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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL GOLDEN and TRACY LOCKE,	:	Civil Action No. 2:15-cv-8559-MCA-LDW
	:	
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,	:	
	:	
v.	:	
	:	
FEDERAL BUREAU OF INVESTIGATION,	:	
	:	
Third-Party Defendant.	:	
	:	

DEFENDANTS NEW JERSEY INSTITUTE OF TECHNOLOGY AND CLARA WILLIAMS'
BRIEF IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE DENYING PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES

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PRELIMINARY STATEMENT

Magistrate Judge Wettre's Report and Recommendation held there was no causal nexus between plaintiffs' lawsuit and the conduct of defendants NJIT and its records custodian Clara Williams (collectively, "NJIT") and therefore no attorneys' fees under OPRA could be awarded. This holding remains correct because what began as a simple request for records morphed into a complex matter involving directives from the Federal Bureau of Investigation ("FBI") expressly prohibiting dissemination by NJIT based on the FBI's position that such records constituted property of the United States of America, the confidential and privileged nature of which prohibited disclosure. The FBI assumed total control of the OPRA process, while NJIT was subjugated to the FBI. Indeed, the FBI through stipulated facts has admitted to its overriding role in this action as the entity which reviewed, redacted, and produced documents to the plaintiffs pursuant to their OPRA requests. As such, there can be no causal nexus between plaintiffs' OPRA action and the production of documents such that NJIT is liable for any attorneys' fees in this matter. The FBI's interest in the confidentiality of the documents in fact precluded NJIT from producing the very documents the FBI initially instructed NJIT to withhold from production and for which the FBI went so far as to seek before this Court both injunctive and declaratory relief precluding NJIT from releasing any documents. Plaintiffs' appeal fails to acknowledge and address this relief sought by the FBI, which precluded NJIT from taking the very action Plaintiffs' counsel has repeatedly, though incorrectly, argued was available to NJIT, which was to ignore the FBI and produce the documents.

Despite numerous opportunities to file a FOIA request for the very documents at issue and for which fees are recoverable against the FBI, plaintiffs refused to do so, both on receipt of the FBI's May 27, 2015, correspondence advising plaintiffs to issue a FOIA request and also at

the first Court appearance in this matter before the Superior Court of New Jersey wherein Judge Stephanie Mitterhoff, J.S.C., asked plaintiffs' counsel directly why no FOIA request was issued. No substantive response was provided. And, for reasons remaining unknown, after this matter was removed to Federal Court by the FBI and plaintiffs were possessed of facts confirming the representations made by NJIT's counsel to the effect the FBI remained in complete control over the subject matter documents, plaintiffs remained steadfast in their refusal to name the FBI as a direct party defendant, despite knowing the initial document review and the post-commencement of litigation re-review of the documents was done solely by the FBI. These critically important facts were overlooked entirely by Plaintiffs in their appeal.

The oft-repeated mantra of Plaintiffs on this appeal that NJIT was the records custodian, made independent decisions to withhold documents, participated in the review and subsequent second review and actually made productions of documents, as in made the determination of what to withhold and what to produce, remains 100% expressly contradicted by the Stipulated Facts. That this Stipulation presents an inconvenient truth does not excuse Plaintiffs' counsel from attempting to rely on her own submissions as somehow constituting the facts of what transpired between NJIT and the FBI. The misstatements and erroneous characterizations of the actual facts are legion in plaintiffs' most recent submission and really are more of the same that were asserted by plaintiffs' counsel before Magistrate Wettre. They were rejected by her Honor in the well-documented and reasoned Report and Recommendation and no legitimate reason has been proffered to disturb Magistrate Wettre's ruling.

Thus, the very simple calculus that plaintiffs wish to apply here – OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys' fees – is most certainly not applicable to the facts at bar.

Magistrate Judge Wettre recognized all of these facts in rendering her well-reasoned Report and Recommendation denying plaintiffs' application for attorney's fees under OPRA. Plaintiffs have offered no legal or factual basis that would in any way discredit or undermine the Report and Recommendation, which must otherwise be affirmed.

PROCEDURAL HISTORY/STATEMENT OF FACTS¹

Plaintiffs filed a verified complaint and order to show cause on September 11, 2015, seeking to have NJIT provide access to public records purportedly supporting the writing of a book by plaintiff Golden about the relationship between federal intelligence agencies, including the FBI and CIA, and colleges and universities. See verified complaint at ¶¶ 1-3. Plaintiffs' verified complaint was brought pursuant to OPRA, N.J.S.A. 47:1A-1, et seq., and the common-law right of access. See verified complaint at ¶ 1. More specifically, plaintiffs allege that between April and August 2015, they made three requests to NJIT under both OPRA and the common-law right of access for email correspondence between NJIT employees and the FBI and/or CIA and that NJIT improperly and unlawfully withheld, in whole or in part, all or a vast majority of the records requested. See verified complaint at ¶¶ 4-5.

