

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

----- x

In the matter of

JANON FISHER,

Petitioner,

**RESPONDENT'S
VERIFIED ANSWER**

Index No.: 157755/2021

For Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules

- against -

THE CITY OF NEW YORK OFFICE OF THE
MAYOR,

Respondent.

----- x

Respondent City of New York Office of the Mayor (“Respondent”), by its attorney, Georgia M. Pestana, Corporation Counsel of the City of New York, hereby answers the Verified Petition (“Petition”) and respectfully alleges as follows:

1. Denies the allegations set forth in paragraph “1” of the Petition, except admits that Petitioner submitted a FOIL request (the “FOIL Request”) on October 21, 2020 and purports to proceed as set forth therein.

2. Denies the allegations set forth in paragraph “2” of the Petition, except admits that Petitioner purports to proceed as set forth therein, and respectfully refers the Court to the FOIL Request, a true and accurate copy of which is attached hereto as Exhibit A, for a complete and accurate statement of its content. Respondent affirmatively states that Petitioner’s FOIL Request and Appeal dated April 4, 2021, a true and accurate copy of which is attached

hereto as Exhibit B, request the Questionnaires of all applicants under review by MACJ, and Petitioner did not limit his request to only those candidates nominated by MACJ.

3. Denies the allegations set forth in paragraph “3” of the Petition, and respectfully refers the Court to a blank copy of the Uniform Judicial Questionnaire (the “Questionnaire”), a true and accurate copy of which is attached hereto as Exhibit C, for a complete and accurate statement of its content.

4. Denies the allegations set forth in paragraph “4” of the Petition.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph “5” of the Petition.

6. Denies the allegations set forth in paragraph “6” of the Petition, except admits that Respondent has offices located at City Hall, New York, NY 10007, and respectfully refers the court to the statute cited therein for a complete and accurate statement of its provisions.

7. Admits the allegations set forth in paragraph “7” of the Petition.

8. Denies the allegations set forth in paragraph “8” of the Petition, except admits that Petitioner purports to proceed as set forth therein, and respectfully refers the Court to the statutes cited therein for a complete and accurate statement of their provisions.

9. Admits the allegations set forth in paragraph “9” of the Petition.

10. Denies the allegations set forth in paragraph “10” of the Petition, and respectfully refers the Court to Mayor Bill de Blasio’s Executive Order No. 4 on the Mayor’s Advisory Committee on the Judiciary, dated May 29, 2014, a true and accurate copy of which is attached hereto as Exhibit D, for a complete and accurate statement of its content.

11. Denies the allegations set forth in paragraph “11” of the Petition, except admits that the Mayor’s Advisory Committee on Judicial Appointment (MACJ) reviews the pool of applicants for judgeships and ultimately nominates three candidates for each vacancy.

12. Denies the allegations set forth in paragraph “12” of the Petition, except admits Petitioner submitted a FOIL request on October 21, 2021 for copies of the completed Questionnaires of applicants then-currently under review by MACJ.

13. Denies the allegations set forth in paragraph “13” of the Petition, except admits that Respondent denied Petitioner’s FOIL request on March 17, 2021.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “14” of the Petition, except admits that the Committee on Open Government (COOG) contacted Respondent about Petitioner’s request.

15. Denies the allegations set forth in paragraph “15” of the Petition, except admits that Respondent notified Petitioner that it had re-opened his request, and affirmatively states that Respondent notified Petitioner that it had re-opened his request on March 23, 2021.

16. Denies the allegations set forth in paragraph “16” of the Petition, except admits that Respondent denied Petitioner’s request on March 23, 2021, and respectfully refers the Court to the FOIL Denial dated March 23, 2021, a true and accurate copy of which is attached hereto as Exhibit E, for a complete and accurate statement of its content.

17. Denies the allegations set forth in paragraph “17” of the Petition, except admits COOG issued an advisory opinion on March 26, 2021, and respectfully refers the Court to the Advisory Opinion dated March 26, 2021, a true and accurate copy of which is attached hereto as Exhibit F, for a complete and accurate statement of its content.

18. Denies the allegations set forth in paragraph “18” of the Petition, except admits that Petitioner appealed on April 4, 2021 and attached a copy of the Advisory Opinion to that appeal.

19. Admits the allegations set forth in paragraph “19” of the Petition.

20. Denies the allegations set forth in paragraph “20” of the Petition, and respectfully refers the Court to the Appeal Response dated April 19, 2021, a true and accurate copy of which is attached hereto as Exhibit G, for a complete and accurate statement of its content.

