SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Ava E. Lubell
Heather E. Murray
Cornell Law School
First Amendment Clinic
Ithaca, New York, 14853
Tel.: (646) 382-5423
Ava.Lubell@cornell.edu

Counsel for Petitioner

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

New York State Constitution

INTRODUCTION

This is a case about enhancing the public's trust in the integrity of the New York City Mayor's judicial appointment process by ensuring the public has access to information regarding the selection of judicial nominees.

While many trial court judges in New York ascend to the bench through democratic elections that allow for public input,[1] the State constitution vests the Mayor of New York City with the authority to appoint individuals to certain court vacancies.[2] Candidates wishing to be considered for appointment must submit a job application in the form of a completed Uniform Judicial Questionnaire ("Questionnaire")[3] to the Mayor's Advisory Committee on The Judiciary ("MACJ").[4] The Questionnaire solicits information directly from candidates that is crucial to determining an aspiring judge's qualifications and includes questions regarding a candidate's educational attainment, litigation background, client representations, areas of substantive legal expertise, executive experience, and more.[5] The Questionnaire also solicits information that speaks to a candidate's broader job performance and temperament, along with information about a nominee's susceptibility to conflicts of interest or the appearance of them.[6] The Committee verifies Questionnaire data, examines writing samples, and interviews candidates and their references.[7]

[1] N.Y. Const. art. VI § 6(c).
[2] N.Y. Const. art. VI § 13(a), 15(a), 21(c).
[3] *See* Pet. ¶ 3; Ex. A. "Pet." cites refer to the accompanying Petition filed in this matter. "Ex." citations refer to the corresponding exhibits attached to the Petition.
[4] *See* Pet. ¶ 11; Ex. J at 2.
[5] *See* Pet. ¶ 3; Ex. A at 3–9.
[6] *See* Pet. ¶ 3; Ex. A at 8-10.
[7] *See* Pet. ¶ 11; Ex. J at 4.

The MACJ ultimately winnows the candidate pool to a group of finalist nominees for review by the Mayor.[8]

Veteran journalist Janon Fisher requested completed Questionnaires of judicial candidates because the public has a significant interest in knowing the identity of the individuals the MACJ nominates and in having access to information to assess the qualifications of nominees. This "right to know the process of governmental decision-making" is, in fact, "basic to our society." N.Y. Pub. Off. Law § 84. And yet, the Office of the Mayor ("OOM") ignored this foundational principle of New York's Freedom of Information Law ("FOIL") in denying access to completed Questionnaires. OOM claims that disclosing the Questionnaires constitutes an unwarranted invasion of privacy[9] and that disclosure would chill the candor of candidates seeking appointment,[10] conveniently overlooking that any applicant who would withhold relevant information and be anything less than candid would be fundamentally unfit to serve. Additionally, OOM offers the conclusory assertion that disclosure would lead to potential embarrassment for unsuccessful candidates and thus discourage them from seeking appointment.[11]

OOM's arguments are inconsistent with the reality of MACJ's selection process and with FOIL. The mere possibility of disclosure leading to embarrassment is not grounds for withholding public documents. *See, e.g., Buffalo News v. Buffalo Mun. Housing Auth*., 163 A.D.2d 830, 831 (4th Dep't 1990) (rejecting claim of unwarranted invasion of privacy where newspaper may use records to "create embarrassing articles"). And even if some candidates might still be generally embarrassed by the disclosure of their candidacy, any embarrassment would already be triggered

[8] *See* New York City Bar Ass'n Work Group on The Family Court Judicial Appointment and Assignment Process, *The Family Court Judicial Appointment and Assignment Process* (Dec. 2020) at 11, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-family-court-judicial-appointment-and-assignment-process.
[9] *S*ee Pet. ¶ 19; Ex. I at 1.
[10] *See* Pet. ¶ 19; Ex. I at 2.
[11] *Id*.

by professional contacts being interviewed during MACJ's evaluation process.[12] OOM's failure to disclose public records is even more "noteworthy" now than it was a decade ago when a trial court took special note of Bill de Blasio's crusade as the then-New York City Public Advocate against the City's failure to "release even the most routine data requested under the state's Freedom of Information Law." *Hernandez v. Office of the Mayor of the City of New York*, 2011 N.Y. Slip Op. 33073(U), 2011 WL 6012165 (Sup. Ct., N.Y. Cty. Nov. 23, 2011) (citation omitted). Ten years later, de Blasio is now the NYC Mayor, but little has changed on the transparency front. OOM's failure even to acknowledge the significant public interest in ensuring that the appointment process is "open and transparent, with publicly available data about the diversity of applicants and nominees" demands scrutiny.[13]

