To be Argued by:
HEATHER E. MURRAY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2023-00339

In the Matter of the Application of

JANON FISHER,

Petitioner-Respondent,

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

– against –

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

Americans have been engaged in "heated debates about the best method for state judicial selection" since the country's founding. *Carlson v. Wiggins*, 760 F. Supp. 2d 811, 812-14 (S.D. Iowa 2011) (citation omitted). The legitimacy of the judicial branch, which "rests entirely on its promise to be fair and impartial[,]" is at the core of these judicial selection debates. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 489 (2009). This case goes to the heart of these debates in seeking to enforce under New York's Freedom of Information Law ("FOIL") the "people's right to know the process" for New York City mayoral judicial appointments. N.Y. Pub. Off. Law § 84. As the lower court correctly noted in ruling that the records at issue be released, "[t]here really must be sunshine in the process" of judicial appointments. (R.227.)

Mr. Janon Fisher, a seasoned New York journalist, seeks judicial questionnaires (the "Questionnaires") that contain basic information about the identities and qualifications of candidates seeking to serve on the City's judiciary. The lower court correctly held in a ruling from the bench that these documents should be released because no exemption applies to serve as a blanket ban to shield these documents from disclosure. (R.225-29.) Instead of attempting to demonstrate that the lower court erred in its decision, Respondent-Appellant New York City Office of the Mayor ("OOM") devotes much of its brief to resurrecting an argument

it already explicitly waived: that it can withhold these documents because the Mayor's Advisory Committee on the Judiciary is not an agency subject to FOIL. This argument fails for two reasons. First, the OOM already waived this argument in direct response to the trial court judge's request during oral argument that the OOM clarify its position, thereby preventing the lower court from ruling on this issue and foreclosing appellate review. Second, should the Court wish to consider this argument on its merits despite the OOM's waiver, the MACJ is unequivocally an agency subject to FOIL because it performs a governmental function and not merely an advisory role—crucially, the mayor may not act to appoint a judge until the MACJ has nominated that particular judge to the mayor.

Since the MACJ is indeed an agency subject to FOIL, the Questionnaires must be disclosed, because the OOM cannot demonstrate that the public interest privilege or any FOIL exemptions apply to shield the documents. First, the Court of Appeals over 40 years ago rejected an agency's attempt to rely on the common law public interest privilege to prevent the disclosure of documents subject to FOIL, reasoning that documents may only be withheld if they squarely fit within one of FOIL's enumerated exemptions. Second, the OOM has failed to demonstrate that disclosure of the information sought, including applicants' identities and qualifications, would result in an unwarranted invasion of privacy. The OOM's argument ignores that Mr. Fisher has agreed to the redaction of highly sensitive personal information in the

Questionnaires consistent with the lower court's ruling here, such as the residential addresses of candidates and their families, social security numbers, and health information. Finally, the OOM has no basis for withholding the Questionnaires under the life and safety exemption, since it presents entirely speculative and unconvincing support for that position. For these reasons, this Court should affirm the lower court and require the OOM to release the Questionnaires.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Question Presented: Whether the Court should consider an issue on appeal that a party explicitly waived during oral argument at the lower court, thereby preventing the lower court from ruling on the issue.

Answer below: The lower court did not address this question.

Question Presented: Whether the lower court correctly held that an agency cannot withhold in their entirety completed judicial questionnaires concerning candidates' qualifications and fitness for office under either the public interest privilege or FOIL's privacy or life and safety exemptions.

Answer below: Yes.

COUNTERSTATEMENT OF THE CASE

I. The Mayor's Advisory Committee on the Judiciary

The New York Constitution empowers the New York City mayor to appoint judges to serve on City family and criminal courts and to fill vacancies on the Civil

Court. 15 N.Y. Const. art. VI, §§ 13(a), 15(a), 21(c). For decades, the City's mayors have chosen to delegate much of the work of judicial appointments to committees. *See* Lozier, James Edward, Note, *Judicial Selection in New York: A Need for Change*, 3 Fordham Urb. L.J. 605, 626 n.107 (1975). Mayor de Blasio created the Mayor's Advisory Committee on the Judiciary ("MACJ") on May 29, 2014, via Executive Order No. 4, to assist with his judicial appointments and reappointments. (R.143-46.) The FOIL request at issue was made to the office of Mayor de Blasio concerning his MACJ. Mayor Adams also has a MACJ, and the executive order outlining how the MACJ works under Adams is substantively the same as the executive order de Blasio issued regarding his MACJ. *See* N.Y. City Exec. Order No. 14 (April 12, 2022), https://www.nyc.gov/office-of-the-mayor/news/014-002/executive-order-14.