21. Denies the allegations set forth in paragraph “21” of the Petition.

22. Denies the allegations set forth in paragraph “22” of the Petition.

23. Denies the allegations set forth in paragraph “23” of the Petition.

24. Denies the allegations set forth in paragraph “24” of the Petition.

25. Denies the allegations set forth in paragraph “25” of the Petition.

26. Repeats and re-alleges the responses set forth above as if fully set forth herein.

27. Denies the allegations set forth in paragraph “27” of the Petition, except admits that Petitioner purports to proceed as set forth therein and respectfully refers the Court to the statutes cited therein for a complete and accurate statement of their provisions.

28. Denies the allegations set forth in paragraph “28” of the Petition, and respectfully refers the Court to the statute referenced therein and the case law interpreting its provisions for a complete and accurate statement of government entities’ obligations under FOIL.

29. Denies the allegations set forth in paragraph “29” of the Petition.

30. Denies the allegations set forth in paragraph “30” of the Petition.
31. Denies the allegations set forth in paragraph “31” of the Petition.
32. Denies the allegations set forth in paragraph “32” of the Petition.
33. Denies the allegations set forth in paragraph “33” of the Petition.
34. Denies the allegations set forth in paragraph “34” of the Petition.
35. Admits the allegations set forth in paragraph “35” of the Petition.
36. Denies the allegations set forth in paragraph “36” of the Petition.
37. Denies the allegations set forth in paragraph “37” of the Petition.

**AS AND FOR A STATEMENT OF THE
PERTINENT AND MATERIAL FACTS,
RESPONDENT RESPECTFULLY ALLEGES**

A. Petitioner’s FOIL Request and Administrative Appeal

38. On or about October 21, 2020, Petitioner submitted to the Office of the Mayor (OOM) a request for records pursuant to the New York State Freedom of Information Law (“FOIL”), N.Y. Pub. Off. Law §87, *et seq.* See Exhibit A. Petitioner requested: “a copy of all Uniform Judicial Questionnaires for applicants currently under review by the Mayor's Advisory Commission on the Judiciary.” *Id.*

39. On March 23, 2021, Respondent denied the request. See Exhibit E.

40. On March 26, 2021, the COOG issued an advisory opinion in response to Petitioner’s request regarding Respondent’s response to his October 21, 2020 FOIL request. See Exhibit F.

41. Petitioner appealed the denial of his FOIL request on April 4, 2021, and by letter dated April 19, 2021, Respondent denied Petitioner’s appeal on the grounds that disclosure of the Questionnaires (1) would constitute an unwarranted invasion of privacy under

N.Y. Pub. Off. Law §§87(2)(b) and 89(2)(b); (2) endanger the safety of applicants to judicial positions under N.Y. Pub. Off. Law §87(2)(b)(f); and (3) chill the candor of applicants to positions of public trust. *See* Exhibit G.

B. MACJ and the Judicial Appointment Process

42. Through Executive Order No. 4, New York City Mayor Bill de Blasio established MACJ on May 29, 2014. *See* Exhibit D. Mayor de Blasio's Executive Order No. 4 is substantially similar to that issued by his predecessor, former-New York City Mayor Michael Bloomberg, as well as that former-New York City Mayor Rudolph Giuliani. *See* Executive Order No. 8 of Michael Bloomberg, dated March 4, 2002, a true and accurate copy of which is attached hereto as Exhibit H, and Executive Order No. 10 of Rudolph Giuliani, dated July 20, 1994, a true and accurate copy of which is attached hereto as Exhibit I. All three executive orders establish MACJ as a nineteen member committee that, among other things, is created to "recruit, to evaluate, to consider, and to nominate judicial candidates highly qualified for appointment and . . . reappointment"; and "nominate and present to the Mayor three candidates for appointment to each vacant judicial office." *See* Exhibits D, H, and I at Sections 5, 1, and 2. Further, all three executive orders mandate, among other things, that (1) the mayor must only appoint judges from the pool of three nominated by MACJ; (2) MACJ shall conduct a public hearing regarding the Mayor's chosen applicant; and (3) MACJ communications with the Mayor concerning judicial qualifications of candidates must be confidential except for those submitted or received pertaining to a public hearing. *Id.* Sections 4, 3, and 6.

