Court of Appeals

of the

State of New York

In the Matter of the Application of

JANON FISHER,

Petitioner-Appellant,

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-Respondent.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

----------X

In the matter of :
JANON FISHER,

Petitioner-Appellant, :

:

-versus-

The City of New York Office of the Mayor, :

Respondent-Respondent. :

----------X

New York County Clerk
Index No. 157755/2021

Appellate Division
Case No. 2023-00339

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the accompanying Memorandum in Support of Petitioner-Appellant's Motion for Leave to Appeal, order of the Appellate Division with Notice of Entry, order of the Supreme Court, New York County, record in the Appellate Division, and briefs in the Appellate Division, Petitioner-Appellant will move this Court, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on the 2nd day of January, 2024, for an order, pursuant to CPLR 5516 and Rule 500.22 of the Court of Appeals Rules of Practice, granting Petitioner-Appellant leave to appeal to this Court from the order of the Appellate Division, First Department, dated October 31, 2023.

Dated: December 14, 2023

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MEMORANDUM OF LAW

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-APPELLANT'S MOTION FOR LEAVE TO APPEAL

Pursuant to CPLR 5516 and 22 NYCRR 500.22, Petitioner-Appellant Janon Fisher respectfully submits this memorandum in support of his motion for leave to appeal.

PRELIMINARY STATEMENT

The Appellate Division's reversal of a ruling that would allow for more "sunshine in the process" of judicial selection (R.227), if left to stand, may have an impact far beyond this individual request. The Appellate Division's misreading of this Court's precedent to continue to shroud judicial candidate applications in secrecy could not only lead to a decline in public trust in appointed jurists, but also allow wide swaths of records agencies label "confidential" to be withheld without the requisite demonstration that an agency has met its statutory obligations. *See* Op. at 2. What is more, the Appellate Division's decision failed to even consider, as required, the great public interest of New Yorkers in a more transparent judicial selection process and ignored a well-reasoned Committee on Open Government ("COOG") advisory opinion supporting disclosure. *See id.* at 1-3.

In finding that disclosing information concerning candidates' public employment history and litigation experience would amount to an unwarranted invasion of personal privacy, the Appellate Division disregarded this Court's precedent requiring that an agency either demonstrate that information falls squarely

within a FOIL exemption or disclose the reasonably segregable non-exempt information. Instead, the Appellate Division determined with no basis that releasing redacted applications to address any legitimate privacy concerns would be "judicially unworkable" in this context. *Id.* at 3. In addition to there being no basis for declining to require that indisputably public information in the records be released, the Appellate Division also ignored that candidates are notified at the outset of the application process that the necessary vetting involved includes verifying questionnaire answers with employers, schools, grievance committees and bar associations and potentially sharing so-called confidential information with the New York City Bar Judiciary Committee for evaluation.

The Appellate Division's mistaken approach deserves review by this Court. Because the decision misapplies this Court's precedent and deprives the public of vital information to assess candidate qualifications and the efficacy of the judicial appointment process, it threatens to erode "public confidence" in the judiciary, without which "the judicial branch could not function." *In re Raab*, 100 N.Y.2d 305, 316 (2003). Leave to appeal should be granted.

PROCEDURAL HISTORY AND TIMELINESS

A. The FOIL Request

On October 21, 2020, journalist Janon Fisher requested via FOIL "all Uniform Judicial Questionnaires for applicants currently under review by the Mayor's

Advisory Committee on the Judiciary" ("MACJ"). (R.110.) Almost five months later, the City of New York Office of the Mayor ("OOM") denied the request without explanation. (R.47.) Mr. Fisher then contacted the COOG for an advisory opinion regarding the denial. (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*.

In response to the COOG's inquiry, the OOM notified Mr. Fisher that it had "re-opened" his request. (R.56.) Shortly thereafter, the OOM denied the request again on March 23, 2021, with citations to 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 applicants. (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.)