¹ NJIT relies upon and incorporates herein by reference the procedural history and statement of facts set forth their brief in opposition to plaintiffs' motion for attorneys' fees. Nevertheless, because the standard of review of Magistrate Judge Wettre's Report and Recommendation is de novo, as set forth infra, defendants again set forth the procedural history and statement of facts in full in opposition to plaintiffs' objections.

A. Stipulated Facts²

At the outset it is important to recognize that the FBI's role in this matter is now fully established based upon undisputed facts, as NJIT and the FBI have filed a set of Stipulated Facts which establish definitively that the FBI governed the review, redaction, and production process respecting plaintiffs' OPRA requests. This cannot be overlooked as plaintiffs, in moving for attorneys' fees under OPRA, use language which suggests that NJIT somehow controlled this process despite the FBI's overwhelming involvement to the contrary and/or were required to ignore the FBI and release the documents. For example, plaintiffs' state:

- In response to Ms. Locke's OPRA request (the "Second Request"), NJIT refused to provide copies of any responsive records ...
- In response to Plaintiffs' final OPRA request (the "Third Request") ... NJIT also refused to provide any responsive records.
- [C]ounsel for the FBI informed Plaintiffs that it was in possession of approximately 6,000 pages of documents provided to it by NJIT that NJIT had identified as responsive to Plaintiffs' OPRA Requests.
- NJIT had not agreed to release all requested records to Plaintiffs before this lawsuit was filed ...
- Under NJIT's theory of this case, any public agency could abdicate their [sic] responsibility to pay attorney's fees ... by (1) either outsourcing its responsibility

² Plaintiffs object to the Stipulated Facts submitted by NJIT in opposition to plaintiffs' motion for attorneys' fees on the basis that plaintiffs "did not agree" to the Stipulated Facts. See Plaintiffs' Objections at 9 n.4. Plaintiffs' position in this regard is flawed if for the singular reason that the Stipulated Facts document only those actions and communications which occurred by and between NJIT and the FBI. Nowhere in the Stipulated Facts are there any facts which in any way involve plaintiffs or their counsel. Indeed, any reference to the plaintiffs in the Stipulated Facts concerns only conduct that is undisputed, such as their filing of a lawsuit or their final acceptance of documents pursuant to their OPRA requests. Clearly, Magistrate Judge Wettre understood that to be the case in rightfully accepting the Stipulated Facts in her Report and Recommendation. See Report and Recommendation at 3 n.2 ("the Court finds its limited use of the [Stipulated Facts] appropriate and not prejudicial in any way to plaintiffs"). It bears noting plaintiffs strenuously objected to conducting any discovery therefore leaving NJIT and the FBI/DOJ to present to this Court the actual facts of what transpired between NJIT and the FBI. Thus, plaintiffs' counsel's repeated misstatements that NJIT reviewed, NJIT produced, NJIT controlled, etc. must be recognized as simply incorrect.

to respond to an OPRA request ... and/or (2) acquiescing to a third party's request or demand to withhold requested records ...

See plaintiffs' moving brief at 3, 5, 13, 25-26 (emphasis added) (the 'sic' remains misplaced in the original text).

Because of the Stipulated Facts, there is no uncertainty regarding the FBI's role in assuming complete control over the subject documents, the manner of review and production in response to plaintiffs' OPRA requests. Indeed, the facts regarding the FBI's involvement are now undisputed and must be considered as such in connection with plaintiffs' motion for attorneys' fees. It simply continues to defy credulity for plaintiffs to repeat their assertions that NJIT was required to ignore the lawful direction of the FBI prior to the litigation and to ignore the injunctive and declaratory relief asserted by the FBI against NJIT after the litigation ensued. That such facts remain inconvenient to plaintiffs' simple calculus remains clear, which is why they choose to ignore them.

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

On April 8, 2015, at 5:12 p.m., plaintiff Golden submitted the first of three OPRA requests (the "First Request") directly to defendant Williams. See November 11, 2015, Certification of Clara Williams at ¶ 17 (hereinafter "Williams Cert.") (Exhibit B to Potters Cert. in opposition to plaintiffs' motion). The First Request sought the following records:

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

See Williams Cert. at ¶ 18.

Following receipt of Plaintiffs' OPRA requests on April 8, 2015, and in compliance with the time period set forth under New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., NJIT assembled documents to respond. See Stipulated Facts ¶ 1. Williams forwarded the First Request by email to David Ullman, Associate Provost for Information Services & Technology and Chief Information Officer for NJIT, as Ullman was the individual with the authority to authorize access to emails sought in the First Request. See Williams Cert. at ¶ 19. Williams simultaneously contacted Annie Crawford, Assistant Vice President of the Department of Human Resources for NJIT, and requested the identities of all individuals who held the official titles of police chief, provost, vice provost, vice president, and dean, during the period January 1, 2010 to April 9, 2015, whose emails were sought as part of the First Request. See Williams Cert. at ¶ 20. Upon receipt of the list of individuals holding such titles provided by Ms. Crawford, Williams immediately forwarded same to Ullman to facilitate his search for responsive records. See Williams Cert. at ¶ 21. All of this transpired in less than two hours from the time Williams first received and reviewed the First Request. See Williams Cert. at ¶¶ 17-21.