Candidates for judicial appointment or reappointment are required to submit a Uniform Judicial Questionnaire to the MACJ. (R.21.) The questionnaire requests basic biographical information, including an applicant's name, address, educational background, and employment history. It also asks questions about candidates' qualifications and fitness for a judgeship, including their legal expertise, ability to cope with the schedule and scrutiny that comes with a judgeship, and information that might indicate a conflict of interest or issues that could compromise a candidate's ability to perform duties impartially. (*See generally* R.21-43.)

The MACJ's work involves a multi-step process to nominate three candidates for a given open judgeship. Upon receipt of a questionnaire, the MACJ conducts a preliminary review of the candidate's qualifications. (R.174.) Then, if a candidate clears this preliminary review, the MACJ contacts a candidate's references. (*Id.*) The MACJ also contacts schools and employers to verify the information provided. (R.173.) After scrutinizing each candidate through multiple rounds of review, the MACJ sends qualified applicants' materials to a subcommittee, which interviews candidates and continues to solicit external feedback from third parties with knowledge of the candidate. *Id.*

The subcommittee then prepares reports about qualified candidates before the full MACJ meets to consider applications. (R.175.) The governing executive order mandates the MACJ nominate to the mayor the three candidates it prefers for each open position. (R.143.) The mayor "shall not appoint a judge unless nominated by the Committee[.]" (R.144.)

At this point, the mayor's role in the appointment process begins, as he selects one of the three recommended candidates and submits his choice to the New York City Bar Association's Judiciary Committee ("Bar Association") for review. (R.60.) If the Bar Association approves the mayor's selection, the MACJ then conducts a public hearing on the judicial nominee. (R.144.) Only after the hearing, "upon the

appointment of each candidate," does the public receive any summary of the chosen candidate's qualifications. (R.72.)

In addition to new appointments, the MACJ also plays a role in reappointments of sitting judges. Judges seeking to continue serving on family and criminal courts submit the same questionnaire to the MACJ as judges seeking initial appointment; the MACJ then reviews the questionnaires before recommending to the mayor whether a judge should be appointed for another term. (R.21; R.143-44.) The mayor "shall not reappoint an incumbent judge unless recommended for reappointment by the Committee." (R.144.)

II. FOIL Request and Appeal

On October 21, 2020, journalist Janon Fisher requested via FOIL "all Uniform Judicial Questionnaires for applicants currently under review by the [MACJ]." (R.110.) Almost five months later, the OOM denied the request without explanation. (R.47.) Mr. Fisher then contacted the Committee on Open Government ("COOG") for an advisory opinion. (R.49.) The COOG notified the OOM on March 19, 2021, that it was looking at the request and asked the OOM for "any additional information that it believes would be helpful . . . in forming an opinion as [to] the appropriateness of the Office's response." (R.52.) The COOG also noted that the OOM's initial response was "clearly insufficient." *Id*. Within a week of receiving the COOG's inquiry, the OOM notified Mr. Fisher that it had "re-opened" his request. (R.56.)

However, the OOM denied the FOIL request again on March 23, 2021, and this time cited Section 86(3) of FOIL (which defines "agency") and four FOIL exemptions, including Sections 87(2)(b), (f) and (g) and Section 89(2)(b). (R.58.) The MACJ again gave no explanation to justify withholding the Questionnaires. *Id.*

The COOG issued an advisory opinion on March 26, 2021, stating that, "based on the authorizing Executive Order," the MACJ "served more than a purely advisory capacity[,]" because "[t]he Mayor may not act unless the Committee has nominated a particular judge[.]" (R.60-61.) Therefore, "it is clear that records maintained by" the MACJ "are records subject to rights of access conferred by FOIL." (R.61.)

With respect to the privacy exemption, § 87(2)(b), the COOG said "there are aspects of the questionnaire that reflect information which, if disclosed would not constitute an unwarranted invasion of personal privacy (e.g., education, licensure, public employment, etc.). Those portions of the records clearly could be disclosed." *Id*. With respect to the public safety exemption, § 87(2)(f), the COOG said that "it is unlikely that the agency could meet its burden of proof in withholding the entire record on this ground." *Id*. Finally, as to the inter- or intra-agency exemption, § 87(2)(g), the COOG said that because "these records are completed and submitted to the agency by candidates for employment and not by employees or officials of the agency, they cannot in our view be characterized as 'inter-agency or intra-agency' materials[.]" *Id*.

