attorneys' fees because it faced a supposed "Hobson's choice," Report at 7, is incompatible with New Jersey law; making such a "choice" is exactly the type of "judgment call" that the Act requires NJIT to make. *McLoughlin*, 2016 WL 6134926, at *3.

Further, in any event, it was improper for the Magistrate Judge to supplant the central inquiry under the catalyst theory as recognized by the New Jersey Supreme Court—whether the litigation was the catalyst for the "relief ultimately achieved[,]"

Mason, 196 N.J. at 76—with an analysis of NJIT's "reasonableness." As discussed above, the Report's "sole[]" focus on NJIT's conduct was erroneous. As a matter of law, the Magistrate Judge gave undue weight to her belief that "NJIT's conduct as custodian in this difficult situation was reasonable." Report at 18; *cf. McLoughlin*, 2016 WL 6134926, at *3; *Smith*, 422 N.J. Super. at 398 (noting the willfulness of a violation of OPRA or lack thereof is irrelevant for the purposes of the Act's mandatory fee-shifting provision).

III. If adopted, the Report will have effects far beyond this case, discouraging parties from resolving disputes once in litigation, and providing a roadmap for New Jersey agencies to avoid their obligations under OPRA.

A. The Report, if adopted, will discourage future requesters from attempting to informally resolve disputed legal issues once in litigation.

As the Report correctly recognizes, a requester is entitled to attorneys' fees if their request is fulfilled pursuant to a settlement reached in the course of litigation. *See* Report at 12 (citing *Schmidt v. City of Gloucester City*, 2012 WL 3064254 (App. Div. July 30, 2012); *see also Mason*, 196 N.J. at 74 ("A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters."); *Teeters v. Div. of Youth & Family Servs.*, 387 N.J. Super. 423 (App. Div. 2006) (holding requester was a prevailing party under catalyst theory entitled to attorneys' fees when she entered into a partial settlement agreement with the agency during litigation). As the Appellate Division has explained, there is a "strong public policy

of [New Jersey] favoring settlements. A result that places a claimant in a distinctly worse position economically if she settles than she would be by carrying the matter to a successful litigation conclusion disserves that policy." *Id.* at 432 (internal and other citations omitted).

Notwithstanding this clear public policy, however, the Report penalizes Plaintiffs for (1) agreeing, in the course of this litigation, to the "consult[ation]" and review process proposed by NJIT and the FBI, in order to get records responsive to the Requests as quickly as possible, and (2) agreeing, after receiving thousands of pages of responsive records, and informally obtaining additional relief as to certain redactions Plaintiffs viewed as critical, not to challenge the remaining redactions and withholdings. *See* Report at 15–16 ("here, the production of documents post-lawsuit was unrelated to any action taken by the Court[]"); *id.* at 17 ("plaintiffs determined not to challenge the FBI's remaining redactions and withholdings, having obtained through this process information that Golden was able to use in his book[]").

Certainly, Plaintiffs could have refused to do either of these things; they could have insisted that the parties brief all disputed legal issues. Doing so, however, would have increased costs and attorneys' fees, required additional party and court resources, and further delayed release of the records Plaintiffs sought. By unfairly penalizing Plaintiffs for being willing to compromise and informally reaching agreement as to certain disputed legal issues after this lawsuit was filed, the Report

will undoubtedly discourage future requesters from doing so, in contravention of New Jersey's clear public policy of promoting settlement during the course of litigation. *See Teeters*, 387 N.J. Super. at 432.

B. The Report creates a loophole in OPRA that will have a damaging effect on the public's right to know.

The Report provides a roadmap for New Jersey agencies to avoid what New Jersey's Legislature intended to be a "mandatory" attorneys' fee provision, thus undermining legislative intent and fundamentally altering state law. Indeed, the uncertainty that the Report recommends this Court inject into the application of OPRA's mandatory fee-shifting provision will almost certainly dissuade future requestors from pursuing meritorious OPRA litigation in the future.

OPRA's fee-shifting provision serves the Act's underlying purpose of promoting openness. The New Jersey Legislature determined that a fee-recovery provision is necessary because records requesters, including members of the news media like Mr. Golden, often do not have the resources to engage in protracted litigation against the government. As the Appellate Division explained in *Courier News* (and the New Jersey Supreme Court later reiterated in *New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr.*, 185 N.J. 137, 153 (2005)), OPRA's mandatory fee-shifting provision serves as a "vital means of fulfilling" the State's commitment to open government; without it:

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

378 N.J. Super. at 546.

The Report, if adopted, will provide a blueprint for agencies to avoid OPRA's fee-shifting provision entirely, leaving even successful requestors (like Plaintiffs) unable to recover any of their attorneys' fees in litigation they are forced to bring to obtain requested records. By the Report's reasoning, a records custodian can avoid an award of attorneys' fees whenever it receives a request for records that might implicate third-party interests simply by (1) contacting the third party, and (2) doing whatever that third party instructs it to do, no questions asked. *See* Report at 1–2 (concluding that "[b]ecause NJIT's position that it would follow the FBI's directives as to what documents could be produced remained unchanged from the first OPRA request to the conclusion of this lawsuit" the "requisite causal nexus between this lawsuit and the documents obtained by plaintiffs needed to deem plaintiffs prevailing parties under OPRA is absent[]").

As Plaintiffs' counsel argued at the hearing on Plaintiffs' motion for an award of attorneys' fees, the implications of such a ruling are profound. *See* Decl. of Katie Townsend In Support of Pls.' Objections to the Magistrate Judge's Report and Recommendation, Ex. B, at 17:20–18:4 (providing hypothetical of an OPRA request

to NJIT for communications between it and the Department of Education). And faced with uncertainty as to whether even a clearly meritorious OPRA lawsuit would be found to be ineligible for an attorneys' fee award under OPRA's mandatory fee-shifting provision after many months of argument and briefing as to the requester's entitlement to fees, the "ordinary citizen" will be unlikely to file, and lawyers may hesitate to take, OPRA cases seeking access to records that in any way could be construed as implicating third-party interests. Such a result would be contrary to both the intent of the Legislature in enacting a mandatory fee-shifting provision and the catalyst theory set forth by New Jersey's Supreme Court.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court reject the Report's findings and recommendations.

Dated: May 9, 2018.

Respectfully submitted,

/s/ Bruce S. Rosen

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CERTIFICATE OF SERVICE

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

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This 9th day of May, 2018.

/s/ Bruce S. Rosen