In turn, Ullman solicited the assistance of Devin Batra, Database Administrator for the Information Services and Technology Department and NJIT, to search for and retrieve responsive emails. See Williams Cert. at ¶ 22. Batra accessed NJIT's mainframe and performed a search of the email extensions set forth in the First Request and the list of individuals provided by Ms. Crawford. See Williams Cert. at ¶ 23. Batra compiled all emails that were returned on his search and placed them on a DVD, which Batra then delivered and downloaded to Williams' computer on April 13, 2015, just four days after the First Request was received by Williams. See Williams Cert. at ¶ 24.

On receipt of the emails, Williams began printing them. See Williams Cert. at ¶ 25. In light of the massive volume of emails, on April 14, 2015, Williams emailed plaintiff Golden and requested an extension until May 29, 2015, to respond to the First Request. By email on that same date, April 14, 2015, plaintiff Golden agreed to Williams' extension request. See Williams Cert. at ¶ 26. Because of the nature of the subject OPRA requests, which specifically sought communications between the FBI and NJIT using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, most of the documents assembled by NJIT originated from the FBI; that is, the assembled documents were created and transmitted by the FBI to NJIT, among others. See Stipulated Facts ¶ 2. Many of the assembled documents contained written dissemination controls identifying the documents as confidential, limiting their dissemination to only authorized possessors, and prohibiting their disclosure or dissemination absent the permission of the FBI. See Stipulated Facts ¶ 3.

By way of example, one dissemination control advised:

Although UNCLASSIFIED, this information is property of the FBI and may be distributed only to members of organizations receiving this bulletin, or to cleared defense contractors. Precautions should be taken to ensure this information is stored and/or destroyed in a manner that precludes unauthorized access. See Stipulated Facts ¶ 4.

By way of further example, another dissemination control advised:

Information contained in this intelligence bulletin is for official use only. No portion of this bulletin should be released to the media, the general public, or over nonsecure Internet servers. Release of this material could adversely affect or jeopardize investigative activities. See Stipulated Facts ¶ 5.

Having concerns about the FBI warnings/prohibitions, NJIT notified the FBI about the subject OPRA request, advised the FBI that documents were assembled in response, and requested the FBI to provide direction on the assembled documents. See Stipulated Facts ¶ 6. In

response, Special Agent McHugh advised that the FBI would need to review all of the documents before any disclosure occurred. See Williams Cert. at ¶ 28.

On May 22 and 26, 2015, the FBI visited NJIT offices. See Stipulated Facts ¶ 7. On May 26, the FBI reviewed approximately 2,000 pages of documents assembled by NJIT that did not contain dissemination controls. See Stipulated Facts ¶ 7. The FBI applied redactions to this set of documents, informed NJIT that the redacted materials were not to be released, and authorized the release of approximately 540 pages of material either in full or partially redacted. See Stipulated Facts ¶ 7. NJIT complied with the FBI's lawful direction to withhold the redacted documents and produced the documents the FBI authorized it to release to plaintiffs. See Stipulated Facts ¶ 7. NJIT did not participate or assist with this document review process, other than making its conference room with the assembled documents available to the FBI. See Stipulated Facts ¶ 7. Further, the FBI informed NJIT that the 4000 pages of documents containing the dissemination controls were the property of the United States Government ("USG") and were not to be distributed. See Stipulated Facts ¶ 8.

On May 27, 2015, the FBI corresponded with NJIT Records Custodian Williams. See Stipulated Facts ¶ 9 and copy of May 27, 2015, FBI correspondence, attached as Exhibit I to Certification of Clara Williams in Opposition to plaintiffs' Order to Show Cause filed in the State Court, which Certification is attached as Exhibit B to the Certification of Gary Potters, Esq. as part of NJIT's Opposition to plaintiffs' attorney fee application (Potters' Opposition Cert.). The FBI's correspondence acknowledged that NJIT had received a request for email communications between certain individuals at NJIT and certain USG entities, the OPRA requests at issue in this case, and advised NJIT that USG email communications and particularly those of the FBI and its personnel, including attachments to those communications, remained the

property of the USG “and are not to be further distributed without the FBI’s prior written approval.” See Stipulated Facts ¶ 9. The correspondence also requested NJIT to notify the requestor “that he/she may submit a FOIA request for such information either in writing to the FBI or online using www.fbi.gov/foia.” See Stipulated Facts ¶ 9.