The U.S. Supreme Court recognizes "[t]he importance of public confidence in the integrity of judges[.]" *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015). So, too, should the Office of the Mayor. In fact, the judiciary's authority "depends in large measure on the public's willingness to respect and follow its decisions." *Id. at* 433. And the public's confidence in and respect for the judiciary, in turn, "rests to a large degree on the manner in which judges are selected." *Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002, Ginsburg, J., dissenting). To maximize that public trust, researchers have "urge[d] states to adopt a *publicly accountable* appointment process," including by "publicly disclos[ing] a list of potential finalists" and providing "multiple opportunities for public input" "[t]o counter possible behind-the-scenes political influence and build public confidence" in the judiciary.[14]

---

[12] *See* Pet. ¶ 11; Ex. J at 5.
[13] *See, e.g.*, Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 2, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf
[14] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 6-9, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

Sound public policy necessitates a transparent process of judicial selection during which the public learns of the qualifications, backgrounds, and potential conflicts of interest of nominees for judicial appointments. FOIL thus requires that OOM disclose the requested Questionnaires.

BACKGROUND AND PROCEDURAL HISTORY

A. Judicial Appointments and the Mayor's Advisory Committee on the Judiciary

The New York Constitution imbues the Mayor with the authority to appoint judges to serve on family and criminal courts in New York City and to fill vacancies on the Civil Court.[15] There is a rich tradition of New York City mayors dispersing their appointive power to advisory committees with varying degrees of autonomy.[16] Mayor Robert Wagner created the first mayoral judicial selection committee in 1962, the New York City Mayor's Committee on the Judiciary, and tasked it with recommending qualified judicial nominees.[17] And, consistent with the mayoral tradition since then,[18] Mayor Bill de Blasio created the Mayor's Advisory Committee on Judicial Appointment ("MACJ" or "Committee") "to recruit, to evaluate, to consider and to nominate judicial candidates highly qualified for appointment and to evaluate the incumbent judges for reappointment."[19] The Committee is more than merely advisory because the Mayor cannot "appoint a judge unless nominated by the Committee."[20]

---

[15] N.Y. Const. art. VI, §§ 13(a), 15(a), 21(c).
[16] *See, e.g.,* Lozier, James Edward, Note, *Judicial Selection in New York: A Need for Change*, 3 Fordham Urb. L.J. 605, 626 n.107 (1975).
[17] *Id*.
[18] The makeup and mandates of committees vary by administration. In 1975, around half of the members of the then-New York City Mayor's committee were selected by two appellate division presiding judges and the other half by the Mayor himself. *Id.* Mayor de Blasio's committee is made up entirely of individuals appointed by the Mayor.
[19] N.Y. City Exec. Order No. 4 , § 1 (May 29, 2014), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2014/eo_4.pdf.
[20] *Id*.

To be considered for appointment by the Mayor, aspiring judges, both first time applicants and those seeking reappointment, must complete a Uniform Judicial Questionnaire and submit it to the MACJ.[21] The Questionnaire solicits information crucial to determining a potential judge's qualifications, including biographical data that would typically be publicly disclosed on an employer's website. The Questionnaire also solicits information that goes directly to the issue of a judicial nominee's ability to perform the required duties of a judge and poses questions designed to reveal writing ability,[22] substantive legal expertise,[23] personal temperament, and any information that might indicate a conflict of interest[24] or otherwise compromise a candidate's ability to perform her duties impartially (*e.g.,* certain financial arrangements).[25]

Upon receipt of a completed Questionnaire, the MACJ confirms its accuracy and "contact[s] individual and institutional references to gain a complete and accurate assessment of the candidate's professional reputation, performance, and aptitude for judicial responsibility, including, but not limited to the length and quality of practice experience, knowledge of the law, written and oral communication skills, character, integrity, industry and temperament."[26] The MACJ heavily scrutinizes each candidate and conducts multiple rounds of review.[27] The MACJ's Executive Director, Chair, and Vice-Chair identify the most qualified applicants and transmit application materials (of which a completed Questionnaire is but one part) to a MACJ subcommittee which interviews candidates and continues to solicit external feedback from third parties with knowledge of the candidate.[28]

