Appellate Division, First Department, Docket No. 2023-00339
New York County Clerk's Index No. 157755/21

Court of Appeals
State of New York

In the Matter of

JANOK FISHER,

Petitioner-Appellant,

against

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Defendant-Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

In this proceeding under the Freedom of Information Law ("FOIL"), petitioner Janon Fisher seeks leave to appeal the unanimous decision of the Appellate Division, First Department, holding that the Mayor's Advisory Committee on the Judiciary need not disclose, on grounds of personal privacy, the completed questionnaires of applicants for judgeships. The questionnaire assures applicants of confidentiality and probes deeply and at length into their personal, familial, and professional background. The Court should deny review for three reasons.

First, the case is a poor vehicle for review because it does not present a core threshold issue: whether the Committee—a purely advisory body composed of private citizens who are not employed by the government—is even an "agency" subject to FOIL at all. The First Department found that question unpreserved here, but it will undoubtedly be preserved in responses to other FOIL requests from Fisher and others seeking many years of questionnaires. The Court cannot sensibly review the FOIL status of completed questionnaires without considering the threshold "agency" issue.

Second, regarding FOIL's privacy exemption, the case does not present the issues framed in Fisher's motion. The First Department did not hold that an assurance of confidentiality alone renders a document private, regardless of its contents. Rather, the court correctly applied this Court's teaching that assurances of confidentiality—and the reliance interests they create—bears on the privacy analysis where, as here, personal information is at issue. Nor did the Appellate Division fail to consider whether segregable portions of the documents could be disclosed, as Fisher argues. Instead, the court found that redaction would not be "workable"—for reasons that Fisher's motion barely acknowledges.

Third, the First Department's ruling is not otherwise leave-worthy. The decision implicates no split among the departments of the Appellate Division or conflict with this Court's precedent. And the decision is plainly correct, as Fisher's arguments unjustifiably downplay the intrusiveness of the 20-plus page questionnaire and gloss over the sensitivity of disclosing even the fact of submission of an application by candidates who are unsuccessful in securing a nomination for judgeship.

OVERVIEW OF THE CASE

Individuals seeking appointment or reappointment in the New York City Criminal Court, Family Court, or Civil Court on an interim basis must complete a Uniform Judicial Questionnaire and submit it to the Mayor's Advisory Committee on the Judiciary (Record on Appeal ("R") R170-71). The Advisory Committee—a 19-member committee made up of a broad cross-section of New York's legal community, including deans of New York City law schools, legal practitioners, and law firm partners—then evaluates and recommends judicial candidates for appointment and reappointment, selecting three candidates for the Mayor's consideration for each opening (R145. 170). The Committee's role is purely advisory, as delineated in mayoral executive order that is subject to revocation or amendment at any time in the Mayor's sole discretion.

The detailed questionnaire that all applicants for covered judgeships must complete and submit to the Committee is labeled "CONFIDENTIAL" at the top of the first page and spans 23 pages, not counting additional sheets that may be submitted to answer

essay or narrative questions or to disclose additional responsive information that will not fit in the space given (R119-41). The questionnaire asks candidates to completely and thoroughly answer 40 questions about their personal and professional background, many with subparts (*id.*). The questionnaires include extensive questions on personal relationships, substance abuse, arrests, and criminal convictions, among other open-ended questions that require an applicant, for example, to list any reasons they may anticipate difficulty in handling the stresses involved in being a judge and to provide "any other information, specifically including unfavorable information, that could bear on the evaluation of the judicial candidate" (Mot., Ex. 1 at 2; *see also* R118-41).

The questionnaires of any of the candidates who are actually nominated for a judgeship by the Mayor are shared with the Judiciary Committee of the New York Bar Association so that it may evaluate the selected candidates, but the questionnaires of unsuccessful applicants are not shared at all (R175). And once the Mayor chooses a candidate, the Advisory Committee conducts a

public hearing on, and solicits public input about, that candidate (R144).