Mr. Fisher appealed the denial (R.64), which the OOM then denied on April 19, 2021 (R.71-73). This denial articulated for the first time the reasons the OOM believed the records could not be disclosed. The OOM argued that making the questionnaires public would amount to an unwarranted invasion of privacy, that "the mere disclosure of the names of candidates under consideration risks embarrassment and reputational damage to those candidates ultimately not selected for appointment[,]" and that disclosure "would likely chill the candor" of the nominees. (R.72.) Additionally, in the denial, the OOM argued that "applicants [] provide residential addresses, date of birth, the names of all household members and other personally identifying information" and that "[t]he release of any of this information would endanger the safety of potential judicial nominees and their families." (R.73.) The OOM also argued that it does not "waive the inter-agency exemption" when it "accept[s] the Uniform Judicial Questionnaire from members of the public." (R.72.)

III. Decision Below

Following the denial of the request at the administrative appeal, Mr. Fisher initiated an Article 78 proceeding. In its trial court briefing, the OOM reiterated its arguments as to privacy concerns and safety concerns (R.100-104) and made a new argument for withholding the documents on the basis of the public interest privilege (R.97-100). At oral argument, the lower court asked if the OOM was conceding the MACJ was an entity under FOIL and sought confirmation that the OOM "didn't

raise [the] argument" that the MACJ was not an agency. (R.223.) The OOM affirmed that it was conceding the point and that it "did not make that argument." (R.223-24.)

In its ruling from the bench, the lower court granted Mr. Fisher's petition for release of the documents. The lower court stated that the "public interest exemption really does not exist" and dismissed the safety concerns as "sheer speculation." (R.225-26.) The lower court also stated in its decision that although some information, such as the addresses and information related to candidates' children, creates privacy concerns, the OOM would be able to address these concerns through redactions, rather than by entirely withholding the documents. (R.228.) The court acknowledged that under FOIL "[t]he preference is to release" documents (R.226) and ordered the questionnaires to be released because "[t]here really must be sunshine in the process" of judicial appointments (R.227).

ARGUMENT

This Court must affirm the lower court's judgment that FOIL requires disclosure of the documents Mr. Fisher seeks. "FOIL is based on a presumption of access to the records," *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007) unless an agency satisfies its burden of demonstrating that "the material requested falls squarely within the ambit of one of these statutory exemptions[.]" *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

As a threshold matter, the OOM has waived any argument that FOIL does not apply to the MACJ by expressly conceding the point before the lower court. But, even if the Court considers OOM's waived argument, FOIL does indeed apply to the MACJ because the MACJ performed governmental functions in assessing judicial candidates and nominating specific candidates to the mayor for appointment and reappointment. The OOM also has not demonstrated that the public interest privilege applies in the FOIL context or shown that the Questionnaires fall squarely within the privacy or life and safety exemptions. Because the OOM has not met its burden to justify withholding here, the Questionnaires must be released.

I. THE COURT SHOULD DECLINE TO CONSIDER WHETHER THE MACJ IS AN AGENCY SUBJECT TO FOIL BECAUSE THE OOM WAIVED THE ISSUE BELOW.

The OOM attempts to raise as an issue whether it has preserved on appeal the question of FOIL's application to the MACJ. Br. for Appellant at 15-21. However, the OOM explicitly conceded before the trial court that the MACJ is an agency subject to FOIL and thereby waived any ability to argue the opposite on appeal. This Court should decline to even consider the OOM's contention that MACJ is not an agency subject to FOIL; however, if this Court nonetheless deems the issue preserved for appeal, it should find that FOIL does apply to the MACJ, as it is an agency performing governmental functions.

A. By Conceding at the Trial Court That FOIL Applies to the MACJ, the OOM Waived the Opportunity to Argue the Opposite on Appeal.

"A party who agrees not to take a certain position in a trial court will be held to have waived that position on appeal." *Metlife Auto & Home v. Pennella*, 10 A.D.3d 726, 726 (2d Dep't 2004). This principle applies where a party has explicitly argued one position at the trial court and tries to argue an opposing one on appeal. *See In re Sbuttoni*, 16 A.D.3d 693, 694 (2d Dep't 2005) (holding where a party "expressly argued" a claim was subject to a specific statute of limitations, the party could not later argue for a different statute of limitations on appeal). This same concept applies where a party has acquiesced at the trial level to the claims of the other party and then argues the opposite on appeal. *See Llewellyn v. Maurice W. Pomfrey & Assocs., Ltd.*, 16 A.D.3d 1162, 1162 (4th Dep't 2005) (finding where "defendants acquiesced in plaintiff's position" that an agreement was enforceable at the trial court, defendants could not then argue for its unenforceability on appeal).