---

[21] *See* Pet. ¶ 11; Ex. J at 2.
[22] *See* Pet. ¶ 3; Ex. A at 21.
[23] *See* Pet. ¶ 3; Ex. A at 20-21.
[24] *See* Pet. ¶ 3; Ex. A at 8-10.
[25] *Id*.
[26] Ex. J at 5.
[27] *Id.* at 6.
[28] New York City Bar Ass'n Work Group on The Family Court Judicial Appointment and Assignment Process, *The Family Court Judicial Appointment and Assignment Process* (Dec. 2020) at 11, https://www.nycbar.org/member-

The subcommittee issues recommendations that the Executive Director, Chair, and Vice Chair consider[29] before the full committee meets to consider applications and formally votes on which candidates are "highly-qualified."[30] For a given vacancy, the Committee submits three nominees for consideration by the Mayor, who in turn selects a finalist.[31] The Mayor submits his selection to the New York City Bar Association's Judiciary Committee ("Bar Association" or "Bar") for review.[32] If the Mayor's selection is approved by the Bar Association, the MACJ then conducts a public hearing.[33] Only then, "upon the appointment of each candidate," when the process is concluded, is the public provided with a summary of the candidate's qualifications.[34]

B. Janon Fisher's FOIL Requests

On October 21, 2020, Janon Fisher made a FOIL request for copies of the Uniform Judicial Questionnaires completed by applicants currently under review by the MACJ (the "Request").[35] Almost five months later, on March 17, 2021, OOM responded with a blanket denial of the Request, for which it failed to provide any legal justification ("First Denial").[36]

Meanwhile, Mr. Fisher contacted the Committee on Open Government ("COOG"), seeking an advisory opinion on the legal merit of the First Denial.[37] On March 19, 2021, Kristin O'Neill, Assistant Director of the COOG, contacted the Office of the Counsel to the Mayor and offered the "Mayor's Office an opportunity [to] provide any additional information that it believes would be helpful to [the COOG] in forming an opinion as [to] the appropriateness of the Office's

---

and-career-services/committees/reports-listing/reports/detail/the-family-court-judicial-appointment-and-assignment-process.

[29] *Id.*
[30] *See* Pet. ¶ 11; Ex. J at 6.
[31] *See* Ex. J at 6.
[32] *Id.*
[33] *Id.* at 7.
[34] *See* Pet. ¶ 19; Ex. I at 2.
[35] *See* Pet. ¶ 12; Ex. B at 1.
[36] *See* Pet. ¶ 13; Ex. C at 1.
[37] *See* Pet. ¶ 14; Ex. D at 1.

response."[38] O'Neill noted that OOM's response was "clearly insufficient."[39] Within a week of receiving the COOG's inquiry, OOM notified Mr. Fisher that it had "re-opened" his request,[40] but soon issued a second denial in which it summarily cited to Public Officers Law § 86(3), § 87(2)(b)(f) and (g) as well as § 89(2)(b) ("Second Denial").[41]

The COOG issued an advisory opinion on March 26, 2021, questioning OOM's blanket denial and addressing each of the exemptions cited by OOM ("Advisory Opinion").[42] With respect to the privacy exemption, 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."[43] With respect to OOM's invocation of the public safety exemption, the COOG opined that "it is unlikely that the agency could meet its burden of proof in withholding the entire record on this ground."[44] The COOG likewise summarily dismissed OOM's claim that the inter or intra-agency exemption applied because these records are completed and submitted to the agency by candidates for employment and not by employees or officials of the agency."[45] The COOG also noted that "although the term 'advisory' is contained in the title of the" MACJ, "it is clear, based on the authorizing Executive Order, that this Commission served more than a purely advisory capacity,"[46] and is thus subject to FOIL.

[38] *Id.* at 4.
[39] *See* Pet. ¶ 14; Ex. D at 4.
[40] *See* Pet. ¶ 15; Ex. E at 1.
[41] *See* Pet. ¶ 16; Ex. F at 1.
[42] *See* Pet. ¶ 17; Ex. G at 1.
[43] *Id*. at 2.
[44] *Id.*
[45] *Id.*
[46] *See* Pet.¶ 17; Ex. G at 1- 2.

