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

In the matter of JESSE COBURN and OPEN PLANS, INC., Petitioners, - against - NEW YORK CITY DEPARTMENT OF INVESTIGATION, Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	Index No.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Respectfully submitted,

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PRELIMINARY STATEMENT

This is a dispute about access to records that shed light on an important public issue: the qualifications of one of New York City's top officials. Petitioners Jesse Coburn and Open Plans, Inc., the publisher of news outlet Streetsblog NYC ("Streetsblog"), bring this Article 78 proceeding to challenge the New York City Department of Investigation ("DOI")'s improper denial of access to two documents: a resume and a list of educational experiences that the New York City Mayor's Chief Advisor, Ingrid Lewis-Martin, submitted to DOI as part of an agency background investigation.

Ms. Lewis-Martin holds considerable influence over policy in the Mayor's administration, but key aspects of her qualifications and background remain unclear. DOI refused to provide the requested documents because, it claimed, their disclosure would constitute an unwarranted invasion of personal privacy. But New York courts have repeatedly held that the disclosure of exactly these types of documents, resumes and lists of educational experiences, do not invade the privacy of public employees and, therefore, must be released.

Petitioners' efforts to obtain relief through FOIL's administrative review process have proven fruitless. They file this petition to vindicate their rights under FOIL and ensure that this important public information — which enables the public to evaluate the qualifications of one of New York City's most powerful officials — is no longer kept hidden. This Court should order DOI to promptly grant Petitioners' FOIL request and grant Petitioners attorney's fees and costs.

BACKGROUND

Mr. Coburn is an award-winning investigative journalist for Streetsblog NYC, a news site that covers New York City with a focus on transit, transportation, and infrastructure. As part of

his reporting, Mr. Coburn filed the FOIL request at issue in this case, seeking Ingrid Lewis-Martin's resume and a listing of her educational background.

Ms. Lewis-Martin is one of the most powerful public officials in New York City. She has served as Eric Adams' top aide since he ran for the State Senate in 2006.[1] In January 2022, Mayor Adams named Ms. Lewis-Martin as his Chief Advisor, a job with sweeping authority to work with "all direct reports to the mayor to support operations at City Hall and advance the administration's strategic policies and priorities."[2] However, her qualifications for this position — particularly the details of her academic background — have never been revealed to the public.

Before becoming Chief Advisor to the Mayor, Ms. Lewis-Martin was required to submit a DOI Background Investigation Questionnaire. Section 36 of the Questionnaire requires that an applicant submit a resume, and section 32, the "Academic Degrees" section, requires the applicant to "[l]ist all high schools, technical schools, colleges, universities, graduate schools, and professional schools" the applicant attended, along with any degrees earned.[3] Although the first page of the Questionnaire claims that it "is not a public document and cannot be obtained through a Freedom of Information Act request," it cites no authority for that proposition.

On January 16, 2024, Mr. Coburn filed a FOIL request with DOI seeking the resume Ms. Lewis-Martin submitted with her Background Investigation Questionnaire and her completed "Academic Degrees" section of the Questionnaire. Ex. A (requesting "(1) The resume Ms. Lewis-

[1] Brian M. Rosenthal and Jeffery C. Mays, *The 'Fiercely Loyal' Adams Adviser Agitating From Inside City Hall*, N.Y. Times (June 18, 2023), https://www.nytimes.com/2023/06/18/nyregion/ingrid-lewis-martin-adams.html.
[2] *Mayor Adams Announces Ingrid Lewis-Martin as Chief Advisor to the Mayor*, NYC Office of the Mayor (Jan. 10, 2022), https://www.nyc.gov/office-of-the-mayor/news/024-22/mayor-adams-ingrid-lewis-martin-chief-advisor-the-mayor.
[3] A blank copy of the Background Investigation Questionnaire is available at https://www.nyc.gov/assets/doi/downloads/pdf/bg/BackgroundInvestigationQuestionnaire(March 2020).pdf.

Martin submitted as part of her DOI background investigation. (2) The portion Ms. Lewis-Martin's completed DOI background investigation questionnaire that appears under the header 'academic degrees.'"). He made clear that he was "not requesting Ms. Lewis-Martin's entire background investigation questionnaire." *Id*.