Here, the OOM conceded at the trial level that the MACJ is an agency subject to FOIL, and therefore, it cannot now argue the opposite. The OOM's briefing below articulated no argument that the MACJ is not an agency, and the OOM made no such point at oral argument. In fact, the lower court explicitly asked the OOM's counsel at oral argument whether the OOM was conceding the MACJ is an agency under FOIL and sought confirmation that the OOM "didn't raise that argument." (R.223.)

The OOM replied in the affirmative, confirming that it was conceding the point and "did not make that argument." (R.223-24.) The lower court then proceeded to rule from the bench without addressing the agency argument that the OOM waived. (R.225-29). Because the OOM acquiesced at the trial level to Mr. Fisher's position, it cannot now argue the opposite in a gambit to reverse a judge who had no opportunity to rule on the issue.

B. The MACJ Is an Agency Subject to FOIL Because It Performs Governmental Functions.

Even if this Court decides to consider the OOM's waived argument that the MACJ is not an agency subject to FOIL, it should decline the OOM's invitation to shield the MACJ's documents from disclosure and instead defer to the COOG's well-reasoned advisory opinion in this matter. (R.60-62.) Because the MACJ performs governmental functions as an integral part of the judicial appointment and reappointment process in New York City, it is clearly an agency subject to FOIL.

Under FOIL, an agency is "any state or municipal" entity "performing a governmental . . . function[.]" N.Y. Pub. Off. Law § 86(3). Although solely giving advice does not constitute performing a governmental function for purposes of FOIL, "[t]he mere attachment of the label 'advisory' to a . . . committee is insufficient to circumvent FOIL[.]" *Snyder v. Third Dep't Jud. Screening Comm*., 18 A.D.3d 1100, 1101 (3d Dep't 2005). Instead, a court determining whether an entity is subject to FOIL must make "a realistic appraisal" of whether it indeed

performs a governmental function. *Perez v. City Univ. of New York*, 5 N.Y.3d 522, 528 (2005).

"Key" to the "conclusion" that an entity labeled as advisory performs a governmental function is the "power it possesses" and the role it plays in an agency's decisionmaking process. *Id.* at 528-30 (holding that a College Senate was an agency subject to FOIL given its role as "the sole legislative body on campus authorized to send proposals to the CUNY Board of Trustees" on a variety of issues and the necessity of the Senate's input to the university's "governance scheme"); *MFY Legal Servs., Inc. v. Toia*, 402 N.Y.S.2d 510, 511–12 (Sup. Ct., New York Cty., Special Term 1977) (finding that advisory committee to Social Services Department was agency performing governmental functions because of its necessity to the department's functioning, as the "Commissioner may . . . be prohibited from acting before he receives [the committee's] advice").

Here, as the Committee on Open Government determined, the MACJ is an agency subject to FOIL because it plays a necessary role in the judicial appointment process beyond merely advising the mayor. The COOG found that "it is clear" the MACJ's "records [are] subject to rights of access conferred by FOIL" because "[t]he Mayor may not act unless the Committee has nominated a particular judge; this is not a merely advisory role." (R.60-61.) Though not binding, the COOG's opinions "should be upheld if not unreasonable or irrational." *Forsyth v. City of Rochester*,

185 A.D.3d 1499, 1500 (4th Dep't 2020) (quoting *Weslowski v. Vanderhoef,* 98 A.D.3d 1123, 1130 (2d Dep't 2013)). *See also Thomas v. New York City Dep't of Educ.,* 103 A.D.3d 495, 498 (1st Dep't 2013) (holding that COOG's opinions "may be considered to be persuasive"); *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 305 A.D.2d 83, 90 (2d Dep't 2003) (recognizing the "intrinsic merit" of COOG opinions).

The OOM argues the MACJ "does not share power with the Mayor to appoint candidates," and its role is therefore purely advisory. Br. for Appellant at 13. However, the mayor does share his power of appointment with the MACJ; the Executive Order requires that the mayor choose a judge from the nominees selected by the MACJ, thereby sharing the appointment power with the MACJ through a multi-step process. (R.143-44).