Mr. Fisher appealed the Second Denial on April 4, 2021 ("Appeal").[47] OOM denied his appeal, and now finally shared its reasoning.[48] OOM argued that making the Questionnaires public would amount to an unwarranted invasion of privacy,[49] that "the mere disclosure of the names of candidates under consideration risks embarrassment and reputational damage to those candidates ultimately not selected for appointment,"[50] and that disclosure would "likely chill the candor"[51] of the nominees. In its analysis, OOM failed to apply the requisite balancing test to evaluate whether the public's interest in disclosure outweighs an individual's reasonable expectation of privacy.[52] OOM did concede, however, that MACJ is an agency subject to FOIL by failing to make an argument to the contrary.[53]

OOM's refusal to disclose the letters requested by Mr. Fisher deprives the public of an opportunity to understand the judicial appointment process and weakens the public's trust in OOM, MACJ, the appointment process, and, ultimately, the judicial nominees as well.

ARGUMENT

I. OOM HAS NOT MET ITS BURDEN OF SHOWING THE RECORDS ARE EXEMPT UNDER THE PRIVACY EXEMPTION.

Under FOIL, "all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted." *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986). "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the

[47] *See* Pet. ¶ 18; Ex. H at 1.
[48] *See* Pet. ¶ 19; Ex. I at 1-3.
[49] *See* Ex. I at 1.
[50] *Id.* at 2.
[51] *Id.*
[52] *See id.* at 1-3.
[53] *See id.*

requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Id.* "Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). The [privacy] section does not create a blanket exemption." *Thomas v. New York City Dep't of Educ*, 103 A.D.3d 495, 497 (1st Dep't 2013).

"What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Dobranski v. Houper*, 154 A.D.2d 736, 737 (3d Dep't 1989). FOIL's privacy exemption enumerates a non-exhaustive list of items that amount to an "unwarranted invasion of personal privacy." N.Y. Pub. Off. Law § 89(2)(b). When an agency invokes FOIL's privacy exemption, courts first examine whether the requested records fall squarely into one of the statute's enumerated categories. *New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (2005). If the agency cannot show that records fall within one of these categories, courts "balanc[e] the competing interests of public access and individual privacy" to determine whether disclosure amounts to an *unwarranted* invasion of privacy. *See Dobranski,* 154 A.D.2d at 737 (emphasis added).

In issuing its blanket denial, OOM omitted the required balancing analysis and failed to demonstrate that disclosure of the requested records would be "offensive and objectionable to a reasonable [person]" such that it can justify withholding here. *Id*. In fact, courts have repeatedly ruled that the type of information that would be revealed by disclosing the Questionnaires would not, in fact, constitute an unwarranted invasion of privacy.

A. Respondents Fail To Establish That The Requested Records Fall Into the Privacy Exemption's Enumerated Categories of Exemption.

FOIL specifically exempts from disclosure "employment, medical or credit histories or personal references of applicants for employment"[54] as an unwarranted invasion of privacy. N.Y. Pub. Off. Law § 89(2)(b). But "[a] record is not considered employment history merely because it records facts concerning employment." *See Mothers on the Move, Inc. v. Messer*, 236 A.D.2d 408, 410 (2d Dep't 1997). New York courts have ruled that many employment-related documents do not fall within the privacy exemption, including, for example, "intra-agency materials, charges brought against employees, redacted performance evaluations and appraisals, disciplinary charges, agency decisions regarding charges, and penalties." *Windham v. City of New York Police Dept,* 2013 N.Y. Slip Op. 32418(U), 2013 WL 5636306 (Sup. Ct., N.Y. Cty. 2013).