43. All applicants to judicial appointment or re-appointment in New York City Criminal Court, Family Court, and, on an interim basis, Civil Court, must complete and submit a thorough and comprehensive Questionnaire to MACJ. *See* Exhibit G and MACJ's Frequently

Asked Questions (FAQ) webpage, a true and accurate copy of which is attached hereto as Exhibit J.

44. The Questionnaire is 23 pages long and contains 40 questions, several of which contain sub-questions. *See* Exhibit C. Applicants must fill out each question, which ask, among other things, for (1) the full name, and any prior names, of the candidate; (2) the names, relationship, residential and business addresses, and occupations of all individuals the candidate resides with; (3) the candidates' current residential and business addresses, as well as every residence they have had in the last ten years; (4) their citizenship or naturalization status; (5) a list of all employment, as well as explanations of periods of unemployment, and including reasons for leaving prior positions; (6); any history of discipline, resignation, or termination during past employment; (7) detailed financial history or involvement, as well as tax history; (8) relationships with other attorneys or judges; (9) any accusations or claims of misconduct, malpractice, or unlawful conduct, even if unsubstantiated, and any relevant documentation; (10) any litigation to which they were a party in criminal, civil, matrimonial, or administrative proceedings; (11) any arrests, citations, and indictments, even if withdrawn, vacated, or dismissed; (11) any instances in which they were subpoenaed, called as a witness, questioned, interviewed, or asked to provide testimony or documents to any court or investigative body; (12) if the candidate, or any firm or entity they have been affiliated with, were ever the subject of an investigation by a court, investigative body, or the International Revenue Service, even if unsubstantiated; (13) any judgments entered against the candidate, even if satisfied; (14) any bankruptcy petition filed by or against the candidate; (15) current or prior drug, alcohol or prescription drug use or abuse; (16) current or former membership in professional, political,

community, or social organizations; and (17) extensive history of prior litigation, including the contact information for other attorneys and judges involved. *Id.*

45. After each Questionnaire and application is thoroughly reviewed, MACJ nominates three candidates to the Mayor. *See* Exhibit D at Section 2.

46. When the Mayor selects a candidate from the three nominees, then and only then does Respondent share application information and Questionnaire with the Judiciary Committee of the New York City Bar Association (the “Bar Association”). *See* Exhibit J at p. 6. The Questionnaires of the entire pool of candidates are not shared with the Bar Association. *Id.*

47. Further, once the Mayor notifies MACJ of his selection for judicial appointment, MACJ then conducts a public hearing concerning the fitness of the nominee for appointment, and MACJ may reconsider the nomination based on the information received. *See* Exhibit D at Section 3.

C. The Instant Proceeding

48. On or about August 18, 2021, Petitioner commenced this Article 78 Proceeding in the Supreme Court of New York, County of New York, alleging that Respondent failed to provide documents as required by FOIL. Petitioner seeks access to the records and an award of attorney’s fees and costs.

**AS AND FOR A FIRST DEFENSE: THE
RECORDS SOUGHT ARE PROTECTED BY
THE PUBLIC INTEREST PRIVILEGE.**

49. As a preliminary matter, though Petitioner references an advisory opinion by the COOG, such opinions are not binding on this Court. *John P. v. Whalen*, 54 N.Y.2d 89, 96 (1981) (noting that COOG’s “advisory opinion . . . is neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency.”);

Matter of Thomas v. New York City Dept. of Educ., 103 A.D.3d 495, 498 (1st Dep't 2013)

(“advisory opinions issued by the Committee on Open Government are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis”)

(internal quotation marks omitted).

50. FOIL “imposes a broad duty on government to make its records available to the public,” subject to certain exemptions. *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 274 (1996). Indeed, courts have long recognized the public interest privilege that protects avenues of free and frank communications between principal executive officials and their staff and others to permit them to exercise their public duties to protect the public and advance the public's interest and welfare. As the Court of Appeals noted in *Steering Committee v. Port Authority (In re World Trade Ctr. Bombing Litigation)*, 93 N.Y.2d. 1 (1999): “Specifically, the privilege envelops confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.” *Id.* at 8 (*quoting Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 117 (1974)). “It has long been recognized that the public interest is served by keeping certain government documents privileged from disclosure.” *Lowrance v. State*, 185 A.D.2d 268 (2d Dep't 1992). “The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality.” *Cirale*, 35 N.Y.2d at 117.