B. Proceedings in the Trial Court

Following the denial of his administrative appeal, Mr. Fisher timely filed an Article 78 proceeding on August 18, 2021, in Supreme Court, New York County. In the OOM's trial court briefing, the agency reiterated its arguments as to privacy 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 ruled that although some information, such as candidate 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). The lower court additionally noted that the "public interest exemption really does not exist" and dismissed the OOM's safety concerns as "sheer speculation." (R.225-26.) The lower court's order, dated December 1, 2022, was entered in the office of the Clerk of New York County on December 2, 2022.

C. Proceedings in the Appellate Division

Following OOM's appeal, the Appellate Division reversed the ruling of the lower court on October 31, 2023. Op. at 1-3. After determining that the OOM had not properly preserved the issue of whether the OOM is an agency subject to FOIL, the Appellate Division ruled that the agency sustained its burden of establishing that disclosure of the records would constitute an unwarranted invasion of personal privacy. *Id.* The Appellate Division reasoned that disclosure of the questionnaires "would undermine the assurances of confidentiality provided to candidates for judicial office" because "the word 'CONFIDENTIAL'" is stamped "in upper-case letters and boldface near the top" of the questionnaire's first page. *Id.* at 2.

In finding that "disclosure would create a chilling effect, thus potentially diminishing the candor of applicants and causing others to decide against applying for judicial positions[,]" the Appellate Division cited to no evidence in the record. *Id.* It similarly provided no basis for its determination that "disclosure of the very fact that certain candidates submitted the questionnaires could harm those persons'

reputations by revealing that they sought to leave their jobs, or were unsuccessful in their applications for judicial positions." *Id.* at 3. Instead of ordering limited redactions to the questionnaires to address any legitimate privacy concerns, the Appellate Division concluded that "[t]rying to address all these potential problems merely by ordering redactions to the questionnaires would be judicially unworkable." *Id.*[1]

D. Timeliness of the Motion for Leave to Appeal

Notice of Entry of the Appellate Division's Oct. 31, 2023 decision was mailed to Petitioner-Appellant's counsel on November 17, 2023. This motion for leave to appeal is timely made within 30 days of service of the Notice via mail. *See* CPLR 5513(b).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because the denial of Mr. Fisher's Article 78 Petition constitutes a final order within the meaning of CPLR 5602(a)(1).

[1] The First Department did not address the trial court's dismissal of the OOM's safety concerns as "sheer speculation" or the court's conclusion that the "public interest exemption really does not exist." (R.225-26.)

QUESTIONS PRESENTED FOR REVIEW

1. May an agency immunize records from FOIL disclosure by designating them "confidential," without also demonstrating that the records squarely fall within a statutory exemption?

The decision of the First Department answers this question, "Yes."

2. When a record contains some information that is exempt from FOIL's disclosure mandate, does FOIL require an agency to disclose any reasonably segregable sections that contain non-exempt information?

The decision of the First Department answers this question, "No."

ARGUMENT

I. The Decision Below Involves an Issue of Overwhelming Public Importance With an Impact Far Beyond This Specific Case.

Review should be granted because the decision below presents an issue of great public importance. *See* 22 NYCRR § 500.22(b)(4). This Court's FOIL decisions make abundantly clear that agency decisions limiting the public's right to access government information are indeed a matter of public importance to New Yorkers. *See, e.g.*, *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987) (finding that a "narrow construction" of FOIL defeats an "important public policy"). Beyond the importance of FOIL disclosure generally, the public has a particular interest in the information sought here regarding the qualifications of candidates for appointment to judgeships presiding over criminal, family and civil cases that affect the lives of

hundreds of thousands of New Yorkers each year. While the New York State court system in general is "under-resourced" and "over-burdened[,]" New York City family, civil and criminal courts, in particular, have been singled out for facing "extremely high volumes of cases, fewer resources to hear those cases and aging facilities" that together create, "in effect, a second-class system of justice for people of color in New York State[.]" Secretary Jeh Johnson, Report from the Special Adviser on Equal Justice in the New York State Courts, New York Courts (Oct. 2020), https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

Appointments to judgeships in these critical courts is a matter of great public concern. Disclosure of candidates' applications is important for many reasons, including:

