SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of Janon Fisher	:	Index No. 157755/2021 Hon. Shlomo S. Hagler
Petitioner,	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	:	
-v-	:	
NEW YORK CITY OFFICE OF THE MAYOR,	:	
Respondent.	:	

PETITIONER'S REPLY IN FURTHER SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Petitioner here seeks basic information that informs the public of the identities and qualifications of candidates seeking to serve in the judiciary. It is hard to conceive of information more fundamental to the public interest in how the judicial system operates.

New York County Supreme Court judges are selected through democratic elections, but certain other judicial positions are appointed by the Mayor.[1] Janon Fisher, a seasoned New York journalist, seeks the portion of judicial candidates' applications that they, themselves, complete and submit to the Mayor's Advisory Committee on the Judiciary (MACJ).[2] The applications include self-reported professional experience and biographical details, information necessary for MACJ to evaluate whether an individual has not only practice experience and knowledge of the law, but also the character and integrity necessary to serve as a judge ("Judicial Questionnaires" or "Questionnaires").[3]

The Questionnaires are factual in nature and include information that would be routinely available to voters in advance of a democratic election.[4] While several other jurisdictions make the names of judicial candidates and the information they submit to nominating committees public,[5] the Office of the Mayor ("OOM") maintains that the public is not only barred from accessing

[1] N.Y. Const. art. VI § 6(c), 13(a), 15(a), 21(c).
[2] *See* N.Y. City Exec. Order No. 4, § 1 (May 29, 2014), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2014/eo_4.pdf
[3] *See* Pet. ¶ 3; Ex. A at 8-10.
[4] *See, e.g.,* Evelly, Jeanmarie, Parra, Daniel, Brand, David, and Olumhense, Ese, *What About Those Judges? A Guide to NYC's 2021 Judicial Ballot,* City Limits (Nov. 2, 2021) *available at* https://citylimits.org/2021/11/02/what-about-those-judges-a-guide-to-nycs-2021-judicial-ballot/.
[5] "Of the 31 jurisdictions in which nominating commissions are used in selecting supreme court justices, the names of those who apply for judicial vacancies are made public in 20 states. Applicant interviews may be open to the public in 15 states, and commissions conduct at least some deliberations in open session in six states." Reddick, Malia and Kourlis, Rebecca Love, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices,* Institute for the Advancement of the Legal System, University of Denver (Aug. 2014) at 8 at 8, https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

information about candidates' qualifications, but also their very identity. Respondent's MOL at ¶¶ 51-52.

OOM's arguments against disclosure fail for three reasons. First, the public interest privilege is a common law doctrine that does not apply here because it "cannot protect from disclosure materials which [FOIL] requires to be disclosed." *Doolan v. Bd of Co-Op Educ. Servs., Second Supervisory Dist. of Suffolk Cty.,* 48 N.Y.2d 341, 347 (1979). Even if the privilege did apply, it would not shield the Questionnaires from release. OOM provides no support for its contention that candidates would be less candid or that Committee deliberations would be harmed. Respondent's MOL at ¶¶ 52-53. And contrary to what OOM suggests, Respondent's MOL at ¶ 57, the potential embarrassment a candidate might face in not being selected is not a recognized grounds to block disclosure in a FOIL action. *See, e.g., Buffalo News v. Buffalo Mun. Housing Auth.*, 163 A.D.2d 830, 831 (4th Dep't 1990).

Second, OOM's arguments against disclosure fail because it misapplies FOIL's privacy exemption, which only bars disclosure that is deemed "offensive and objectionable" after conducting a balancing test. *See Dobranski v. Houper*, 154 A.D.2d 736, 737 (3d Dep't 1989). The privacy exemption likewise does not bar disclosure here because the interests of the public knowing judicial candidates' qualifications *and* what qualifications the MACJ values in the nomination process outweigh candidates' purported privacy interests.

Lastly, OOM's argument that the public safety exemption applies hardly merits discussion. Respondent's MOL at ¶ 58. Mere speculation about the possibility of a safety threat, presented without any evidentiary support, is insufficient to sustain the agency's burden. *See Mack v. Howard*, 91 A.D.3d 1315, 1316 (4th Dep't 2012).