51. New York courts have routinely applied the public interest privilege to cases involving the disclosure of records maintained by judicial nominating committees, including applications and questionnaires containing information regarding judicial applicants, as Petitioner seeks here. Further, courts have specifically found that the privilege applies to MACJ

and the advice intended for the Mayor and principal City decisionmakers. *Toker v. Pollak*, 73 A.D.2d 584, 584 (1st Dept. 1979) (finding that MACJ was entitled to the protections of the public interest privilege where, “because of the public interest nature of the matter, unbridled discovery could conceivably do damage to the usual functioning of a most valuable institution”).

52. Though Petitioner attempts to discredit Respondent’s assertion that disclosure of the Questionnaires risks chilling candidates’ candor, this Court has long recognized that very risk as detrimental to the public interest. Indeed, in quashing a subpoena *duces tecum* seeking records of a judicial nominating committee, this Court aptly explained the reasoning underlying the well-settled principle that these records are not subject to disclosure: “[both] candidates and those who comment upon their qualifications would be reluctant to be entirely candid if they knew their disclosures were available to the prying eyes of outsiders.” *Matter of Lambert v Barsky*, 91 Misc 2d 443, 444 (Sup. Ct. New York Co. 1977); *see also Snyder v. Third Dep’t Judicial Screening Comm.*, 18 A.D.3d 1100, 1102 (3rd Dep’t 2005) (“The Screening Committees elicit information about potential judicial appointees and, to ensure candid input about and consideration of such individuals, confidentiality is a recognized necessity of the process.”). In short: “confidentiality and candor are complementary to one another. Destroy one and the other vanishes.” *Matter of Lambert*, at 444.

53. An individual’s interest in confidential information maintained by a judicial nominating committee thus “must give way to the overriding public interest in assuring that only the most qualified candidates are appointed to judicial office” because “it seems almost beyond question that if the files of the Mayor’s committee were subject to disclosure, the free flow of information to the committee and particularly adverse comments would slow to a trickle or dry up completely.” *Baumgarten v. Koch*, 97 Misc. 2d 449, 452 (Sup. Ct. New York Co.

1978). The New York City Charter echoes the substantial public interest in maintaining the Mayor's ability to promulgate rules concerning the confidentiality of information obtained by the City. N.Y.C. Charter § 8(g) (declaring that "it is essential to the workings of city government that the city retain control over information obtained by city employees in the course of their duties," and that "the mayor may promulgate rules requiring that information obtained by city employees be kept confidential to the extent necessary to preserve the trust of individuals who have business with city agencies").

**AS AND FOR A SECOND DEFENSE:
RESPONDENT PROPERLY DENIED
PETITIONER'S FOIL REQUEST AS
DISCLOSURE WOULD CONSTITUTE AN
UNWARRANTED INVASION OF PERSONAL
PRIVACY AND ENDANGER SAFETY.**

54. In addition to the foregoing, Pub. Off. Law § 87(2)(b) provides that an agency may deny access to records or portions thereof if their disclosure "would constitute an unwarranted invasion of personal privacy" under the provisions of § 89(2). An unwarranted invasion of personal privacy under § 89(2) explicitly includes:

(i) disclosure of employment, medical or credit histories or personal references of applicants for employment; (ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility; (iii) sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; (iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; (v) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; (vi) information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or (vii) disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

Here, the Questionnaires request information expressly exempted under § 89(2)(b), including extensive employment history and the contact information of up to ten references. *See* Exhibit C. Indeed, employment history questions alone make up nearly half of the questions on the Questionnaire. *Id.*

55. Moreover, the enumerated list of privacy exemptions in §89(2)(b) is not exhaustive. *See* Pub. Off. Law § 89(2)(b) (“an unwarranted invasion of personal privacy includes, *but shall not be limited to*. . .”) (emphasis added); *New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 485 (2005) (finding communications exempt from disclosure even though they did not fall under any of the enumerated categories). When the enumerated privacy exemptions are inapplicable, the Court must decide whether an invasion of privacy is “unwarranted” by measuring what would be “offensive and objectionable to a reasonable person of ordinary sensibilities.” *Asian Am. Legal Defense Fund & Educ. Fund v. New York City Police Dep’t*, 41 Misc. 3d 471, 479 (Sup. Ct. N.Y. Co. 2013) (quoting *Matter of Dobranski v. Houper*, 154 A.D.2d 736, 737 (3d Dept. 1989)). This requires a balancing of the privacy interests at stake against the public interest in disclosure of the information:

On the private end of the scale is the expectation of privacy accruing to the individual furnishing the information and the general need to protect against dissemination of personal information relating to that individual. The scale’s public end includes the presumption that governmental records are to be available to public scrutiny, the judicial reluctance to broaden the narrow exceptions to disclosure, and concern as to whether the information contained in the document sought to be revealed is a matter of public record.