- **Disclosure of questionnaires allows the public and the press to independently vet candidates in advance of appointments and hold public officials accountable for their selections**. In one prominent example of recent efforts to shed more light on the judicial selection process, Pennsylvania journalists won access to judicial vacancy applications they sought to cover the governor's selection to fill an appeals court vacancy. *See Office of Gen. Counsel v. Bumsted,* 247 A.3d 71 (Pa. Cmwlth. 2021). Several judicial candidates supported this public records lawsuit by voluntarily disclosing their identities to demonstrate the importance of making these applications public.[2]

[2] 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-vacancyshrouded-in-secrecy/article_9675c366-d926-11eb-86f0-a70b50255178.html.

- **Disclosure of judicial questionnaires attracts qualified candidates and can contribute to diversity on the bench**. Research has demonstrated that a "clear, transparent, and public" judicial selection process attracts qualified judicial candidates.[3] For example, 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 through its transparency.[5]

- **Disclosure of judicial questionnaires is critical to support much-needed independent evaluations of the judicial appointment process**. A New York City Bar Association Work Group recently raised "significant concerns" in a December 2020 report about the transparency and efficiency of the New York City Family Court appointment process.[6] The Work Group found that "the current [appointment] system leaves the Family Court in a state of constant flux," with certain "Family Court parts remaining without judicial officers for lengthy periods of time because of lags in the appointment process or delays in the replacement of judges" and judges seeking reappointment sometimes not being informed "until a few days or less before their terms' expiration whether they will in fact be reappointed."[7] While the Work Group requested basic information regarding the appointment process to evaluate its efficacy, the "MACJ was unable to readily provide the precise number of applications it receives or how many proceeded to each of the described steps" in the appointment

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[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-judicialperformance-review/15515743/ (attributing the success of Arizona's merit selection system to its transparency and opportunities for public input).

[6] The Family Court Judicial Appointment & Assignment Process Work Group Committee Report (Dec. 2020) at 1, New York City Bar Association, *available at* https://s3.amazonaws.com/documents.nycbar.org/files/2020790-FamilyCourtJudicialAppointmentProcess.pdf.

[7] *Id.* at 1-2.

process. This basic information is crucial to a meaningful evaluation of the appointment system.

At bottom, the disclosure of judicial questionnaires is essential to safeguard judicial independence and accountability. Given its far-reaching impact, this decision denying access to the questionnaires deserves further review by this Court.

II. The Decision Below Misconstrues This Court's Decision in *Harbatkin* and Overextends the Unwarranted Invasion of Privacy Exemption.

This Court nearly 40 years ago ruled that an agency cannot "use its label of confidentiality" to keep private that which should otherwise be public. *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984). Because "none of the statutory exemptions" created by the Legislature in enacting FOIL "empower[] a government agency to immunize a document from FOIL disclosure by designating it as confidential, either unilaterally or by agreement with a private party[,]" *City of Newark v. L. Dep't of City of New York*, 305 A.D.2d 28, 32–33 (1st Dep't 2003), the Appellate Division erred in finding that the "confidential" label on the judicial candidate questionnaires here somehow justifies withholding the records in their entirety. Op. at 2. The Appellate Division's decision rests on an unsupportable expanded application of this Court's decision in *Harbatkin v. New York City Dep't of Recs. & Info. Servs.*, which only permitted limited redactions of informants' names from interview transcripts in which interviewees were explicitly

promised confidentiality by the government for participation in mid-twentieth century anti-Communist investigations. 19 N.Y.3d 373, 380–81 (2012). The Appellate Division's decision, if permitted to stand, threatens to extend the unwarranted invasion of privacy exemption far beyond its narrow bounds to any records the government sees fit to label "confidential"—irrespective of whether or not they contain public information—as long as an agency can claim that a private party relied on that label in providing the information. That cannot be the law.

A. The *Harbatkin* Decision At Most Recognizes a Privacy Interest in Records Involving an Explicit Promise of Confidentiality to Government Informants, Which is Inapplicable Here.