DOI denied the request on February 2, 2024, claiming that the requested records "are exempt from disclosure under FOIL" because "disclosure would constitute an unwarranted invasion of personal privacy." Ex. B. Mr. Coburn then filed an administrative appeal of DOI's denial on February 14, 2024. Ex. C.

On February 29, 2024, DOI denied the administrative appeal. Ex. D. DOI claimed that disclosure of the requested material "would constitute an 'unwarranted invasion of personal privacy'" under FOIL, and it gave three reasons: applicants are promised that their Questionnaire responses will be confidential, disclosure of Questionnaire material "would have a chilling effect" on future applicants' candor, and it claimed that a recent First Department decision supported its decision. Ex. D at 2.

After thus exhausting their administrative remedies, Petitioners filed this Article 78 Petition seeking an order requiring DOI to release the requested records, which are not subject to any FOIL exemption, and to award Petitioners their attorney's fees and costs.

ARGUMENT

The Freedom of Information Law "imposes a broad duty on government to make its records available to the public" in order "[t]o promote open government and public accountability." *Matter of Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 274 (1996) (citing N.Y. Pub. Off. Law § 84). The statute's purpose is to "extend public accountability wherever and whenever feasible" because "government is the public's business." N.Y. Pub. Off. Law § 84.

To achieve the legislature's aim of open access and public accountability, FOIL establishes that all public agency records 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); N.Y. Pub. Off. Law § 87(2). It provides only limited exemptions to this broad rule of access, allowing the government to withhold records from the public only in specific circumstances. These "[e]xemptions are to be narrowly construed" to ensure the public retains "maximum access" to government records. *Cap. Newspapers*, 67 N.Y.2d at 566. When the government claims that one of FOIL's exemptions applies to prevent the public from accessing a record, it "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption." *Id*.

The statute also provides for attorney's fees in certain circumstances when a requester prevails in court — another way that the law seeks to discourage secrecy and help citizens learn about their government. N.Y. Pub. Off. Law § 89(4)(c).

Here, DOI's refusal to produce the requested records cannot be justified by the FOIL exemption that DOI cites. The agency fails to carry its burden of establishing that the records "fall[] squarely within a FOIL exemption," and its withholding frustrates FOIL's purpose of promoting "open government and public accountability." *Cap. Newspapers*, 67 N.Y.2d at 565-66. The Court should order DOI to release the requested records to Petitioners, and it should grant Petitioners' request for attorney's fees and costs.

I. The Requested Materials Must Be Disclosed.

The resume and "Academic Degrees" material that Petitioners seek are public records and must be released. Courts have repeatedly determined that exactly the same kinds of documents, detailing a public official's qualifications and educational background, are public. The First Department has specifically "reject[ed]" the argument that public officials' employment history,

resume, or educational history could be shielded from disclosure, even if that information was "revealed on [the officials'] job applications." *Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep't 1999). In its holding, the Court considered and denied the exact argument that DOI offers here, that disclosure of such information could constitute "an unwarranted invasion of the employees' privacy." *Id*. The holding in *Kwasnik* is dispositive here: DOI cannot withhold Ms. Lewis-Martin's resume and educational background material.

Numerous other courts have reached the same conclusion. The Third Department held that release of "an individual's educational background, *i.e.*, the level of education attained and the particular institutions attended, does not constitute" an unwarranted invasion of personal privacy. *Ruberti v. State Police*, 218 A.D.2d 494, 498-99 (3d Dep't 1996). The court concluded that "a reasonable person of ordinary sensibilities" would not "find it offensive and objectionable to have such information disclosed." *Id*. at 499. Where a requester sought "the educational degrees possessed by [State Police] civilian employees," the court ordered the records released. *Id*. at 496.