Fisher's FOIL request broadly sought a copy of all questionnaires for applicants "currently under review" by the Advisory Committee under FOIL as of October 21, 2020 (R110). The Office of the Mayor denied that request, citing Public Officers Law § 86(3), § 87(2)(b)(f), (g), and § 89(2)(b) (R148). Those citations made clear the multiple grounds for denying Fisher's request: (1) the records were in the possession of the Mayor's Advisory Committee on the Judiciary—an advisory body—not an "agency" subject to FOIL as defined by § 86(3); (2) disclosure of the questionnaires would violate the applicants' personal privacy, contrary to assurances of confidentiality stamped on the face of the questionnaires themselves; (3) disclosure would endanger the safety of the candidates; and (4) the questionnaires were inter- or intra-agency materials (*id.*).

Fisher then requested an advisory opinion from the New York State Committee on Open Government ("COOG") (R150-52). COOG believed that limited portions of the questionnaire could be

redacted—like an applicant's address or information related to an applicant's children—but opined that the questionnaires should otherwise be disclosed (*id.*). COOG also opined that the Advisory Committee "served more than a purely advisory capacity" and thus rejected the Mayor's Office's rationale that the Advisory Committee was not an "agency" subject to FOIL at all (R150-51).

Fisher then appealed the Mayor's Office's denial (R112-13). The Mayor's Office denied Fisher's administrative appeal, stating that the denial was "supported by the legislature's intent of protecting privacy made explicit by Public Officers Law § 87(2)(b) and § 89(2)(b)" (R154). The Mayor's Office explained that the background review process for judicial candidates was "considered highly confidential for good reason" (R155). And, as the Mayor's Office made clear, even the disclosure of an applicant's name "risks embarrassment and reputational damage" (*id.*).

Fisher then filed an article 78 petition (R11). In response to Fisher's petition, the Mayor's Office argued that the public interest privilege protected the records, that disclosing the questionnaires would risk chilling the applicants' candor, and that doing so would

further "constitute an unwarranted invasion of personal privacy" (R99-100). The Mayor's Office also cited *Snyder v. Third Dep't Judicial Screening Committee*, 18 A.D.3d 1100 (3d Dep't 2005), *lv. denied*, 5 N.Y.3d 711 (2005), where the Third Department held that a judicial screening committee—like the Advisory Committee—was not subject to FOIL as an advisory committee (R99).

After briefing, Supreme Court held oral argument on the matter. Under questioning, counsel for the Mayor's Office stated that it was not pressing the "agency" question (R224). For his part, Fisher disclaimed any entitlement to the questionnaires without any redactions, but never identified what those redactions might look like or how redaction would be workable (R205).

In its decision, Supreme Court concluded that the only issue in the case arose under the exemption for personal privacy, but found that exemption protected only some of the information contained in the questionnaires (R225-29). The court determined that the Mayor's Office "must redact all personal information and must provide ... the public information" (R228). Public information, according to the court, included certain categories of information,

like the dates of attendance at academic institutions, any licensure the candidate has, and any public employment the candidate has held (R227-29). The court directed the parties to submit a redacted version of the questionnaire for approval (R229).

The Mayor's Office appealed that order, arguing that the Advisory Committee is not an agency within the definition of Public Officers Law § 86(3) and that multiple, overlapping statutory exemptions barred the disclosure of the questionnaires (see Index No. 157755/2021, NYSCEF No. 27; Dkt. No. 2023-00839, NYSCEF Nos. 7, 12).

The First Department held that whether the Advisory Committee is an "agency" subject to FOIL had not been properly preserved, but reversed the lower court's order requiring disclosure of the completed questionnaires. The court agreed with the City that the questionnaires were exempt from disclosure, ruling that "the City properly applied the personal privacy exemption ... to deny petitioner's FOIL request in its entirety" (Mot., Ex. 1 at 2).