Dobranski, 154 A.D.2d at 737-38 (internal citations omitted).

56. A review of the Freedom Of Information Act (FOIA) – FOIL’s federal equivalent – is “instructive.” *Leshner v. Hynes*, 19 N.Y.3d 57, 64-65 (2012). The United States

Supreme Court explained that FOIA's central purpose is to open the *government's* activities to the sharp eye of public scrutiny, not disclose information about *private citizens*. *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 774 (1989) (emphasis in original). A release of information about a private citizen to a third party is "reasonably expected" to infringe upon personal privacy. *Id.* at 780. Moreover, "[t]he privacy interest in nondisclosure encompasses an individual's control of personal information and is not limited to that of an embarrassing or intimate nature." *People for the Am. Way v. Natl. Park Serv.*, 503 F. Supp. 2d 284, 304 (D.D.C. 2007) (citing *United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982)).

57. Here, Petitioner's FOIL Request seeks the Questionnaires of all judicial applicants under review by MACJ at the time the FOIL Request was submitted. This would inevitably include numerous Questionnaires completed by applicants, private individuals, who were not selected for appointment to the judiciary. The public interest in extensive personal and professional information about all applicants, the majority of whom would not be appointed to a judicial position, is far outweighed by the applicant's privacy interests. As discussed above, the Questionnaires ask detailed questions about an applicant and their families, several of which implicate an applicant and their household's safety or risk embarrassment. For example, the Questionnaire asks, among other things, for current and past places of residence; details of any involvement in litigation, including matrimonial litigation that is often inherently personal; information about disciplinary proceedings, criminal, civil, or professional allegations against the candidate, and investigations into the candidate, even if unsubstantiated or dismissed; financial and tax history, including past bankruptcy; past substance use or abuse; and past or present membership in professional, community, or social organizations. *See* Exhibit C. The same

considerations exist even if the FOIL request was limited to the Questionnaires of only candidates nominated by MACJ, which it was not. *See* Exhibits A and B. That such information of a private person could become public and end up on the internet or in the media is clearly offensive and objectionable to a reasonable person of ordinary sensibilities.

58. Further, information concerning an applicant's date of birth, residence, involvement as a party or witness in prior litigation and/or investigations, and detailed description of their prior litigation history as an attorney or judge has the potential to endanger their or their family or household members' "life or safety" pursuant to Pub. Off. Law §87(2)(f). *See Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police*, 218 A.D.2d 494, 499 (3d Dep't 1996) ("the agency in question need only demonstrate "a possibility of endanger[ment]" in order to invoke this exemption") *Chebere v. Johnson*, 3 A.D.3d 365, 366 (1st Dep't 2004) (noting that Pub. Off. Law §87(2)(f) protects witness statements).

59. Even where the public's interest would be highest, relating to the application of the candidate ultimately selected by the Mayor, the balancing test still favors a denial of disclosure for the reasons stated above. Further, the Mayor's selection is subject to a public hearing, in which "upon reasonable notice . . . any person may present information concerning the fitness of the nominee for appointment," which involves the public in the ultimate selection for appointment, and MACJ publishes a summary of each appointee's qualifications "immediately upon . . . appointment." *See* Exhibit D at Section 3(a); *see also* Exhibit G at p. 2. Moreover, not only must the public interest in disclosure of judicial questionnaires be weighed against the significant privacy interests of the private individual candidates, it must also be balanced against the countervailing public interest in maintaining candor in the judicial nomination process as discussed above.

60. Petitioner's contention that Respondent waived any exemption by providing application materials to the Bar Association is unavailing. First, Petitioner cites to Petitioner's Exhibit J at page 6 to support this contention, which is MACJ's FAQ webpage. The FAQ states, in relevant part: "If you have been selected [to judicial appointment by the Mayor], your candidacy will be forwarded to the Judiciary Committee of the New York City Bar for approval, which involves a similar screening process." *See* Exhibit J at p. 6. The cited section of the FAQ does not support Petitioner's contention that MACJ specifically submits its uniform judicial questionnaire to the Bar Association, indeed it does not mention the questionnaire at all. Further, the Bar Association only receives application information relating to the single candidate selected by the Mayor, not every candidate that MACJ considers or nominates. *Id.* Accordingly, the privacy and public interest concerns in maintaining the confidentiality of the Questionnaires must outweigh an individual's interest in their disclosure.