Additionally, OOM's repeated reliance on the scope of Fisher's request as grounds for withholding public documents is a straw man argument fundamentally inconsistent with FOIL. Respondent's MOL at ¶ 57. Even if this Court ultimately determines that the identities and qualifications of unsuccessful applicants are exempt from disclosure, information regarding those formally nominated by the MACJ would still need to be released because the public has significant interest in learning about frontrunners and these nominees could reasonably expect less privacy in their candidacy. Petitioner concedes that some highly sensitive data[6] contained within all the applications may be properly withheld. It does not follow that OOM may withhold *all* information contained in those applications as "blanket exemptions for particular types of documents are inimical to FOIL's policy[.]" *Gould v. New York City Police Dep't.*, 89 N.Y.2d 267, 275 (1996). The Court should thus require OOM to release the Questionnaires.

ARGUMENT

I. THE PUBLIC INTEREST PRIVILEGE DOES NOT SHIELD THE RECORDS FROM DISCLOSURE

OOM claims that candidates and those who comment upon their qualifications would not be candid if Questionnaires were disclosed and thus the public interest privilege bars their release. Respondent's MOL at ¶ 52. As a threshold matter, Fisher does not seek the comments of third parties, nor any other deliberative materials held by the MACJ. Even if that were the case, the public interest privilege is generally applicable in the discovery context as an "exception to liberal discovery rubrics," *Matter of World Trade Ctr. Bombing Litig.,* 93 N.Y.2d 1, 8 (1999), and cannot

[6] Petitioner does not oppose redacting certain information, including residential addresses of candidates and their families, telephone numbers, social security numbers, and health information.

be used to "protect from disclosure materials which [FOIL] requires to be disclosed." *Doolan v. Bd of Co-Op Educ. Servs., Second Supervisory Dist. of Suffolk Cty.,* 48 N.Y.2d at 347.

Even if the privilege did apply here, it still would not shield the names of candidates or the Questionnaires because OOM has not, as required, "demonstrate[d] the specific public interest that would be jeopardized by an otherwise customary exchange of information[.]" *Matter of World Trade Ctr. Bombing Litig.,* 93 N.Y.2d at 8. OOM offers only mere speculation of harm that the concrete experience of other jurisdictions belies.[7] Respondent's MOL at 51-53. Without "specific support for the claim" of privilege, OOM's argument fails. *Cirale v. 80 Pine St. Corp.,* 35 N.Y.2d 113, 117 (1974).

A. The Public Interest Privilege Does Not Bar Disclosure Because the Records Do Not Contain Deliberative Communications

OOM argues that the privilege attaches to all records in possession of judicial nominating committees in all circumstances. But the cases it relies on do not support a blanket withholding of non-deliberative communications and are readily distinguishable. Respondent's MOL at ¶ 51. Indeed, the public interest privilege's "governing legal principle . . . [is] a fact-driven balancing of competing interests that is not readily amenable to matter-of-law dictates." *Matter of World Trade Ctr. Bombing Litig.,* 93 N.Y.2d at 12. For example, a New York court has found that personnel records are not "protected by the public interest privilege" precisely because they "do not constitute policy-making materials." *Weingard v. City of New York*, 9 Misc.3d 891, 894 (Sup. Ct., N.Y Cty. 2003).

[7] *See* Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 9, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf

OOM erroneously relies on cases in which *deliberative* materials were sought from judicial nominating committees with different structures and duties than the MACJ to argue that all records held by judicial nominating committee are private. Respondent's MOL at ¶ 51. *See Matter of Lambert v. Barksy,* 91 Misc. 2d 443, 444 (Sup. Ct., New York Cty. 1977) (barring discovery where the court feared petitioner's intended use for the records in a case before FOIL was effective); *Toker v. Pollak*, 73 A.D.2d 584, 584 (1st Dep't 1979) (permitting discovery of records held by a judicial nominating committee). In both the FOIL cases OOM cites, *Snyder* and *Baumgarten*, the court barred disclosure because the judicial screening committees at issue played a "purely advisory role" and thus, unlike the MACJ, were not subject to FOIL. *Snyder v. Third Dep't Judicial Screening Committee,* 18 A.D.3d 1100, 1102 (3d Dep't 2005); *Baumgarten v. Koch*, 97 Misc. 2d 449, 449, 450 (Sup. Ct., New York Cty. 1978). No argument has been made here that the MACJ is not subject to FOIL, as the recent COOG opinion in this matter demonstrates.[8]

Here, Fisher seeks no deliberative communications whatsoever. He instead seeks a set of factual information (names and biographical data) that would *support* deliberations. Under FOIL, such information is public. Pub. Off. Law §87(2)(g) (mandating release of factual data). Earlier this year, a Pennsylvania Commonwealth court ordered the disclosure of judicial questionnaires precisely because the "applications at issue" merely contained "background information about the applicants" but no "notes or opinions that could be considered deliberative." *See Office of Gen. Counsel v. Bumsted*, 247 A.3d 71, 85 (Pa. Cmwlth 2021). The court found that "'[i]nformation that is purely factual, even if decisionmakers used it in their deliberations[,] is usually not protected.'" *Id*. at 84.