The OOM also argues that the MACJ is not an agency because it cannot implement its own recommendations, and the mayor can "reject any of the nominees, and can ask the Committee to vet additional candidates for his review."[1] Br. for

[1] The OOM also argues the MACJ is not an agency subject to FOIL because the MACJ was created by an executive order and not by statute. *See* Br. for Appellant at 13, 15. But the OOM cites no case law that supports this bright line distinction between entities created by statute and by executive order. To the contrary, the Second Department has instead credited the fact that an entity was not created by either "statute or executive order" and instead merely "by invitation" in its determination that a task force was not an agency. *Poughkeepsie Newspaper Div. of Gannett Satellite Info. Network v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs,* 145 A.D.2d 65, 67 (2d Dep't 1989). Such a distinction also ignores the analysis the Court must undertake here, which demonstrates that the MACJ is an agency because it is "exercising a

Appellant at 14. But just because a higher authority "retains the formal power to veto recommendations," of an entity, "that does not in and of itself . . . render the [entity] purely advisory." *Perez*, 5 N.Y.3d at 530. Even if the mayor was free to fully ignore the MACJ's recommendations (and he was not), the MACJ's role, like the College Senate's role for the Board of Trustees in *Perez*, was an "integral component[] of the governance structure" for City judicial appointments, therefore rendering it subject to FOIL. *Id.* Indeed, the mayor could not ignore the MACJ's nominations without leaving judgeships vacant, which would conflict with the mandate to fill judgeships "within ninety days unless a longer period is required in the public interest." (R.144). Although the MACJ cannot appoint candidates on its own, its recommendations are not purely advisory, either—they are a key part of the appointment and reappointment processes. This makes the MACJ's work a quintessentially governmental function.

Additionally, the OOM erroneously relies on surface similarities to a case involving a state judicial screening committee, *Snyder v. Third Dep't Jud. Screening Comm.*, 18 A.D.3d 1100 (3d Dep't 2005), to argue the MACJ is not an agency.[2] But

quintessentially governmental function" through its critical role in the appointment process. *Perez*, 5 N.Y.3d at 529.

[2] The OOM also erroneously relies on *Baumgarten v. Koch* to support its position. Br. for Appellant at 15, 22, 24, 27. The role of the MACJ here is easily distinguishable from the committee in that case, whose mayor "made judicial appointments of individuals other than those recommended by the committee." *Baumgarten v. Koch*, 97 Misc. 2d 449, 451 (Sup. Ct., N.Y. Cty. 1978). Here, the Mayor was not free to appoint individuals if the MACJ had not recommended them. (R.144.) The *Baumgarten* court, moreover, ultimately withheld the documents in reliance

the governor's committee in *Snyder*, unlike here, was "limited to providing information to [the] appointing authority" about interim judicial vacancies. *Perez*, 5 N.Y.3d at 530 (distinguishing the committee in *Snyder* from the College Senate in *Perez*). While the governor did not even receive "advice about which of the candidates it may prefer" from the committee, *Snyder*, 18 A.D.3d at 1102, here "[t]he Mayor shall not appoint a judge unless nominated by the [MACJ]." (R.144.) The MACJ therefore plays a key part in the overall appointment and reappointment decision-making process that renders it subject to FOIL.

In sum, the MACJ's necessity to the appointment and reappointment process demonstrates it performs governmental functions. If the Court chooses to consider this issue, it should therefore find, just as the COOG determined, that the MACJ is an agency subject to FOIL.

II. THE LOWER COURT CORRECTLY HELD THAT NEITHER THE PUBLIC INTEREST PRIVILEGE NOR THE PRIVACY OR SAFETY EXEMPTIONS JUSTIFY WITHHOLDING HERE.

The OOM argues that this is not a "standard FOIL case" and thus considerations outside the enumerated FOIL exemptions justify withholding the Questionnaires. Br. for Appellant at 21. But the law makes no exception for a so-called "non-standard" FOIL case to allow an agency to manufacture additional

on the public interest privilege, *Baumgarten*, 97 Misc. 2d at 452, a common law doctrine the Court of Appeals later determined does not apply in the FOIL context. *See Doolan v. Bd of Co-Op Educ. Servs., Second Supervisory Dist. Of Suffolk Cty.*, 48 N.Y.2d 341, 347 (1979).

FOIL exemptions beyond those enumerated in FOIL itself. An agency instead has the burden to demonstrate for each and every withholding "that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification denying access." *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 566 (1986). The OOM has not met and cannot meet this burden.