The holding below misconstrues this Court's ruling in *Harbatkin*. 19 N.Y.3d at 380–81. In the *Harbatkin* decision, this Court weighed the competing public interest and privacy interests at stake in redacting names and identifying details from the interview transcripts of anti-Communist investigation informants and determined that much of the information had to be released. *Id.* For most people named in the transcripts, the Court found that revealing they "were named as present or former Communists" amounted to a "diminished claim[] of privacy" that must be weighed against the public interest in a "significant part of our past" being "told as fully and as accurately as possible." *Id.* at 380. The only redactions that the Court sanctioned shielded the names of citizen informants who government officials "promised that no one would find out they were being interviewed" concerning

Communist activities. *Id.* At the time these informants were interviewed, there was inherent harm in labeling someone a Communist, which does not in any way compare with applying for a judgeship. This Court's holding rejecting broader scale redactions of the transcripts demonstrates that the *Harbatkin* decision stands for the narrow proposition that government informants who are promised confidentiality may, for a limited period of time, have a privacy interest that is deemed sufficient to shield their identities from the public.

Because the *Harbatkin* decision only shielded the identities of informants promised confidentiality, the Appellate Division could not reasonably have equated the privacy interests of these Communist informants with those of judicial candidates. While the *Harbatkin* informants were assured confidentiality by the government prior to participating in their interviews, judicial candidates have no such expectation of privacy in the application information they share. Some candidates completing questionnaires are incumbent judges whose qualifications for reappointment as sitting judges should already be part of the public record and whose status as incumbents greatly diminishes any privacy interests they might otherwise have. And all candidates are notified from the outset that the application process involves verification of questionnaire answers with employers, schools, grievance committees and bar associations, a background check, and the potential for the questionnaires to be shared with the New York City Bar Judiciary Committee for

evaluation. *See, e.g.*, *Frequently Asked Questions*, NYC Mayor's Advisory Committee on the Judiciary, *available at* https://www.nyc.gov/site/macj/faq/frequently-asked-questions.page. Indeed, applicants are required to complete a set of confidential information waivers already during the vetting process. *Id.* Because candidates for judicial office have a diminished expectation of privacy that is in no way outweighed by the public interest in the qualifications of candidates for appointment, the Appellate Division should not have shielded these records from disclosure in their entirety.

And, even if this Court determined such a privacy interest somehow outweighed the great public interest in disclosure of the qualifications of candidates for judicial appointments, the *Harbatkin* decision does not support the wholesale withholding of the candidate questionnaires. Review of the lower court's decision is necessary here to correct the Appellate Division's fundamental misreading of the *Harbatkin* decision.

III. The Decision Below Failed to Require the Agency to Meet Its Burden Under This Court's Precedent to Establish That the Entirety of the Records Must Be Withheld and That Any Legitimate Privacy Concerns Could Not Be Addressed by Redactions.

Leave to appeal should also be granted because the First Department failed to follow this Court's precedent establishing how the statutory burdens imposed by FOIL are to be enforced. Specifically, the First Department accepted a wholly speculative claim of harm—that a so-called chilling effect would diminish the

candor of applicants and cause some not to apply—as sufficient justification to withhold the entirety of candidate questionnaires. Op. at 2-3. Even though much of the information disclosed in the questionnaires is biographical in nature and indisputably public, the First Department provided no explanation for how a chilling effect would arise from the disclosure of this information. *Id.* Neither did the Court demonstrate that it even considered the significant public interest in disclosure prior to determining that the questionnaires could be withheld in their entirety under the privacy exemption. *Id.* Claiming that ordering redactions in this context "would be judicially unworkable," if permitted to stand, threatens to severely hamper FOIL's effectiveness by allowing for the blanket withholding of records with no basis. *Id.* at 3.

A. Decision Below Failed to Require the Agency to Show a Particularized and Specific Justification For Denying Access to the Entirety of the Questionnaires.

This Court has repeatedly held that an agency "does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (citing *Church of Scientology of New York v. State*, 46 N.Y.2d 906, 908 (1979)). "[T]he burden of demonstrating that requested material is exempt from disclosure rests on the agency" precisely because FOIL's

purpose is "[t]o give the public maximum access to records of government[.]" *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80, 464 N.E.2d 437 (1984).

