

## Third Circuit Issues Important OPRA Decision on Legal Fees - *NJ OPRA Blog*

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According to N.J.S.A. 47:1A-6, a records requestor who prevails in any proceeding shall be entitled to an award of reasonable attorneys' fees. We have written about OPRA's fee-shifting provision before, noting that without the fee-shift most requestors would not have the funds to challenge denials of access. As a result, the state would be far less transparent.

On August 14, 2019, the United States Court of Appeals for the Third Circuit issued an important published opinion relating to OPRA's mandatory fee-shifting provision.

The case, titled *Golden v. New Jersey Institute for Technology*, involved OPRA requests filed by Pulitzer Prize-winning journalist Daniel Golden, who was seeking records from NJIT to use as research for his book, "Spy Schools: How the CIA, FBI, and Foreign Intelligence Secretly Exploit America's Universities." Many of the responsive records in NJIT's files originated from the FBI and were purportedly subject to prohibitions on public dissemination.

The records custodian reached out to the FBI to determine how to respond to the request and the FBI directed NJIT to withhold most of the records "[i]n no uncertain terms." NJIT thus denied the OPRA requests by claiming the records were exempt. Golden sued.

After the lawsuit was filed and removed to federal court, the FBI reviewed the previously withheld records and NJIT produced thousands of pages of documents that it had formerly deemed to be exempt. Golden moved for attorney's fees, arguing that he was a prevailing party because his lawsuit was the "catalyst" for NJIT's release of records that were not exempt. The District Court denied the fee motion and was "persuaded by NJIT's position that it had acted reasonably in following the FBI's direction."

The Third Circuit disagreed and all but stated, “If a public agency permits a third party—even if it’s the FBI—to dictate its OPRA response, then that public agency will be on the hook for attorneys’ fees if it turns out that the denial of access was unlawful.” The court made it clear that it is the custodian who has the obligation “to parse the requested records, decide whether exemptions appl[y], and withhold documents pursuant to those exemptions” and that obligation cannot be outsourced to a third party outside the agency.

Importantly, the Third Circuit flatly rejected the argument that OPRA’s fee-shifting provision contains any “reasonableness” requirement. State courts have reached the same conclusion based on the plain language of OPRA, but public agencies still make this argument to trial courts.

This decision is important because there are often times where issues of first impression are litigated and the agency was operating under good faith when it denied a request, but nonetheless was wrong as a matter of law. In such situations, the OPRA requestor is still entitled to an award of attorneys’ fees. Indeed, OPRA contains a mandatory fee-shifting provision so that requestors can find competent counsel to litigate those types of cases.