The OOM makes the novel argument that "public interest"—both the public interest privilege from the discovery context and seemingly the public interest as a general concept—as well as "personal privacy" are "two interrelated doctrines" that somehow "protect these questionnaires from disclosure." Br. for Appellant at 21. This argument fails because the OOM has not cited and cannot cite any support for its position, which flies in the face of New York courts' narrow interpretation of FOIL exemptions to only allow for withholding where documents fall "squarely within" an enumerated FOIL exemption. Br. for Appellant at 21; *Capital Newspapers*, 67 N.Y.2d at 566. Because the OOM cannot demonstrate the public interest privilege, the privacy exemption, or the life and safety exemption justify withholding the Questionnaires, they must be disclosed.

A. The Public Interest Privilege Cannot Shield Materials That Must Be Disclosed Under FOIL.

As the Court of Appeals determined and the lower court here subsequently correctly held, R.225-26, any reliance on the public interest privilege in the FOIL context is misguided because it is not an enumerated FOIL exemption. *See Doolan*,

48 N.Y.2d at 347. Since the privilege is instead a common law doctrine applicable in the discovery context, it cannot be improperly deployed like a FOIL exemption to "protect from disclosure materials which [FOIL] requires to be disclosed[.]" *Id*. Thus, the cases OOM relies on to deploy the public interest privilege, which apply the privilege in the discovery context, are inapplicable. *See Toker v. Pollak*, 73 A.D.2d 584, 584 (1st Dep't 1979) (finding the public interest privilege is a safeguard against the dangers of "unbridled discovery"); *Jones v. State of New York*, 58 A.D.2d 736, 736 (4th Dep't 1977) (claimant in a wrongful death action seeking government investigation records).

For the same reason, the OOM cannot rely on a purported "public interest" in nondisclosure that doesn't squarely fit within the ambit of an enumerated FOIL exemption. The OOM relies at length on *Baumgarten*, 97 Misc. 2d at 452, to support speculative concerns about candidates' lack of "candor" if the Questionnaires were to be disclosed. *See* Br. for Appellant at 23-24. But this case, like *Toker* and *Jones*, is inapplicable because it improperly justifies withholding FOIL records based on the public interest privilege, a doctrine subsequently rejected by the Court of Appeals. *See id*.; *see also Doolan*, 48 N.Y.2d at 347.

Even if the OOM had attempted to somehow tie candor concerns to an enumerated FOIL exemption, it utterly fails to demonstrate that the public interest in qualified judicial candidates is served by blanket "confidentiality and candor" in

the judicial selection process. Research has demonstrated that it is not cloak-and-dagger confidentiality that attracts qualified applicants, but, rather, a "clear, transparent, and public" judicial selection process.[3] For instance, Arizona's judicial selection system, which publicly releases completed judicial questionnaires, has not only had no "apparent difficulty in attracting qualified candidates,"[4] but it has also been lauded for increasing diversity on the bench.[5]

The OOM conjures a hypothetical judicial candidate, who, while qualified to serve for a position requiring the utmost "character, integrity, industry and temperament," R.79, would simultaneously balk at the public disclosure of their professional background. The OOM ignores that similarly qualified judicial candidates in nearby Pennsylvania did just the opposite of what the OOM predicts here recently by voluntarily disclosing their identities and advocating for a more transparent judicial process[6] in connection with a public records suit journalists

[3] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 8, *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.
[4] *Id.* at 9 n.iv.
[5] *See, e.g.*, Scott Bales, *Why Arizona has some of America's best judges*, AZ CENTRAL (Sept. 12, 2014), https:// www.azcentral.com/story/opinion/op-ed/2014/09/12/arizona-judicial-performance-review/15515743/ (attributing the success of Arizona's merit selection system to its transparency and opportunities for public input).
[6] Brad Bumsted and Sam Janesch, *Three Candidates Identified for State Court Vacancy Shrouded in Secrecy*, LANCASTER ONLINE (Jun. 30, 2021), https://lancasteronline.com/news/politics/three-candidates-identified-for-state-court-vacancy-shrouded-in-secrecy/article_9675c366-d926-11eb-86f0-a70b50255178.html.

brought to unveil candidates' identities and qualifications. *See Office of Gen. Counsel v. Bumsted*, 247 A.3d 71 (Pa. Cmwlth. 2021).