On May 29, 2015, NJIT produced approximately 540 pages of documents to plaintiffs. See Stipulated Facts ¶ 10. See NJIT’s May 29, 2015, correspondence to plaintiff Golden, attached as Exhibit A to Potters’ Certification. Additionally, NJIT notified plaintiffs that it was withholding documents from production consistent with the FBI’s direction. See Stipulated Facts ¶ 10. The subject May 27, 2015, FBI correspondence was included in NJIT’s May 29, 2015, transmittal of the redacted documents to plaintiffs. See Stipulated Facts ¶ 11. Thus, plaintiffs were aware of the FBI’s directives to NJIT regarding their OPRA request at the time that documents were timely provided pursuant to the agreed-upon extension date of May 29, 2015. By email dated June 5, 2015, plaintiff Golden acknowledged receipt of NJIT’s response to the First Request. See Williams Cert. at ¶ 39. And, despite plaintiffs’ receipt of the FBI’s May 27, 2015, correspondence advising the plaintiffs to file a FOIA request, no such request, to our knowledge, was ever filed, this despite a fee shifting provision under FOIA. 5 USCA § 552(a)(4)(E).

The second OPRA request was submitted to Williams by email on July 28, 2015, at 1:26 p.m., by plaintiff Locke (the “Second Request”). See Williams Cert. at ¶ 41. The Second Request sought the following records:

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

January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the people at NJIT.

See Williams Cert. at ¶ 42.

Recognizing that the Second Request looked familiar, Williams referred back to the First Request and realized the two requests were identical. See Williams Cert. at ¶ 43. In light of the position taken by the FBI in response to the First Request, together with the prohibition on disclosure set forth in the FBI's letter of May 27, 2015, Williams immediately contacted Special Agent McHugh by telephone and email to discuss the Second Request and the manner in which NJIT should respond to same. See Williams Cert. at ¶¶ 44-45. On July 29, 2015, just one day after the Second Request was received, Williams sent a letter response to plaintiff Locke by email denying the Second Request, citing to several applicable OPRA exemptions and the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams Cert. at ¶ 46.

On August 13, 2015, at 4:10 p.m., plaintiff Golden submitted the third OPRA request to Williams by email (the "Third Request"). See Williams Cert. at ¶ 47. The Third Request mirrored the First Request and sought the following records:

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

See Williams Cert. at ¶ 48.

Given the similarities between the First and Third requests, Williams immediately emailed plaintiff Golden to ascertain whether the Third Request had been sent in error since it was clearly duplicative of the First Request, which NJIT previously responded to on May 29, 2015. See Williams Cert. at ¶ 49. Plaintiff Golden responded by advising the Third Request was broader than the First Request in that the Third Request sought records through the then-current date of August 13, 2015. See Williams Cert. at ¶ 50. On August 17, 2015, within the time parameters afforded by OPRA, Williams sent a letter response to plaintiff Golden by email, inter alia, directing plaintiff Golden to the FBI's letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams Cert. at ¶ 53.

C. Plaintiffs' Lawsuit

Thereafter, on September 11, 2015, plaintiffs filed an Order to Show Cause in the Superior Court of New Jersey, Law Division, Essex County under Docket No. ESX-L-6392-15 (the "State Court Proceeding") seeking to enjoin NJIT from denying them access to FBI records that were the subject of their OPRA requests. See Stipulated Facts ¶ 12. In response to plaintiffs' lawsuit, and at the request of the FBI, NJIT re-assembled the documents. See Stipulated Facts ¶ 12. The FBI retrieved the printed hardcopy set of these documents from NJIT's counsel's offices. See Stipulated Facts ¶ 12. The FBI applied Bates stamps to these documents and did not provide NJIT with a copy of the Bates stamped documents. See Stipulated Facts ¶ 12.

The FBI also requested that NJIT's counsel secure an extension of time for NJIT to answer or otherwise move respecting the Order to Show Cause because the FBI intended to intervene in the lawsuit. See Potters Opposition Cert. ¶ 4. The FBI advised that the extension was necessary to afford the FBI time to go through the required administrative process to intervene. See Opposition Potters Cert. ¶ 4. NJIT's counsel obtained the requested extension and

advised plaintiffs' counsel of the reason for same. See Potters Opposition Cert. ¶ 4. Despite the extension of time, the FBI never intervened in the lawsuit. See Potters Opposition Cert. ¶ 5. On November 13, 2015, NJIT filed its opposition to Plaintiffs' Order to Show Cause, Answer, and Third-Party Complaint naming the FBI as a Third-Party Defendant. See Stipulated Facts ¶ 13. NJIT named the FBI as a third-party defendant because the FBI never intervened in plaintiffs' lawsuit. See Potters Opposition Cert. ¶ 6.

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

the issues raised by plaintiffs' order to show cause are premature for adjudication based on (a) the FBI and Department of Justice having advised of their need for additional time to address both the FBI's course of action and to commence their review of the redacted and exempted documents and (b) the Court's recognition of defendant NJIT's compliance with the written direction of the FBI to not produce certain documents[.] See Stipulated Facts ¶ 14.

The Order additionally provided that "the FBI shall forthwith conclude their decision making process on their course of action and also simultaneously commence review of the redacted and exempted documents." See Stipulated Facts ¶ 14. By the very terms of this Order, the plaintiffs were in possession of actual knowledge of (1) NJIT's lack of control over the subject matter documents and, equally importantly, (2) the FBI's complete control over the subject matter documents based on the very terms that the FBI was going to commence their review, actually re-review, of the subject documents. And, perhaps most importantly, Judge Mitterhoff expressly recognized NJIT's compliance with the FBI's lawful direction to it to withhold documents from production.