Here, no evidence demonstrates that the OOM relied on anything other than unsubstantiated speculation in claiming that releasing any portion of candidate questionnaires for appointment to NYC judgeships would somehow invade the privacy of the candidates. If the agency had actually consulted with candidates regarding the putative impact of public disclosure, it may well have found that New York candidates, like their Pennsylvania counterparts in a similar public records matter in the Commonwealth, actually support disclosure to avoid the appearance of a political patronage appointment system. *See supra* at 9. The OOM likewise failed to articulate any basis to support the implausible claim that public disclosure of the candidates' qualifications and their identities would cause an invasion of privacy in the context of vying for judicial office, particularly given that judges for elected state court positions and for appointed positions in other states routinely face public scrutiny. *See supra* at 9-10.

To support the speculative proposition that disclosure of candidates' identities would result in an unwarranted invasion of privacy due to the reputational harm of "revealing that they sought to leave their jobs, or were unsuccessful in their applications for judicial positions[,]" the Appellate Division erroneously relied on

prior precedent that is in no way analogous to throwing one's hat in the ring for a prestigious judgeship. Op. at 3 (citing *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 532 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016])). In *Asian Am. Legal Def. & Educ. Fund*, the First Department found that the privacy interest in withholding counterterrorism surveillance records outweighed the public interest in disclosure specifically because revealing "the subject[s] of counterterrorism-related surveillance would not only have the potential to be embarrassing or offensive, but could also be detrimental to the reputations or livelihoods of such persons or entities." *Id.* While it may be embarrassing for some candidates to not ultimately be chosen for a judgeship, the fact of applying cannot credibly construed as "detrimental to the reputations" of any lawyers. *Id.* Without question, there is great public interest in the disclosure of candidates' qualifications and identities here that outweighs the mere embarrassment of candidates not chosen for the bench.

The Appellate Division also failed to even address the COOG's advisory opinion in this matter that concluded that much of the information in the questionnaires "clearly could be disclosed" because it would not result in an unwarranted invasion of privacy, including, for example, information concerning "education, licensure, public employment, etc." (R.61). The COOG's advisory opinion merits deference because COOG is "the State agency charged with

administering the Freedom of Information Law[,]" *Miracle Mile Associates v. Yudelson*, 68 A.D.2d 176, 181 (1979), and "should be upheld" by this Court because it is "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)).

B. Decision Below Ignored FOIL's Requirement That an Agency Segregate and Disclose Non-Exempt Portions of Requested Records

The Appellate Division's decision should be reviewed for the additional reason that it failed to enforce the agency's statutory duty to segregate and disclose non-exempt portions of the requested records. Even when a FOIL exemption properly applies, an agency must still disclose any reasonably segregable portions containing nonexempt material. *See, e.g.*, *Matter of Schenectady Cty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills* ("*Mills*"), 18 N.Y.3d 42, 45 (2011); *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 464 (2007); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996). This Court requires that an agency "must redact the record to take out the exempt information" when "it can do so without unreasonable difficulty." *Mills*, 18 N.Y.3d at 45.

The trial court upheld this statutory requirement in holding that the OOM had no reasonable basis for failing to provide the records to Mr. Fisher and in ordering limited redactions to address privacy concerns. (R.227-228). In reversing and upholding the OOM's blanket claim of exemption, the Appellate Division simply

ignored the redaction requirement. Without redaction, FOIL's exemptions would, in effect, never be "narrowly construed" as the Legislature intended in enacting FOIL to "ensure maximum access to government documents[.]" *Gould*, 89 N.Y.2d at 275. The Appellate Division's failure to require redaction here constitutes a fundamental error of law that this Court should correct.

CONCLUSION

For the foregoing reasons, Mr. Fisher respectfully requests that this Court grant its motion for leave to appeal.

Dated: December 14, 2023
Ithaca, New York

Respectfully submitted,

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Attachment 1

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kapnick, J.P., Gesmer, Scarpulla, Rodriguez, O'Neill Levy, JJ.