Because the "public interest privilege" and "public interest" more generally are not enumerated FOIL exemptions, the OOM fails to meet its burden to demonstrate that the material sought "falls squarely within" any FOIL exemption. *Capital Newspapers v. Burns*, 67 N.Y.2d at 566.

B. The OOM Has Failed to Show that the Identity and Qualifications of Judicial Candidates Should Be Withheld Under FOIL's Privacy Exemption.

The lower court correctly held that FOIL's privacy exemption cannot justify blanket withholding of the Questionnaires. (R.226-29.) As a threshold matter, Mr. Fisher does not oppose the redaction of certain highly sensitive or personal information, including social security numbers, health information, telephone numbers, or the residential addresses of candidates and their families. While Mr. Fisher has conceded that such information may be redacted here, (R.185 n.6, 203-04), the lower court correctly pointed out with respect to candidates' residential addresses that the OOM's argument for withholding this information under any exemption makes little sense, given that state judicial candidates seeking election are already required to publicly disclose this information "for very good reason" to demonstrate that a candidate lives in the relevant jurisdiction. (R.222-23.) Putting aside the sensitive information Mr. Fisher concedes can be withheld, the OOM has

failed to demonstrate that releasing other information in the Questionnaires would constitute an unwarranted invasion of privacy under any category specifically enumerated in this exemption or the requisite balancing test that considers whether any privacy interest outweighs the public interest in disclosure. *See Dobranski v. Harper*, 154 A.D.2d 736, 737 (3d Dep't 1989). Therefore, this information must be disclosed.

First, the OOM has failed to show that the information requested falls under a specific category enumerated in the privacy exemption under FOIL. While FOIL exempts "disclosure of employment, medical or credit histories or personal references of applicants for employment[,]" N.Y. Pub. Off. Law § 89(2)(b)(i), this Court has found that when a public position requires a certain level of career experience, disclosure of employment history is not an unwarranted invasion of privacy. *Kwasnik v. City of New York*, 262 A.D.2d 171, 171-72 (1st Dep't 1999). In *Kwasnik*, as here, the "need for the information would be great and the personal hardship of disclosure small," *id*. at 172, because applicants' employment history is highly relevant to their judicial qualifications and in many cases already publicly available in some manner. This is because the "highly-qualified" candidates (R.80) sought by the MACJ are the types of individuals whose achievements and activities would already be available on an employer's website, court docket, bar association publication, or other similar locations.

Time after time, including in this matter, the COOG has determined that "prior public employment and other items that are matters of public record, general educational background . . . and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed." (R.87; *see also* R.60). But in an attempt to argue that disclosure of this information would still somehow constitute an unwarranted invasion of personal privacy, the OOM baselessly claims that the "COOG's ignorance of the statutory language" and the "Supreme Court's express reliance on COOG's decision" together "undermine[] the court's decision[.]" Br. for Appellant at 29. Putting aside the OOM's position on the merits, the COOG's advisory opinions merit deference from New York courts because it is "the State agency charged with administering the Freedom of Information Law." *Miracle Mile Associates v. Yudelson*, 68 A.D.2d 176, 181 (1979).

Second, the OOM has also failed to show that the Questionnaires should be withheld under the requisite balancing test, where courts "balanc[e] the competing interests of public access and individual privacy" to determine whether disclosure amounts to an unwarranted invasion of privacy that is "offensive and objectionable to a reasonable man of ordinary sensibilities." *Dobranski*, 154 A.D.2d at 737.

The public has a fundamental interest in accessing the Questionnaires to assess whether judicial candidates possess the requisite job qualifications necessary to perform their duties. This interest clearly outweighs any purported privacy

interests of candidates. *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) (rejecting privacy exemption over the "employment history and qualifications" of a candidate appointed by the mayor that "did not meet the credentialing requirements for the all-important position of School Chancellor").

Because judges have "a duty to conduct" themselves "in such a manner as to inspire public confidence in the integrity, fair-mindedness and impartiality of the judiciary," *Matter of Young*, 19 N.Y.3d 621, 625 (2012) (quoting *Matter of Esworthy*, 567 N.Y.S.2d 390 (1991)), it is in the public interest to make public prior to a candidate's appointment or reappointment information that the OOM claims should be shrouded in secrecy, including any "malpractice suits, arrests, charges, sanctions, bar discipline, resignations, bankruptcies, and past drug or alcohol use." Br. for Appellant at 26–27. This compelling public interest outweighs the claim that releasing this type of information would "invade the depths of the candidate's intimate information." Br. for Appellant at 25.