[8] *See* Pet. ¶ 14; Ex. D at 4.

Fisher seeks factual documents voluntarily submitted by the applicants, documents that contain no deliberations by MACJ, nor input from third parties. Far from being categorically confidential, as OOM claims, the Questionnaires must be disclosed.

B. The Public Interest Privilege Does Not Bar Disclosure because OOM Fails to Provide Specific Support for the Public Interest It Purports to Protect by Withholding the Records.

To determine whether the public interest privilege applies, one must assess how "the overall public interest on balance would be better served[.]" *Cirale*, 35 N.Y.2d at 118. Put another way, "the court must balance the harm to the public interest if the confidential information is disclosed, against the harm to the party seeking disclosure if the information is withheld." *Pinks v. Turnbull*, 13 Misc.3d 1204(A), 2006 N.Y. Slip Op. 51687 (U) (Sup. Ct. N. Y. Cty. 2006) at *4. Here, that party is the public, and the public interest demands the requested material be disclosed.

There is a significant public interest in learning about the candidates who applied to serve as judges in New York for two reasons. First, the information will allow citizens to assess the candidates themselves. Second, the information will allow the public to better understand which qualifications and experience the MACJ and the Mayor value. OOM's failure even to acknowledge the public interest in ensuring that the appointment process is "open and transparent, with publicly available data about the diversity of applicants and nominees" demands scrutiny.[9] New York clearly values the public's ability to assess candidates because the primary method of selection for judges on the Supreme Court is democratic election.[10] The Questionnaires will provide the public with information that would be available if the judicial seat had been filled through a democratic election.

[9] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 2. https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.
[10] N.Y. Const. art. VI § 6(c).

Furthermore, it is undeniably in the public interest to enhance public trust in the judiciary, which researchers argue can best be achieved by "publicly disclos[ing] a list of potential finalists" and providing "multiple opportunities for public input" "[t]o counter possible behind-the-scenes political influence and build public confidence" in the judiciary and the selection of judges.[11] The judiciary derives much of its power from the public's trust in its integrity, which Supreme Court Justices and researchers[12] alike have noted is enhanced by transparency in the process of judicial selection. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002, Ginsburg, J., dissenting).

II. OOM HAS FAILED TO SHOW THAT RELEASING THE IDENTITY AND QUALIFICATIONS OF JUDICIAL CANDIDATES AMOUNTS TO AN UNWARRANTED INVASION OF PRIVACY UNDER FOIL.

A. OOM Has Failed to Show that Judicial Candidates Have a Privacy Interest in Shielding the Fact that They Applied to the MACJ

When evaluating an agency's denial under the privacy exemption, courts must "balanc[e] the competing interests of public access and individual privacy" and determine whether disclosure amounts to an *unwarranted* invasion of privacy. *See Dobranski,* 154 A.D.2d at 737. "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Id.* at 737. "'Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.'" *Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015) (quoting *Matter of Dilworth v. Westchester County Dep't. of Correction,* 93 A.D.3d 722, 724 (2d Dep't 2012). Because OOM only makes conclusory assertions that disclosing information about

[11] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 6-9, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.
[12] *Id.*

professional misconduct, financial conflicts of interest, and membership in professional organizations is clearly offensive and objectionable and fails to even acknowledge the countervailing public interest, its argument fails. Respondent's MOL at ¶ 57.

A recent Pennsylvania case examined this very issue and concluded that releasing the identity of judicial applicants and their questionnaires does not constitute an unwarranted invasion of privacy. In *Office of General Counsel v. Bumsted*, Pennsylvania's Office of Open Records found on remand that candidates who submit applications to a judicial nominating committee have no privacy interest in keeping their identities or the fact of their applications confidential. *See Bumsted v. Pa. Office of Gen. Counsel*, OOR Dkt AP 2019-1918, at 8-9 (finding "public interest" in providing public with comparable degree of information that would be available if judicial seat were filled via election "is strong and outweighs the interest that Candidate A may have in shielding their identity and entire application"). In fact, in response to the suit, applicants publicly identified themselves and openly advocated for disclosure of applicant identities going forward.[13] Like Pennsylvania, the majority of U.S. jurisdictions with committee-based appointment processes disclose the identity of applicants.[14] In making its conclusory privacy claim, OOM ignores not only that candidates have voluntarily sought these positions, but also that they have already authorized outreach to colleagues, who would be aware in the event the individual they recommended was not selected.