920 In the Matter of JANON FISHER,
Petitioner-Respondent,

Index No. 157755/21
Case No. 2023-00339

-against-

THE CITY OF NEW YORK OFFICE OF THE MAYOR,
Respondent-Appellant.

Sylvia O. Hinds-Radix, Corporation Counsel, New York (Chloe K. Moon of counsel), for appellant.

Cornell Law School First Amendment Clinic, Ithaca (Heather E. Murray and Christina N. Neitzey of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about December 2, 2022, which granted the petition to the extent of directing respondent City of New York Office of the Mayor to provide redacted copies of the records sought in accordance with the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The City has not preserved its argument that the Mayor's Advisory Committee on the Judiciary, the body from which petitioner requested the records, is not an agency covered by FOIL even though the City raised that issue in its initial denial of the FOIL request. The City did not rely on that ground in its decision in denying petitioner's administrative appeal, and the Corporation Counsel affirmatively waived and abandoned this issue at oral argument before Supreme Court. This Court has no

discretionary authority in an article 78 proceeding to reach an unpreserved issue in the interest of justice (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Nevertheless, the City properly applied the personal privacy exemption (Public Officer's Law § 89[2][a]) to deny petitioner's FOIL request in its entirety, as the City sustained its burden of establishing that disclosure of the records sought in this case — "all Uniform Judicial Questionnaires for applicants . . . under review by the Mayor's Advisory Committee on the Judiciary" as of October 21, 2020 — would "constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]; *see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). Disclosure of the questionnaire, which states the word "CONFIDENTIAL" in upper-case letters and boldface near the top of its first page, would undermine the assurances of confidentiality provided to candidates for judicial office (*see Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380 [2012], *cert denied* 568 US 1157 [2013]).

Moreover, disclosure would create a chilling effect, thus potentially diminishing the candor of applicants and causing others to decide against applying for judicial positions. The questionnaire contains extensive questions touching on highly personal and sensitive matters, such as personal relationships, reasons for leaving jobs, reasons for periods of unemployment, substance abuse, arrests, criminal convictions, testifying as a witness in criminal cases, and reasons for anticipated difficulty in handling the stresses involved in being a judge, as well as a catch-all question at the end of the questionnaire asking for any other information, specifically including unfavorable information, that could bear on the evaluation of the judicial candidate. In addition to

the particular contents of the questionnaires, disclosure of the very fact that certain candidates submitted the questionnaires could harm those persons' reputations by revealing that they sought to leave their jobs, or were unsuccessful in their applications for judicial positions (*see Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 532 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]). Trying to address all these potential problems merely by ordering redactions to the questionnaires would be judicially unworkable.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: October 31, 2023

Susanna Molina Rojas
Clerk of the Court

PLEASE TAKE NOTICE that the attached order was entered in the office of the Clerk of the Appellate Division, First Department, on October 31, 2023.

Dated: November 17, 2023

HON. SYLVIA O. HINDS-RADIX
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Attorney for Appellant
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By: _____
CHLOE MOON
Assistant Corporation Counsel
212-356-2611

To:

Heather E. Murray
Christina Neitzey
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Attorneys for Respondent

New York County Clerk's Index No. 157755/21
Appellate Division Case No. 2023-00339

New York Supreme Court
Appellate Division: First Department

In the Matter of JANON FISHER,

Petitioner-Respondent,

against

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Respondent-Appellant

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Appellant
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within order and Notice of Entry is hereby admitted.

New York, N.Y._____, 2023

_____, Esq.

Attorney for _____

Attachment 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17

Justice

----------X

JANON FISHER

Plaintiff,

- v -

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Defendant.

----------X

INDEX NO. 157755/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 20 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the Petition is granted to the extent stated on the record today. Submit order on notice within forty-five (45) days.

12/1/2022
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[X]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 14, 2023

deponent served the within: **Motion for Leave to Appeal**

upon:

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for Respondent-Respondent
100 Church Street
New York, New York 10007
(212) 356-2611
cmoon@law.nyc.gov

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 14, 2023

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 513075