In holding that the City had sustained its burden of establishing that disclosure would constitute an unwarranted

invasion of privacy here, the First Department highlighted the questionnaires' "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" (*id.*). So too, the court noted the "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" (*id.* (emphasis added)).

The court further reasoned that, in addition to the content 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" (*id.* at 3). Given the breadth of highly intimate and personal details the questionnaires ask for, the court agreed that "[t]rying to address all

their potential problems merely by ordering redactions to the questionnaires would be judicially unworkable" (*id.*).

REASONS TO DENY LEAVE

A. This case is a poor vehicle for review, as it does not tee up the key threshold issue of whether FOIL even applies here.

For reasons of preservation, the First Department did not reach the threshold question of whether the Advisory Committee is even an "agency" whose records are subject to FOIL. But that question formed a major part of the background to this dispute—including one on which Fisher sought an opinion from COOG—and it is an issue that will be front and center in the resolution of other still-pending FOIL requests relating to judicial questionnaires. Because the significant threshold question of whether FOIL applies cannot be reached by this Court, *see, e.g.*, *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 406-07 (2006), this particular case makes a poor vehicle for review.

As whether FOIL even applies to the Advisory Committee is a dispositive, threshold question, accepting Fisher's invitation to reconsider the First Department's application of the privacy

exemption would be an unnecessary use of judicial resources. If the Advisory Committee is not an agency subject to FOIL, there would be no need to reach the question the First Department resolved, namely whether the privacy exemption bars disclosure here. Any guidance from the Court limited to the privacy exemption could prove largely academic and even misleading.

Moreover, the threshold question is a substantial one. The Third Department has held that a closely analogous state-level judicial advisory committee is not subject to FOIL, *Snyder v. Third Dep't Judicial Screening Comm.*, 18 A.D.3d 1100, 1102 (3d Dep't 2005), *lv. denied*, 5 N.Y.3d 711 (2005), and this Court has cited that decision approvingly, *see Perez v. City Univ. of N.Y.*, 5 N.Y.3d 522, 530 (2005). Because the Advisory Committee—created by Executive Order and just as easily disestablished—performs a purely advisory role, it is not subject to FOIL under these precedents.

And while we do not believe the disclosure of judicial candidate questionnaires presents a leave-worthy question in any permutation, the Court will likely have the opportunity to consider whether to grant leave in a case that will present the question of

FOIL's applicability together with the "privacy" exemption issue. Other pending FOIL requests, including a request Fisher has brought seeking the questionnaires of all candidates who have applied over the past two decades implicate these precise questions.

B. Nor does this case even present the concerns or issues that Fisher frames in his motion.

Even apart from the case's vehicle problems, a grant of leave is not warranted. Fisher's arguments for leave describe a different case than the one he chose to bring and, in any event, do not support further review. He makes two major errors in this regard—(1) he improperly conflates the small number of selected nominees with the entire population of applicants, and (2) he exaggerates the holding of the First Department. But neither of these tactics provides a justification for granting leave.

First, Fisher continues to downplay the serious privacy concerns raised by disclosing all applicants' intimate information by citing the public's interest in knowing about a particular nominee who is chosen for a judgeship (and, of course, who is

publicly vetted at that time). But that approach ignores the request Fisher actually made, seeking *all* applicants' questionnaires.

Even setting that aside, by conflating the two distinct categories, Fisher ignores a crucial difference: for those who are unsuccessful, the mere fact of applying to a judicial position brings the possibility of embarrassment, *see Harbatkin v. N.Y.C. Dep't of Records & Info. Servs.*, 19 N.Y.3d 373, 380 (2012), or could be "detrimental to the reputations or livelihoods of such persons." *Matter of Asian Am. Legal Defense & Educ. Fund v. N.Y.C. Police Dep't*, 125 A.D.3d 531, 532 (1st Dep't 2015). As the First Department correctly noted, "[d]isclosure 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" (Mot., Ex. 1 at 3). While Fisher suggests that specific record evidence was lacking on these points, the Appellate Division appropriately considered them to be a matter of common sense for those in the legal profession.