In fact, the First Department has held that the types of records Mr. Fisher is seeking here, including "the public employment history of [] employees, insofar as revealed on their job applications" along with "attendance at academic institutions" cannot be shielded from disclosure. *See Kwasnik v. City of New York*, 262 A.D.2d 171, 171 (1st Dep't 1999). The "highly-qualified"[55] candidates sought by the MACJ are the very type of individuals whose achievements would be publicly available on an employer's website, court docket, bar association publication, or any number of other locations where details of an accomplished attorney's professional experience routinely appear without any controversy or claim of privilege. While OOM argues that much of the "sensitive and personal information required to be disclosed by the candidates for the Judiciary . . . is *explicitly* exempted from disclosure by FOIL[,]"[56] its argument fails to comport with how

[54] The Questionnaires do not contain references for employment. *See* Pet. ¶ 3; Ex. A.
[55] *See* Pet.¶ 11; Ex. J at 6.
[56] *See* Pet.¶ 19; Ex. I at 2.

courts have actually defined exempted employment histories. Under the prevailing definition, OOM's claim of privilege fails.

B. The Public Interest in Disclosure of Questionnaires Outweighs Any Countervailing Privacy Interest.

i. The Public's Interest in Evaluating the Experience and Job Performance of Judicial Nominees Outweighs Nominees' Interest in Privacy.

Where a job candidate seeks to assume a position with specific qualifications, an agency's disclosure of the evidence of those qualifications is not an unwarranted invasion of privacy because it is "relevant to the performance of the official duties." *See, e.g.*, COOG Advisory Opinion FOIL-AO-13871 (Feb. 12, 2003) (finding disclosure appropriate where records "contain information pertaining to the requirements" of a position). Consistent with that logic, the *Kwasnik* court determined that where an employee's position requires certain levels of educational attainment and prior work experience, the information proving that the employee satisfies those requirements should likewise be disclosed because any "personal hardship of the disclosure [is] small." *See Kwasnik v. City of New York*, 262 A.D.2d at 171.

The MACJ requires that applicants it evaluates for judicial appointments have impressive professional accomplishments and "the highest qualifications."[57] To that end, the MACJ indicates that it may disqualify applicants with a "lack of practical, litigation, and courtroom experience in the specific court(s) to which" candidates seek appointment and "extensive movement between jobs and short periods of employment[.]"[58] The public can only assess whether the MACJ is consistently applying this standard by reviewing the Questionnaires and thus, under *Kwasnik*, disclosing the Questionnaires cannot be an unwarranted invasion of privacy. *Id*. at 172. While

[57] *See* Pet.¶ 11; Ex. J at 1.
[58] *See* Pet.¶ 11; Ex. J at 4.

OOM asserts in a conclusory fashion that "the mere disclosure of the *names* of candidates under consideration risks embarrassment and reputational damage to those candidates ultimately not selected for appointment[,]"[59] it cannot support its bare assertion that the risk of personal embarrassment overrides the public's overwhelming interest in disclosure here. The public can only assess whether a candidate has the qualifications "relevant to the performance of the official duties" if the identity of the candidate is disclosed. COOG Advisory Opinion FOIL-AO-13871 (Feb. 12, 2003).

The information that Mr. Fisher seeks does not fall within the privacy exemption for another reason, namely, that the records contain no "*confidences* regarding" an individual. *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) (emphasis added). In *Hernandez,* a case vindicating the right of the press to access records about mayoral appointments and their professional qualifications, the Court ruled in favor of disclosure because "the public has a right to know. . . information about [an appointee's] employment history and qualifications" to "address community concerns" regarding the appointee's qualifications. *Id.* If the public interest in the qualifications of a *former* schools chancellor necessitates disclosure, then it certainly follows that the employment history of a judicial nominee must be released.

The public interest further demands the release of the Questionnaires because the public has the right to know not only the basic employment history of nominees, but also their relevant job performance issues as well.[60] *See Mulgrew* v. *Board of Education*, 31 Misc.3d 296, 302-303 (Sup. Ct., N.Y. Cty. 2011), *aff'd*, 87 A.D.3d 506 (2011). Regardless of whether the release of job-performance information might embarrass nominees, "[c]ourts have repeatedly held that release

[59] *See* Pet. ¶ 19; Ex. I at 2 (emphasis added).
[60] *See* Pet.¶ 3; Ex. A at 7.

of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy." *Id*. at 302.[61] In *Mulgrew,* the court distinguished between information of substantive import that illuminates the workings of government and the qualifications of government employees from purely personal details like birth dates and contact information that were exempt from disclosure. *Id.* at 303. Petitioner does not seek such purely personal information.