On December 11, 2015, the FBI filed a Notice of Removal to the United States District Court for the District of New Jersey (ECF 1). See Stipulated Facts ¶ 15. On December 28, 2015,

following service by NJIT on the FBI of Requests for Admissions seeking confirmation of the facts now set forth in the Stipulated Facts, which Admissions were issued precisely in an attempt to disabuse the plaintiffs that NJIT had any discretion regarding its course of conduct regarding the subject matter documents, the Honorable Leda D. Wettre, U.S.M.J., entered an Order staying responses to any pending discovery requests pending the outcome of further discussions with the Court. See Stipulated Facts ¶ 16. On February 18, 2016, the FBI filed a Counterclaim against NJIT seeking both declaratory and injunctive relief (ECF 23) in the United State District Court for the District of New Jersey. See Stipulated Facts ¶ 17. As its first cause of action in its Counterclaim, the FBI sought by way of relief that “NJIT should be enjoined from publically releasing federal records under the continued control of the FBI in response to Plaintiffs’ OPRA request.” See Stipulated Facts ¶ 17. Counts Two through Four contained virtually the identical claim for injunctive relief against NJIT. See Stipulated Facts ¶ 17. It is reasonable to conclude the FBI’s use of the words “continuing control” over the subject matter documents in the context of the injunctive and declaratory relief sought by it against NJIT would have finally disabused plaintiffs of any continuing erroneous belief that NJIT had any control over the documents. This matters on plaintiffs’ fee application precisely because plaintiffs were possessed of actual knowledge that NJIT was no longer in control, or possession, of the subject matter documents certainly prior to the filing of this lawsuit and again at the hearing before Judge Mitterhoff and further with the FBI’s counterclaim asserted against NJIT.

Magistrate Judge Wettre’s discovery stay was renewed by a Court Order entered on March 7, 2016, whereby the entire case was stayed (ECF 26) and by subsequent Order entered on June 17, 2016 (ECF 28). See Stipulated Facts ¶ 16.

Subsequent to the substitution of counsel for the FBI and the involvement by the Department of Justice, the FBI conducted a second review of all of the documents previously assembled by NJIT and in the FBI's possession. See Stipulated Facts ¶ 18. In the course of the FBI's review, the FBI solely made all release and withholding determinations. See Stipulated Facts ¶ 18. After making those determinations, the FBI sent the documents back to NJIT, in accordance with FBI protocols for consultation requests. See Stipulated Facts ¶ 18. NJIT then transmitted, as in the performance of a clerical non-substantive function, the documents decided solely by the FBI to be produced or withheld. See Stipulated Facts ¶ 18. NJIT made no independent release or withholding determination during the course of this review. See Stipulated Facts ¶ 18. Based on the FBI's second review, a total of eight (8) supplemental productions of documents were made. See Stipulated Facts ¶ 19. All of plaintiffs' counsel's statements in her pending application implicating NJIT in this re-review process remain false.

In an email dated March 1, 2017, to NJIT's counsel, plaintiffs' counsel confirmed acceptance of the documents produced and informed there would be no challenge to any of the remaining redactions/withholdings. See Stipulated Facts ¶ 20. Plaintiffs confirmed in discussions with counsel following this last production by the FBI of their intention to file an application for attorneys' fees.

Plaintiffs did in fact file an application for attorneys' fees under OPRA. The application was denied in a Report and Recommendation filed by Magistrate Judge Wettre on April 25, 2018. Judge Wettre correctly found that plaintiffs had "not carried their burden ... of demonstrating that their lawsuit was the factual causal nexus for NJIT's release of records to plaintiffs after the filing of this lawsuit ... [and thus] plaintiffs are not entitled to prevailing-party fees under the catalyst theory." See Report and Recommendation at 13.

LEGAL ARGUMENT

STANDARD OF REVIEW

NJIT acknowledges the standard of review of Magistrate Judge Wettre’s Report and Recommendation is de novo. See Cataldo v. Moses, 361 F.Supp.2d 420, 425-26 (D.N.J. 2004) (“The Magistrates Act ... and Fed.R.Civ.P. 72(b) ... provides that a de novo standard of review should be used by the district court when considering a magistrate judge’s report and recommendation and subsequent objections by the parties”). However, “[d]e novo review does not imply that an additional hearing is required ... but rather the court, at its discretion, may rely on the record developed by the magistrate judge, or it may conduct a new hearing, receive further evidence, recall witnesses, or send the matter back to the magistrate judge with additional instructions.” Id. at 426. Here, de novo review mandates that Magistrate Judge Wettre’s Report and Recommendation be affirmed in its entirety.