Fisher's arguments also ignore the transparency that is already baked into the process for the select nominees who are eventually chosen. No one disputes that "[a]ppointments to judgeships in these critical courts is a matter of great public concern" (Mot. at 9). But Fisher's stance—that the public must be privy to the depth of information contained in the completed questionnaires for private citizens who may never become judges—is misguided (*see* Mot. at 9-11). The public need not know such intimate information about candidates who are never selected or nominated. At the same time, releasing that information will lead directly to the concerns the First Department recognized: chilling persons from applying, chilling their candor when they do, and causing reputational harms.

Second, Fisher overstates the breadth of the First Department's holding. Though he suggests that the Appellate Division's decision would allow the government to exempt from disclosure "any records [it] sees fit to label 'confidential'" (Mot. at 12), the decision says nothing of the kind. Rather, it is both fact-specific and appropriately narrow. The court held merely that the

questionnaires are exempt from disclosure under the privacy exemption to FOIL, applying the long-standing and well-established balancing test that weighs the public and private interests at stake. *See* Public Officers Law § 87(2)(b); *N.Y. Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 485 (2005).

The First Department carefully tailored its analysis of the privacy exemption's application to the facts of this case. It thus found that the disclosure of the questionnaires sought would "undermine the assurances of confidentiality provided to candidates for judicial office," "create a chilling effect, thus potentially diminishing the candor of applicants and causing others to decide against applying for judicial positions," and "harm those persons' reputations by revealing that they sought to leave their jobs, or were unsuccessful in their applications for judicial positions" (Mot., Ex. 1 at 2-3).

Nor does Fisher's objection to the court's reliance on *Harbatkin* assist him. Neither this Court in *Harbatkin* nor the First Department here held that an assurance of confidentiality is itself dispositive. Rather both courts recognized that such an assurance

bears some weight where the material sought to be disclosed is intimate and personal.

Fisher never persuasively explains why the longstanding assurance of confidentiality given on the face of the questionnaires, and the reliance interests that come along with it, should be ignored. Nor could he. This Court's decision in *Harbatkin* acknowledges that the assurance of confidentiality *does* bear weight in analyzing the privacy exemption. And though he recognizes that the *Harbatkin* informants were "assured confidentiality by the government prior to participating in their interviews" (Mot. at 13), Fisher purports to see no connection between that case and this one, where similar assurances were given to judicial applicants before they submitted the information at issue. Going so far as to say that judicial candidates "have no such expectation for privacy in the application information they share" (*id.*), Fisher misses the central holding of *Harbatkin*: there is at least an expectation of privacy when private information has been disclosed by individuals in reliance on a guarantee of confidentiality. *Harbatkin*, 19 N.Y.3d at 380-81.

Fisher also mistakenly argues that because the promise of confidentiality resulted only in "limited redactions" in *Harbatkin* (Mot. at 11), it follows that limited redactions are all that should be allowed here. First, *Harbatkin* arose some half century after the documents at issue had been created, leading the Court to conclude that privacy interests had been diminished by the passage of time. *Harbatkin*, 19 N.Y.3d at 380. Second, Fisher ignores the significance of the redactions that were allowed in *Harbatkin*—the Court authorized the withholding of the names and identifying information of informants, so as to protect the identities of those who had been promised confidentiality. *Id.* Here, withholding the questionnaires from disclosure is necessary as a practical matter to protect the identities of applicants.

As the First Department recognized, "disclosure of the very fact that certain candidates submitted the questionnaires" would raise privacy concerns, and addressing those concerns, as well as others, "merely by ordering redactions to the questionnaires would be judicially unworkable" (Mot., Ex. 1 at 3). Fisher never meaningfully addresses that portion of the court's holding, nor has

he ever explained how there would be a practical way to segregate identifying information from the information he believes should be disclosed. After all, nearly any details about an applicant's background—their educational history, professional history, notable cases—could be identifying in some combination.