The public also has a specific interest in evaluating MACJ's own job performance, which cannot be done without having access to the Questionnaires. In many other states, a prospective judge's application is considered public information; additionally, scholars have found that "[a]pplicant interviews *may* be open to the public in 15 states, and commissions conduct at least some deliberations in open session in six states."[62] Disclosing the Questionnaires could hardly be deemed "offensive and objectionable to a reasonable [person] of ordinary sensibilities" when so many other states affirmatively disclose analogous information. *See Dobranski*, 154 A.D.2d at 737.

New York's failure to release the identity of applicants for judgeships places it firmly in the minority of the jurisdictions in which committees play a role in judicial nominations.[63] "[T]ransparent processes" are in fact deployed in many states "without any apparent difficulty in

[61] Many of the Questionnaires are completed by sitting judges seeking reappointment, rendering OOM's argument that disclosure risks embarrassment even less relevant to the requested set of Questionnaires. *See* New York City Bar Ass'n Work Group on The Family Court Judicial Appointment and Assignment Process, *The Family Court Judicial Appointment and Assignment Process* (Dec. 2020) at 11, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-family-court-judicial-appointment-and-assignment-process. By its own admission, "once an appointment decision is made, however, the interest of the public in obtaining information relevant to performance of a public official's duties increases and the concern about confidentiality is reduced." *See* Pet. ¶ 19; Ex. I at 2.

[62] Reddick, Malia and Kourlis, Rebecca Love, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices,* Institute for the Advancement of the Legal System, University of Denver, (Aug. 2014) at 8, https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

[63] *See id*. at 21-22.

attracting qualified candidates."[64] Other states' successful transparent processes call into question OOM's blanket assertion that disclosure that would harm the judicial recruitment, evaluation, and nomination process. In Arizona, for example, judicial applications are available online in their entirety with minimal redactions.[65] And in Florida, judicial candidates are required to make "full and public disclosure of financial interests." *Bloch v. Del Rey*, 208 So.3d 189, 193, 196 (Fla. Dist. Ct. App. 2016).

While OOM argues that the risk of embarrassment would "chill the candor the Committee relies upon *from* applicants,"[66] any applicant who would be less than forthcoming with the MACJ would thereby face disqualification by the MACJ's own metrics of "character, integrity, industry and temperament."[67] OOM has not demonstrated that the requested information would be "offensive and objectionable to a reasonable person" such that it warrants withholding here. To the contrary, courts have ruled that the type of information that would be disclosed by the Questionnaires, including job qualifications and performance would not in fact constitute an unwarranted invasion of privacy. *See, e.g., Kwasnik*, 262 A.D.2d at 172; *Hernandez,* 2011 N.Y. Slip Op. 33073(U), 2011 WL 6012165. The Questionnaires must be released.[68]

---

[64] Bannon, Alicia, Choosing State Judges: A Plan for Reform, Brennan Center for Justice (2018) at 9.
[65] Reddick, Malia and Kourlis, Rebecca Love, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices,* Institute for the Advancement of the Legal System, University of Denver, (Aug. 2014) at 13.
[66] *See* Pet.¶ 19; Ex. I at 2.(emphasis added).
[67] Pet.¶ 11; Ex. J at 5.
[68] While the OOM may attempt to rely on a Third Department case that denied access to state-level judicial screening committee information elicited "about potential judicial appointees" from third parties to bolster its privacy argument here, that case is inapposite. *See Snyder v. Third Dep't Judicial Screening Committee,* 18 A.D.3d 1100, 1102 (3rd Dep't 2005). *Snyder* concerned a gubernatorial judicial screening committee that was found to be "providing purely an advisory role" and thus not subject to FOIL. *Id.* at 1101. Here, OOM has already conceded that MACJ is an agency subject to FOIL by dropping any argument to the contrary from its Appeal Denial Letter. *See* Pet.¶ 19; Ex. I at 1-3.This concession came shortly after the COOG opined to Petitioner that there is no colorable argument that MACJ is not an agency subject to FOIL because "[t]he Mayor may not act unless the Committee has nominated a particular judge; this is not a merely advisory role." Pet.¶ 17; Ex. G at 2. Thus, *Snyder's* rationale for withholding records is readily distinguishable from the matter at hand. Whereas, in *Snyder*, the court grounded its decision in the fact that the governor's committee "does not offer advice about which of the candidates it may prefer," there is no dispute that the MACJ does offer such advice. *Id.* at 1102. In fact, the Mayor may not appoint a judge that the MACJ has not

ii. The Public's Interest in Assessing Judicial Nominees' Conflicts of Interest Likewise Outweighs Nominees' Interest in Privacy.