OOM erroneously analogizes to FOIA privacy exemption cases, omitting the crucial fact that "[FOIA's privacy] [e]xemption turns upon the nature of the requested document" and whether it

[13] Bumsted, Brad and Janesch, Sam, *Three Candidates Identified for State Court Vacancy Shrouded In Secrecy*, Lancaster Online, (Jun. 30, 2021), *available at* https://lancasteronline.com/news/politics/three-candidates-identified-for-state-court-vacancy-shrouded-in-secrecy/article_9675c366-d926-11eb-86f0-a70b50255178.html.
[14] Reddick, Malia and Kourlis, Rebecca Love, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices,* Institute for the Advancement of the Legal System, University of Denver (Aug. 2014) at 21, https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

"sheds light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 750 (1989).[15] Respondent's MOL at ¶ 56. Indeed, a federal court has found that FOIA's privacy exemption did not protect from disclosure the names of nominees not selected to be corporate monitors because "the release of even this small amount of information will serve the public interest, to an extent that outweighs the candidates for these lucrative positions' interest in keeping their identities secret." *Tokar v. U.S. Dep't of Just.*, 304 F. Supp. 3d 81, 98 (D.D.C. 2018). Public Officer's Law §89(2)(b)(v) codifies this same principle, exempting from disclosure "information of a personal nature reported in confidence to an agency" to the extent such information is "not relevant to the ordinary work of such agency." Here, the identity of applicants is deeply relevant to the work of the agency, so they must be disclosed.

B. OOM Has Failed to Show that the Candidates' Privacy Interests Outweigh the Public's Interest in Understanding their Job Qualifications.

Disclosing the Questionnaires does not amount to an unwarranted invasion of privacy because the public's interest in confirming that public officials possess the requisite job qualifications necessary to perform their duties is fundamental and outweighs candidates' purported privacy interests. *See Hernandez v. Office of the Mayor,* 2011 N.Y. Slip Op. 33073(U), 2011 WL 6012165 (Sup. Ct., N.Y. Cty. Nov. 23, 2011), aff'd 100 A.D.3d 55 (1st Dep't 2012). Where an employee's position requires certain levels of educational attainment and prior work experience, the information proving that the employee satisfies those requirements should be disclosed. *See Kwasnik v. City of New York*, 262 A.D.2d 171, 171 (1st Dep't 1999). This is undoubtedly the case for judicial candidates, and thus the Questionnaires must be released.

[15] *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press* involves FOIA requests for criminal records ("rap sheet") of private citizens "that reveal[ed] little or nothing about an agency's own conduct." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 750.

The logic inherent in the findings in *Kwasnik* and *Hernandez* becomes obvious when one considers that many of the appointments made by the OOM are to vacant positions on family court and criminal court.[16]A candidate's experience with family or criminal law is exactly the kind of relevant qualification that must be disclosed under both *Kwasnik* and *Hernandez*. Even if there is some conceivable privacy interest, for example, in a candidate's "history of prior litigation" as part of a law practice, and Petitioner does not concede that there is, the public interest in assessing a judicial candidate's relevant experience undoubtedly outweighs it. Respondent's MOL at ¶ 44. Additionally, whether a candidate has practiced in criminal or family court would typically be discoverable by searching the internet or New York's e-file system,[17] further challenging OOM's assertion that sharing that information would amount to an unwarranted invasion of privacy. And just as with applicants' identities, so too with the Questionnaires: disclosure of the Questionnaires can hardly be deemed "offensive and objectionable to a reasonable [person] of ordinary sensibilities" when so many other states affirmatively disclose analogous information.[18] *See Dobranski*, 154 A.D.2d at 737.