POINT I

THE REPORT AND RECOMMENDATION CORRECTLY
FOUND THAT NJIT WAS NOT LIABLE FOR
ATTORNEYS’ FEES UNDER OPRA

Plaintiffs argue the Report and Recommendation misapplied the catalyst theory and that plaintiffs’ lawsuit caused NJIT to change its position by causing the release of “thousands of pages of records NJIT had previously refused to produce[.]” See Plaintiffs’ Objections at 10-14. It is obvious that plaintiffs are grasping at straws by proffering such arguments. There is not a single fact plaintiffs can point to which remotely demonstrates NJIT changed its position at any time relative to plaintiffs’ OPRA requests. The Report and Recommendation correctly recognized this very fact:

[I]t is clear that NJIT’s stance in not producing records unless and until authorized by the FBI never wavered. This was its position prior to the litigation in

responding to the OPRA requests and that it maintained through the filing of the lawsuit and up until the litigation concluded with plaintiffs' decision not to challenge the FBI's remaining redactions and withholding of documents. In that respect, plaintiffs' lawsuit brought about no change, voluntary or otherwise, in NJIT's conduct as records custodian.

See Report and Recommendation at 14 (emphasis added).

Moreover, what plaintiffs conveniently omit to address in their objection papers is the obvious lack of any causal nexus between plaintiffs' lawsuit against NJIT, on the one hand and the role of the FBI/DOJ in controlling, reviewing and producing the documents, on the other hand. In order to award attorneys' fees under OPRA, a factual causal nexus between the litigation and relief ultimately achieved must be shown. See Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). Plaintiff elected to not issue a FOIA request and also to not sue the FBI as the known custodian of the documents. The undisputed fact remains that NJIT's position never changed at any point in time. The Supreme Court in Mason recognized that determining whether a causal nexus exists requires a "fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions, and viewing each matter on its merits." Id. at 79. The Report and Recommendation again correctly found no causal nexus because of the involvement of the foremost investigative body in the United States – the Federal Bureau of Investigation:

[T]he Court in assessing the factual causal nexus prong of the catalyst theory is required to consider 'the reasonableness of, and the motivations for,' the custodian's conduct in denying access to the records subject to OPRA ... Here, the Court cannot deem NJIT's conduct to have been unreasonable. The FBI is the country's foremost domestic security agency. It made clear in no uncertain terms to NJIT that the records could not be produced without its having reviewed and approved the production, with redactions it deemed appropriate. The FBI maintains that there is sensitive law enforcement information in the documents that would jeopardize ongoing investigations and endanger individuals if revealed ... The FBI accordingly sought time to conduct its review of the records, and NJIT acted in a manner that sought to enable that to occur.

See Report and Recommendation at 16 (emphasis added).

Despite these well-reasoned bases for denying plaintiffs’ motion for attorneys’ fees, plaintiffs nonetheless argue the Court misapplied the correct legal standard for determining an award of fees to a prevailing party under OPRA. In this regard, plaintiffs attempt to oversimplify the analysis by arguing that their filing of a lawsuit caused the production of requested records and therefore they are a prevailing party entitled to attorneys’ fees under the catalyst theory. See plaintiffs’ objections at 15-18. This argument is specious and entirely without merit. Contrary to what plaintiffs would want the Court to believe, this was not a “cookie cutter” OPRA case. The simple calculus of “OPRA request + incomplete (but timely) response + filing of lawsuit + document response supplemented after lawsuit = mandatory award of attorneys’ fees” went right out the window once the FBI assumed control over the documents assembled by NJIT, and through its OPRA responses, Plaintiffs were apprised of this undisputed fact along with having been furnished with a copy of the FBI’s May 27, 2015, letter to NJIT directing them to file a FOIA request, which direction was reiterated by Judge Mitterhoff. Once NJIT was removed from the process, which occurred immediately with the involvement of the FBI, NJIT was no longer the actual custodian of the subject records. These facts remain undisputed and support Magistrate Judge Wettre’s decision to deny attorneys’ fees under OPRA.

POINT II

THE ACTIONS OF NJIT WERE REASONABLE UNDER THE GIVEN CIRCUMSTANCES

Plaintiffs take the position that “NJIT flatly denied Plaintiffs access to the requested records before the lawsuit was filed” and then post-lawsuit “NJIT became primarily motivated by a desire to avoid having to pay an award of attorneys’ fees” under OPRA. See Plaintiffs’ objections at 20. Again, plaintiffs have missed the mark entirely. NJIT advised plaintiffs in no

uncertain terms – both before and after their lawsuit was filed – that the documents they sought were FBI documents and that the FBI explicitly directed NJIT to not do anything with the documents unless and until directed to do so by the FBI. The FBI took charge of the entire OPRA process, and NJIT was left with no reasonable choice under the circumstance.