A potential conflict of interest, like a lack of candor, can also cast doubt on a judge's ability to serve. Indeed, courts place high value on the public's ability to assess a public official's potential conflicts of interest, which often can only be assessed through affirmative disclosures as required by the Questionnaires.[69] *See, e.g.*, *New York Times Co. v. City of New York Off. of Mayor*, 194 A.D.3d 157, 165 (1st Dep't 2021) (finding the "Mayor's Office's privacy claim is inconsistent with the public interest in disclosure of [Conflict of Interest Board] warning letters."). Accordingly, courts have held the public interest in disclosing information relevant to potential conflicts of interest outweighs any attendant privacy interest in the information. *See, e.g., Humane Society of United States v. Fanslau*, 54 A.D.3d 537, 538 (3d Dep't 2008) (holding that "disclosure of the *general* information regarding the income and investments" of a public official "outweighs any personal privacy interest" because of the public's strong interest in uncovering conflict of interest).

The OOM recently abandoned on appeal a similarly improper privacy argument it had made in an attempt to shield warning letters issued by the Conflicts of Interest Board from disclosure. *See New York Times Co.,* 194 A.D.3d at 165. The First Department nonetheless noted that OOM's interpretation would, if adopted, have "eliminate[d] public scrutiny of the Board's use of warning letters for enforcing the conflicts of interest laws" and thwarted citizens' ability to "hold the governors accountable to the governed." *Id.* (internal quotation marks omitted). The

formally nominated. N.Y. City Exec. Order No. 4 , § 4(a) (May 29, 2014), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2014/eo_4.pdf.

[69] *See* Pet. ¶ 3; Ex. A at 8.

Questionnaires similarly contain information that allows for "public scrutiny" of how agencies handle potential conflicts of interest and must be released. *Id*.

iii. OOM Has Waived Any Privacy Interest in the Questionnaires Shared with the Bar Association.

FOIL's privacy exemption cannot apply to the Questionnaires shared with the Judiciary Committee of the Bar Association because the MACJ voluntarily waived any privacy right or privilege when it shared the Questionnaires with a Bar Association committee typically consisting of three dozen or more individuals.[70] Agencies cannot withhold documents under FOIL's privacy exemption when they have waived their statutory privilege by "[v]oluntary disclosure of a significant part of the privileged communications." *New York 1 News v. Office of President Borough of Staten Island*, 166 Misc.2d 270, 276 (Sup. Ct., N.Y. Cty. 1996) (internal quotations omitted). An agency's purported intent to nonetheless maintain privilege is not dispositive. *Id*. In other words, it does not matter whether OOM intended to waive any attendant privacy interest by sharing the Questionnaires with the Bar Association. Here, the very act of sharing the Questionnaires with a third party is sufficient to have waived any purported privilege.

Moreover, agencies cannot remove records from FOIL's reach or somehow preserve privilege "by simply labeling [them] 'purely private.'" *See Cap. Newspapers v. Whalen*, 69 N.Y.2d 246, 254 (1987). OOM misguidedly assigns great weight to the fact that the Uniform Judicial Questionnaire "is emblazoned with the large-type word 'CONFIDENTIAL."[71] But the law is clear

[70] According to the New York City Bar Association, standing committees, like the Judiciary Committee "generally have 39 members." New York City Bar Association. Committee FAQ, https://www.nycbar.org/member-and-career-services/committees/committee-faq (last accessed Aug. 18, 2021).
[71] *See* Pet.¶ 19; Ex. I at 2.

that an agency's "long-standing promise of confidentiality"[72] has no bearing on whether a record is subject to disclosure under FOIL. *Id*. at 253. As the New York Supreme Court has held in an analogous circumstance, "FOIL's statutory disclosure requirements pre-empt any conflicting confidentiality requirements contained in a local ordinance." *See Journal News v. City of White Plains*, 39 Misc.3d 1235(A), 2012 NY Slip Op. 52487 (U), at *3 (Sup. Ct., Westchester Cty. 2012).