OOM fails to balance candidates' alleged privacy interest against the obvious public interest in understanding how MACJ performs its duties and in ensuring that the appointment process is "open and transparent"[19] and not unduly politicized. Disclosure serves the shared interest of the public and MACJ of "ensur[ing] a diverse and broad spectrum of candidates."[20] "Researchers have found that the more transparent the process is, the more likely it is that qualified candidates who

[16] N.Y. Const. art. VI, §§ 13(a), 15(a), 21(c).
[17] *See* New York State Unified Court System *available at* https://iapps.courts.state.ny.us/webcivil/ecourtsMain.
[18] Reddick, Malia and Kourlis, Rebecca Love, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices,* Institute for the Advancement of the Legal System, University of Denver (Aug. 2014) at 8, https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.
[19] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 2, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf
[20] Kim, Desiree, *Message from the Executive Directo*r, Mayor's Advisory Committee on the Judiciary, https://www1.nyc.gov/site/macj/about/message-from-executive-director.page.

are otherwise underrepresented in the field will participate."[21] Moreover, only by comparing the backgrounds of candidates who are selected with those who are not chosen can the public confirm that MACJ is carrying out its duties consistently with the values it proclaims. The public's interest in ensuring MACJ prioritizes diversity on the bench thus outweighs any privacy interest at stake.

OOM also argues that over half of the information in the Questionnaires can be withheld under FOIL's privacy exemption because it purportedly qualifies as employment history. Pub. Off. Law §89(2)(b) (specifically exempting "employment, medical or credit histories or personal references of applicants for employment"). Respondent's MOL at ¶ 54. But OOM ignores that "[a] record is not considered employment history merely because it records facts concerning employment[.]" *Mothers on the Move, Inc. v. Messer*, 236 A.D.2d 408, 410 (2d Dep't 1997). OOM must instead demonstrate why *each* component of the record is not subject to disclosure and cannot rely on sweeping presumptions. *See Cap. Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 655 (1986) (finding that "an agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access."). Background factual information provided in the Questionnaires does not fall into the privacy exemption because it simply "does not encompass the sort of detail that would ordinarily and reasonably be regarded as intimate, private information." *Mothers on the Move, Inc. v. Messer*, 236 A.D. at 410.

[21] Berry, Kate, Building a Diverse Brench: A guide for Judicial Nominating Commissioners, Brennan Center for Justice (2016) at 11, https://www.brennancenter.org/sites/default/files/publications/Building_Diverse_Bench.pdf.

III. OOM HAS FAILED TO SHOW THAT DISCLOSURE PRESENTS ANY RISK TO THE SAFETY OF JUDICIAL CANDIDATES

OOM has not offered any support for its claim that disclosure of the Questionnaires presents a risk to candidates' safety. Respondent's MOL at ¶ 58. Mere speculation about the possibility of a safety threat, presented without evidentiary support, is insufficient to sustain the agency's burden to prove the possibility of endangerment. *See Mack v. Howard*, 91 A.D.3d at 1316. OOM cites *Chebere v. Johnson* as support for its position, but the holding in *Chebere* is inapposite because it involved readily distinguishable documents—witness statements in a criminal prosecution—and the court ultimately made no determination and remanded the case for an in camera review. *See Chebere v. Johnson*, 3 A.D.3d 365, 366 (1st Dep't 2004). It does not follow that FOIL bars disclosure of any individual's "involvement as a party or witness in prior litigation," and certainly not a candidate for a judgeship. Respondent's MOL at ¶ 58. OOM also relies on *Ruberti*, which offers no meaningful parallels to this case, since it barred the release of troop, zone and station assignments of active police officers. *See Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police,* 218 A.D.2d 494, 499 (3d Dep't 1996). Nor is it clear how revealing an applicant's date of birth presents a safety risk, as the OOM claims. Respondent's MOL at ¶ 58. Pub. Off. Law §87(2)(f) simply has no relevance to the case at bar.[22]

[22] OOM inexplicably argues that Petitioner is "not entitled to an award of attorney's fees" as a matter of law because a request for such relief in the Petition was purportedly premature. Respondent's MOL at ¶ 61. We have identified no caselaw that supports this position. In fact, Petitioner in some instances could risk waiving his right to attorney's fees if he fails to assert the claim. *See, e.g., Rotunno v. Gruhill Const. Corp.*, 29 A.D.3d 772, 773 (2006)

CONCLUSION

For all these reasons, Janon Fisher respectfully requests an order requiring OOM to provide promptly copies or access to all records responsive to his request and to pay all costs and attorney's fees incurred in pursing this action.

Dated: November 18, 2021
New York, NY

Respectfully submitted,

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