This public interest in disclosure outweighs secrecy even though the candidates completing the Questionnaires may not yet be and may never become members of the judiciary. This is because the public also has a fundamental interest in ensuring that the process by which public officials are chosen is fair, equitable, and not unduly politicized. As the lower court correctly noted, the public must know

the identities of both successful and unsuccessful candidates to adequately evaluate the fairness of the selection process and to preserve its confidence in the judicial system. (*See* R.211–12 ("Why can't the public know those people who were not selected?").)

In contrast to the weighty public interest in accessing the Questionnaires, the purported privacy interests at stake are minimal. Much of the information sought is already publicly available, making it unlikely that disclosure of such information would be offensive and objectionable to a reasonable person of ordinary sensibilities. The "highly-qualified" candidates (R.80) sought by the MACJ are the types of individuals whose achievements and activities would already be publicly available wherever details of accomplished attorneys' professional experience routinely are published without controversy or claim of privilege.

C. The OOM Has Failed to Show That the Information Sought Falls Under FOIL's Life and Safety Exemption.

The OOM argues that both the COOG and the lower court were "unduly dismissive" of any safety concerns stemming from disclosure here, even though Mr. Fisher has conceded that home addresses can be redacted. Br. for Appellant at 30. The OOM speculatively posits that any information, from "names alone" to "political parties, work experiences or other identifying information" could put candidates at risk. *Id.* at 31. But, as the lower court and the COOG correctly held, mere speculation is not enough to meet the OOM's burden here (R.225) (finding

"there is really no exemption for safety" at issue and noting, with respect to home addresses, that the OOM's argument is "quite ironic[,]" since "many candidates for judicial office" have to publicly disclose this information); (R.61).

An agency seeking to withhold documents under FOIL's life and safety exemption bears the burden of demonstrating more than a hypothetical possibility of endangerment. N.Y. Pub. Off. Law § 87(2)(f); *see Matter of Gould v. NYC Police Dep't*, 89 N.Y.2d 267, 275 (1996). Mere speculation about the possibility of a safety threat, presented without evidentiary support, is insufficient to sustain the agency's burden. *See Mack v. Howard*, 91 A.D.3d 1315, 1316 (4th Dep't 2012). Rather, the party with the burden must show that the information sought "'could, by its inherent nature, . . . endanger the life and safety' of those as to whom the information is sought." *New York Laws. For Pub. Int. v. New York City Police Dep't*, 64 Misc.3d 671, 683 (Sup. Ct., N.Y. Cty. 2019).

The cases cited by the OOM found agencies met this burden to withhold information that is inherently dangerous because disclosure could compromise the safety of individuals involved in criminal investigations, including the identities of undisclosed witnesses in a gang-related homicide investigation and the locations and zone assignments of police officers. *See Matter of Bellamy v. N.Y.P.D.*, 87 A.D.3d 874, 875 (1st Dep't 2011); *Ruberti, Girvin & Ferlazzo P.C. v. N.Y. State Div. of State Police*, 218 A.D.2d 494, 496 (3d Dep't 1996). The same cannot be said for the

information sought here. First, the candidates' work addresses are often public knowledge that cannot be analogized to police officers' troop assignments. Second, it is improbable that the release of information concerning candidates' political affiliation, past addresses, or past work experiences would compromise candidates' current safety. To the contrary, much of the biographical information that the OOM seeks to withhold must be disclosed because it is relevant to the public's right to know the qualifications of judicial candidates. Because the OOM has not met its burden to demonstrate a non-speculative possibility of endangerment here, the Questionnaires should be released.

CONCLUSION

For all these reasons, Mr. Fisher respectfully requests that this Court affirm the lower court's order requiring the OOM to provide the information sought within 45 days and to remand to the lower court for further proceedings with respect to an award of reasonable attorney's fees and litigation costs.

Dated: August 9, 2023
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL
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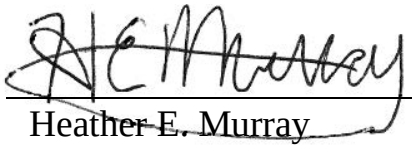
By: 

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[7] Clinic summer fellows Nyssa Kruse and Aika Riguera each drafted portions of this brief. The Clinic is housed within Cornell Law School and Cornell University. Nothing in this brief should be construed to represent the views of these institutions, if any.

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Line spacing: Double spaced.

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 6,651.

Dated: August 9, 2023