When the world's premier law enforcement and investigative body provides a lawful instruction, it remains a fools' errand to speciously state NJIT was within its rights to ignore the direction. The fact is NJIT relies on the FBI and works cooperatively with it to assist in securing the safety of its campus filled with over 11,000 students and almost 2,000 faculty and employees. The only action that NJIT took here was assembling the documents for the FBI. NJIT was excluded from the document review process and therefore did not review any documents. Nor did NJIT withhold any documents. In fact, NJIT was precluded by the FBI from copying the documents, Bates stamping the documents, and never received a copy of the documents back from the FBI. See Potters' Opposition Cert. at ¶ 8. After this lawsuit was filed, NJIT's litigation counsel acceded to the lawful direction of the FBI based on the FBI's stated concern over the extreme confidentiality associated with the subject documents and did not use his own copy room or an outside vendor to duplicate the re-assembled documents. And, lest there be any doubt about the tying of NJIT's hands, once the FBI became involved in this litigation, it filed a counterclaim against NJIT seeking both declaratory and injunctive relief, which prevented NJIT from doing that which Plaintiffs' counsel seems to believe was in NJIT's power to do, namely, produce the documents against the prior oral and written direction of the FBI.

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

relative to plaintiffs' OPRA requests. In fact, in the productions of documents forwarded to the plaintiffs, NJIT's litigation counsel specifically incorporated by reference the February 18, 2016, correspondence from the FBI to NJIT which indicated that the return of documents was done in accordance with FBI protocol. See Potters Cert. ¶ 9. Thus, it was solely the FBI driving and controlling the document review and production process. NJIT's only motivation was to comply with FBI directives regarding the documents at issue.

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

Plaintiffs also assert that NJIT did not act reasonably because it "abandoned ... its statutory obligation under OPRA" by "outsourcing" its obligations to a third-party. See Plaintiffs' Objections at 21-22. This is a gross mischaracterization of what occurred here. NJIT neither abandoned nor outsourced their obligation under OPRA. It was directed by the FBI to not act, other than gathering the requested documents for FBI review. This fact is uncontroverted. Lest plaintiffs forget, the Appellate Division has already spoken on this subject and the Report and Recommendation recognized that very fact:

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

was made but rather another government agency, in this instance the United States Attorney's Office.

Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005) (emphasis added); Report and Recommendation at 18. Notably, plaintiffs do not cite to Gannett whatsoever in their objection papers.

Moreover, Magistrate Judge Wettre correctly pointed out that NJIT acted reasonably in properly balancing the competing interests implicated here:

NJIT was not in a position to know how the release of its communications with the FBI might impact law enforcement activities and compromise individuals involved in those activities, and the FBI in any event forbade NJIT to make that call. NJIT's conduct as custodian in this difficult situation was reasonable. Its motivation was never to deprive plaintiffs of the documents, but rather to balance the competing concerns.

See Report and Recommendation at 18 (emphasis added). The Report a Recommendation rightfully cited to Spectraserv, Inc. v. Middlesex County Utilities Auth., 416 N.J. Super. 565 (App. Div. 2010), as support for its conclusion. There, the Appellate Division found that a requestor was not entitled to attorneys' fees under OPRA where the production of documents was not causally related to the lawsuit. Importantly, the Appellate Division recognized that the custodian had acted reasonably by acknowledging "its obligation to produce non-exempt documents" and by protecting the confidentiality interests of a third-party in the documents sought to be produced. Id. at 579-80, 584. See also Paff v. Borough of Garwood, 2012 WL 5512397 (App. Div. November 15, 2012) (denying attorneys' fees under OPRA where failure to produce DVD of illegal conduct was reasonable given police chief's certification stating that disclosure would jeopardize the security of the municipal building and create a risk of safety).

Plaintiffs cite to Courier News v. Hunterdon County Prosecutor's Office, 378 N.J. Super. 539 (App. Div. 2005), to support an award of attorneys' fees. See plaintiffs' objections at 22-23.

However, Courier News is factually inapposite. In Courier News, the Courier News newspaper made requests to the Hunterdon County Prosecutor's Office under OPRA for a copy of a 911 tape in connection with a then-active criminal investigation. The requests were denied by the prosecutor's office and ultimately, on appeal, the Appellate Division found that the 911 tape was subject to disclosure under OPRA. See Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) ("Courier I"). As the prevailing requestor in Courier I, plaintiff moved before the Appellate Division for an award of counsel fees pursuant to N.J.S.A. 47:1A-6. Given the novelty of the question, the Appellate Division remanded the matter and suggested that the trial judge "invite the joinder of the State, if the County contends that the State should be responsible, in whole or in part, for counsel fees." 378 N.J. Super. at 541. The County did so contend, which led the trial court to grant the application to join the State as a third-party defendant. Id.

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

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

Id. at 546 (emphasis added).

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

Plaintiffs' reliance on the unpublished decision in Paff v. W. Deptford Twp., 2010 WL 546587 (App. Div. February 18, 2010), is similarly misplaced. See plaintiffs' objections at 23. In Paff, the Appellate Division simply held that a consent order to maintain confidentiality of discovery materials that are provided to litigants in a lawsuit could not nullify an entity's obligations under OPRA. 2010 WL 546587 at *2. This ruling is inapposite as there is no consent order to maintain confidentiality here, nor is same even at issue in this action. In relying on Paff, plaintiffs assert generally 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 obligation to comply with OPRA." See plaintiffs' objections at 24. This assertion is simply wrong given that there was no agreement or consent order between NJIT and the FBI relative to plaintiffs' OPRA requests. Rather, the FBI seized control of the production and orchestrated everything. Thus, Paff does nothing to advance plaintiffs' position regarding the award of attorneys' fees.