While there is little New York case law examining the waiver of privilege in the context of FOIL, federal caselaw is instructive because much of FOIL was "patterned after the Federal analogue." *See Fink*, 47 N.Y.2d at 572 n.1. The Southern District of New York has found that under federal FOIA, "[v]oluntary disclosure of a significant portion of the privileged communications" waives the privilege. *See Peck v. U.S.,* 514 F. Supp. 210, 212 (S.D.N.Y. 1981). Regardless of whether OOM intended to waive any privacy privilege that may existed under FOIL, any such privilege has been waived and the records must be disclosed.

II. OOM HAS NOT MET ITS BURDEN OF SHOWING THAT DISCLOSING THE RECORDS THREATENS THE HEALTH AND SAFETY OF NOMINEES.

OOM has offered neither evidence nor explanation for its assertion that disclosing Questionnaires would endanger the life and safety of judicial nominees.[73] Agencies seeking to withhold documents under FOIL's life and safety exemption bear the burden of demonstrating a 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.*

[72] *See* Pet.¶ 19; Ex. I at 2.
[73] *See* Pet. ¶ 19; Ex. I at 3.

Howard, 91 A.D.3d 1315, 1316 (4th Dep't 2012). Indeed, the life and safety exemption "requires a court to consider whether the information sought 'could, by its inherent nature, . . . endanger the life and safety' of those as to whom the information is sought." *See New York Laws. for Pub. Int. v. New York City Police Dep't*, 64 Misc.3d 671, 683 (Sup. Ct., N.Y. Cty. 2019).

Even though "[l]ists of names and addresses of certain groups of people have regularly been held to be subject to disclosure under FOIL," Petitioner acknowledges that the Committee may appropriately determine to redact certain information, such as residential addresses and social security numbers, for safety reasons. *See Thomas v. City of New York, Dep't of Hous. Pres. & Dev.*, 12 Misc.3d 547, 554 (Sup. Ct., N.Y. Cty. 2006). But as OOM provides not even a scintilla of evidence[74] that the release of candidates' academic qualifications, past employment, or financial holdings would expose the candidates to any danger, the Questionnaires containing that information must be disclosed.

Redactions of home addresses, as Petitioner suggested in his Appeal, are all that is necessary to address any safety concerns raised by sharing information about those nominated for public office.

III. OOM HAS NOT MET ITS BURDEN OF SHOWING THE RECORDS ARE EXEMPT UNDER THE INTERAGENCY EXEMPTION.

OOM's assertion that "MACJ does not waive the inter-agency exemption provided under Public Officer's Law § 87(2)(g) when they accept the Uniform Judicial Questionnaire from members of the public," does not merit much consideration.[75] The inter and intra-agency exemption protects internal and intra-agency "[o]pinions and recommendations prepared by

[74] *See* Pet. ¶ 19; Ex. I at 3.
[75] *See* Pet. ¶ 19; Ex. I at 2.

agency personnel . . . as 'predecisional material, prepared to assist an agency decision maker . . . in arriving at his decision.'" *See Matter of Xerox Corp. v. Town of Webster*, 65 N.Y2d 131, 132 (1985). As the COOG noted in its Advisory Opinion to Petitioner, the Questionnaires "are completed and submitted to the agency by candidates for employment and not by employees or officials of the agency," and thus "cannot in our view be characterized as 'inter-agency or intra-agency' materials entitled to the FOIL exemption cited."[76] "Records that consist of communications with people outside the agency," like the Questionnaires submitted by nominees, "must be disclosed." *See Hernandez,* 2011 N.Y. Slip Op. 33073(U), 2011 WL 6012165.

CONCLUSION

For all of the foregoing reasons, Petitioner Janon Fisher respectfully requests that the Court grant his Petition seeking that the Court (1) order OOM to promptly produce the improperly withheld records; (2) award costs and fees incurred in obtaining OOM's belated compliance with this request for public records; and (3) grant such other and further relief as the Court deems proper.

Dated: August 18, 2021

Respectfully submitted,

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC
By: /s/ Ava E. Lubell

Ava E. Lubell
Heather E. Murray
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (646) 382-5423
Ava.Lubell@cornell.edu

Counsel for Petitioner

[76] *See* Pet. ¶ 17; Ex. G at 2.