**AS AND FOR A THIRD AFFIRMATIVE
DEFENSE: PETITIONER IS NOT ENTITLED
TO ATTORNEYS' FEES AS ITS REQUEST IS
PREMATURE AND NOT WARRANTED**

61. Petitioner is neither a prevailing party, nor has Petitioner satisfied the statutory requirements for an award of attorneys' fees. As such, Petitioner is not entitled to an award of attorneys' fees.

62. Pursuant to Pub. Off. Law §89(4)(c)(i), a court *may* assess reasonable fees and costs where a petitioner has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time frame. Pursuant to §89(4)(c)(ii), a court *shall* assess reasonable fees and costs where a petitioner has substantially prevailed, and where the court finds that the agency had no reasonable basis for denying access. (emphasis added). To

substantively prevail, a petitioner must have received “all of the information it requested and to which it is entitled in response to the FOIL litigation.” *See Matter of Competitive Enter. Inst. v. Attorney Gen. of New York*, 161 A.D. 3d 1283, 1286 (3d Dep’t 2018).

63. “Even in cases where documents are ultimately required to be disclosed, the agency may be found to have had a reasonable basis for initially denying access” *N.Y. Lawyers for the Pub. Interest v. N.Y.C. Police Dep’t*, 64 Misc. 3d 671, 684-85, 103 N.Y.S.3d 275, 285-86 (Sup. Ct., NY County 2019) (collecting cases); *see also Norton v Town of Islip*, 17 A.D.3d 468, 793 N.Y.S.2d 133 (2d Dep’t 2005); *New York Times Co. v City of New York Fire Dep’t.*, 195 Misc. 2d 119, 127-28, 754 N.Y.S.2d 517 (Sup. Ct., NY County 2003). Here, there has not yet been a finding on the merits, and thus Petitioner has not substantially prevailed. Accordingly, a request for fees and costs is premature.

64. Further, Respondent responded both to Petitioner’s original FOIL request and to Petitioner’s administrative appeal in an appropriate and timely manner, and had reasonable grounds for denying Petitioner’s request, as discussed above. Therefore, even if Petitioner were deemed a prevailing party, Petitioner is still not entitled to attorney’s fees.

WHEREFORE, Respondent respectfully requests that the Verified Petition be dismissed in its entirety, that the relief sought therein be denied in all respects, and that Respondent be awarded such other and further relief as the Court deems just and proper.

Dated: November 4, 2021
New York, New York

GEORGIA M. PESTANA
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street
New York, New York 10007
(212) 356-8761

hsarokin@law.nyc.gov

By: _____/s/
Hannah J. Sarokin
Assistant Corporation Counsel

cc: **By NYSCEF**
Ava E. Lubell
Counsel for Petitioner

VERIFICATION

Todd Ferrara, an attorney duly admitted to practice before the Courts of the State of New York, duly affirms:

I am an Associate Counsel in the of the Office of Counsel to the Mayor of the City of New York. I have read the factual allegations set forth in the foregoing Verified Answer, and I believe them to be true, based upon my personal knowledge and upon information and belief. The source of my information and the basis for my belief as to matters not within my personal knowledge are a review of the records maintained by the Office of the Mayor and communications with various of its employees.



Todd W. Ferrara, Esq.
Associate Counsel

**Dated: November 4, 2021
New York, New York**

Index No.: 157755/2021

<p>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK</p>
<p>In the matter of</p> <p>JANON FISHER,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">- against -</p> <p>THE CITY OF NEW YORK OFFICE OF THE MAYOR,</p> <p style="text-align: right;">Respondent.</p>
<p>RESPONDENT’S VERIFIED ANSWER</p>
<p style="text-align: center;">GEORGIA M. PESTANA <i>Corporation Counsel of the City of New York Attorney for Defendant, The City of New York 100 Church Street New York, New York 10007</i></p> <p style="text-align: center;"><i>Of Counsel: Hannah J. Sarokin Tel: (212) 356-8761</i></p>
<p><i>Due and timely service is hereby admitted.</i></p> <p><i>New York, New York , 2021</i></p> <p><i>..... Esq.</i></p> <p><i>Attorney for</i></p>