Because the fact-sensitive inquiry here demonstrates that defendants' motives relative to plaintiffs' OPRA requests were governed by FBI directives and because defendants' conduct was

reasonable under the circumstances, the Report and Recommendation concluding as such must be affirmed.

POINT III

THE REPORT AND RECOMMENDATION IS FACT-SENSITIVE AND WILL HAVE NO ADVERSE IMPACT ON FUTURE OPRA MATTERS OR THE PUBLIC IN GENERAL

In a desperate attempt to undermine the well-reasoned Report and Recommendation, plaintiffs present arguments based in equity – namely that the Report and Recommendation will discourage settlements and “dissuade future OPRA requesters from pursuing meritorious OPRA litigation in the future.” See plaintiffs’ objections at 29-33. This is nothing more than rank speculation.

Plaintiffs argue that they were “penalized” because they agreed to the FBI’s document review process and because they agreed to not challenge the remaining redactions and withholdings after receiving thousands of pages of responsive records. See plaintiffs’ objections at 30. According to plaintiffs, they could have disputed these issues but chose not to do so for fear of increased legal costs and the possible delay in the release of records. Id. Thus, they argue that the “Report will undoubtedly discourage future requesters from [compromising], in contravention of New Jersey’s clear public policy of promoting settlement during the course of litigation.” Id. at 30-31. Plaintiffs’ logic on this issue is tortured.

First, there is absolutely nothing to suggest that future requesters will be disinclined to settle an OPRA action based upon this singular case. This matter was decided on its own factual construct per New Jersey Supreme Court precedent. See Mason, supra, 196 N.J. at 79 (“fact-sensitive inquiry on a case-by-case basis ... and viewing each matter on its merits”)(emphasis supplied). To suggest that it will have a far reaching impact beyond that is speculative at best.

Indeed, it smacks of irony that Plaintiffs, in their appeal, argue the Magistrate misapplied an issue of State law, when so much of the time spent on this matter by Plaintiffs' counsel was to avoid a remand of this action to State Court. This bears emphasis both in terms of the amount of time spent in numerous submissions to Magistrate Wettre and conference calls, and the certain preference of Plaintiffs' counsel to remain in Federal Court. Plaintiffs' billing records and ECF submissions leave no doubt on this point.

Second, the fact that plaintiffs agreed to the FBI's document review process and to not challenge the remaining redactions and withholdings after receiving thousands of pages of responsive records was their own choice in this matter. What should not be overlooked is that plaintiffs' decisions were driven by their own desire to publish a book within a time certain; thus, plaintiffs had their own self-imposed constraints that played directly into their decision making process. To suggest now, in hindsight, that these decisions, and the Report and Recommendations' corresponding holding, will somehow stifle future potential OPRA settlements is completely without merit.

Plaintiffs also argue that the Report and Recommendation "creates a loophole" by allowing a records custodian to 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 the third party instructs it to do[.]" See plaintiffs' objections at 32. The issue presented by these facts remains unique. Remarkably, the appeal fails to note there is not a single decision under OPRA, analogous State statutes or under FOIA squarely addressing the rights and obligations of the parties confronted with the lawful direction of a major United States Government Agency or Department. The argument advanced by Plaintiffs on this point is, again, flawed. As set forth supra, the Appellate Division has spoken in dicta to this issue in

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

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

Moreover, this fear argument advanced by Plaintiffs is occasioned directly as a result of their seeking something to which they are clearly not entitled. By seeking attorneys’ fees under these facts and now appealing the well-reasoned analysis and ruling of Magistrate Judge Wettre, Plaintiffs will potentially bring about the very harm they profess to be concerned; namely, a published or even unpublished decision. Surely, they were aware of this outcome in filing the motion for attorneys’ fees in the first place, and knowing these facts presented a true impediment to their simple calculus, they are now doubling down with the same specious arguments. If there were no Stipulated Facts and the FBI had not filed its counterclaim, then this case would have

proceeded very differently. But, the ruling made below is based on actual facts, as opposed to the conjecture of Plaintiffs' counsel and there is no basis factually or under law to disturb the Report and Recommendation.

The fact remains that Magistrate Judge Wettre did address this matter in the context of the goals and purposes behind OPRA. Her Honor recognized that all parties here acted in accordance with OPRA's goals and purposes in promoting "prompt access to government records" and in encouraging "requestors and agencies to work together toward that end by accommodating one another." See Report and Recommendation at 17. As a result, Magistrate Judge Wettre found that it "would be contrary to OPRA to assess fees against NJIT under these circumstances, where the parties acted in a manner encouraged by OPRA." See Report and Recommendation at 17.

For these reasons, plaintiffs' arguments based in equity should be rejected and the Report and Recommendation should be affirmed.