C. The First Department's application of well-settled principles to the particular facts here does not warrant leave.

This Court should not grant leave for another reason: the First Department's holding presents neither a novel question of law, a conflict with this Court's precedent, nor a conflict among the departments of the Appellate Division. *See* 22 NYCRR 500.22(b)(4). Fisher does not even claim there is a split among the departments. Nor could he, as there are no cases on this issue going the other way.

At bottom, Fisher's motion simply quibbles with FOIL's well-settled privacy exemption that protects personal information from disclosure where such information may be embarrassing, damaging to an applicant's reputation, or may chill the applicant from applying altogether. But that fight is a matter for another branch

of government: either the Mayor's Office, which by executive order could alter the process under which candidates are reviewed and recommended, or the State Legislature, which could change the breadth of the privacy exemption under FOIL. Either way, Fisher's complaints lie with policymakers, not the judiciary.

Fisher's reliance on Arizona's policy regarding the judicial nominating process further reveals his main beef: his disagreement with the underlying policy and statutes at play here (*see* Mot. at 9-10). The same is true regarding his citation to a Pennsylvania decision addressing a state records law that, unlike New York's, does not contain a general personal privacy exemption. *Compare* Public Officers Law § 89(2)(b) *with* 65 Pa. Stat. Ann. § 67.708(b)(7). That other states may have chosen different policies for their judicial selection process—or records laws—does not create a leave-worthy issue of law warranting this Court's review.

And the fact that some judicial candidates in some other states "voluntarily disclose their identities" (Mot. at 9) likewise has no bearing on this case: the voluntary choice by some to disclose their identities doesn't mean that disclosure should be foisted on all

others. Nor would it in any way justify broad disclosure of the intrusive questionnaires at issue here—long promised to remain confidential.

Nor does Fisher's challenge to the First Department's determination that redactions would be unworkable here warrant this Court's review (*see* Mot. at 18). That holding is merely another application of well-settled law. *See Matter of Schenectady Cty. Soc'y for the Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 45 (2011) (holding that redactions should be made only when an agency can do so "without unreasonable difficulty"). It is also a correct application of that law. Far from speculating (Mot. at 14), the judges of the First Department offered their reasoned judgment in evaluating the "intrusive" and "sensitive" information presented in these questionnaires, reflecting on the many ways that redactions would be unworkable and disclosure would invade privacy and chill applicants in their applications and candor (*see, e.g.*, 10/10/23 Oral Argument at 29:30-50).

Common sense reveals the sensitive nature of having one's unsuccessful application to a judgeship revealed to the public. Even

if *Harbatkin*'s "limited redactions" were the only ones available here, redacting the names and identifying information from these questionnaires would be an impossible task where almost any combination of answers could identify the applicant. And, of course, more than just the identifying information is sensitive and intimate in these questionnaires. For example, a judicial applicant who was once a victim of sexual assault would have that information disclosed on the basis of Fisher's request for only "limited redactions" (*see* 10/10/23 Oral Argument at 27:05). But that is exactly the kind of information meant to be protected by the privacy exemption.

Fisher's remaining arguments are equally misplaced. Though Fisher suggests that the New York City Bar needs certain information to meaningfully evaluate the candidates (Mot. at 10-11), the Bar is not the public. Besides, the questionnaires of the nominated candidates are already shared with the Bar, and Fisher declined to request the "basic information" he argues about now—like the number of applicants or how many proceeded through each step of the evaluation process (*id.*). And while Fisher contests the

First Department's decision not to rely on the COOG opinion, it is well settled that such opinions are to be considered only for their persuasive value. The COOG opinion here is badly errant and thus not persuasive. Once again, Fisher merely disagrees with the First Department's application of the well-settled law to the facts of this case. That is no basis for leave.

CONCLUSION

The motion should be denied.

Dated: New York, New York
January 26, 2024

Respectfully submitted,

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