Similarly, the state Committee on Open Government ("COOG")'s advisory opinions, "to which courts should defer," *Kwasnik*, 262 A.D.2d at 172, have repeatedly stated that agencies must disclose records, such as resumes, that detail an employee's "prior public employment . . . , general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position." Comm. Open Gov't Advisory Op. 11627 (Aug. 11, 1999), https://docsopengovernment.dos.ny.gov/coog/ftext/f11627.htm (resumes of county attorneys); Comm. Open Gov't Advisory Op. 13871 (Feb. 12, 2003), https://docsopengovernment.dos.ny.gov/coog/ftext/f13871.htm (public official's employment application). COOG reached the same conclusion in a case closely mirroring this one, in which a requester sought a former police officer's employment application, employment questionnaire, and

the results of any "pre-employment investigations" conducted by the New York City Police Department. Comm. Open Gov't Advisory Op. 14461 (Jan. 12, 2004), https://docsopengovernment.dos.ny.gov/coog/ftext/f14461.htm. COOG analyzed the releasability of background investigative documents in the same way that it analyzed any other resume-like material, concluding that personal details irrelevant to the employment could be withheld, but that information that is relevant to the applicant's duties must be disclosed. *Id*. It also noted that "those portions of records indicating one's general education background must be disclosed." *Id*.

This is an easy case. Courts and COOG have repeatedly held that resumes and educational background material must be disclosed to requesters. *E.g.*, *Kwasnik*, 262 A.D.2d at 172. Those are exactly the type of records that Mr. Coburn seeks. DOI should be ordered to disclose them.

II. DOI Fails to Establish That Any Exemption Applies.

DOI claims only one FOIL exemption, the personal privacy exemption, to block release of the records. *See* Ex. D. But as discussed above, the personal privacy exemption does not apply to resumes and educational background materials. *See, e.g.*, *Kwasnik*, 262 A.D.2d at 172 ("We reject CUNY's argument that the public employment history of its employees, insofar as revealed on their job applications, should be shielded from disclosure as an unwarranted invasion of the employees' privacy."). DOI's arguments to the contrary fail to establish otherwise. Because it is DOI's burden to show that the records "fall[] squarely within a FOIL exemption," *Cap. Newspapers*, 67 N.Y.2d at 566, the records must be released.

The personal privacy exemption allows an agency to withhold records whose disclosure "would constitute an unwarranted invasion of personal privacy." N.Y. Pub. Off. Law § 87(2)(b). The statute provides examples of records that fall into the exemption. *See* N.Y. Pub. Off. Law § 89(2)(b). The only example that bears potential relevance to the circumstances here — protecting from disclosure "employment, medical or credit histories or personal references of

applicants for employment," N.Y. Pub. Off. Law § 89(2)(b)(i) — is inapplicable, as courts have emphasized that "[a] record is not considered employment history merely because it records facts concerning employment." *Mothers on the Move, Inc. v. Messer*, 236 A.D.2d 408, 410 (2d Dep't 1997). Records of public employment, along with the resumes and educational backgrounds of public employees, have long been held to be releasable. *Kwasnik*, 262 A.D.2d at 172; *see also Windham v. N.Y. Police Dep't*, 2013 WL 5636306 (Sup. Ct., N.Y. Cty. Oct. 7, 2013) (collecting cases); *supra* § I. Beyond those statutory examples, courts apply an objective standard in determining what constitutes an "unwarranted" invasion of privacy, which "is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Ruberti*, 218 A.D.2d at 498 (quoting *Dobranski v. Houper*, 154 A.D.2d 736, 737 (3d Dep't 1989)). Here, courts have already determined that the release of a public official's resume and educational background would not be objectionable to a reasonable person. *Id.* at 499.

In attempting to shoehorn the requested records into the privacy exemption, DOI has offered three arguments: (1) the front page of the questionnaire tells applicants that the record "cannot be obtained through a [FOIL] request"; (2) release of the material "would have a chilling effect both on candidates' candid disclosure of information to DOI and their willingness to pursue positions that require detailed provision of personal information for background investigations"; and (3) the agency's denial was supported by *Matter of Fisher v. City of N.Y. Off. of the Mayor*, 220 A.D.3d 618, 619 (1st Dep't 2023). Ex. D at 2. None of these arguments support withholding the records.

First, the fact that the Questionnaire tells applicants the document is exempt from FOIL has no bearing on whether a FOIL exemption applies — if it did, the government could choose to hide any document from the public merely by promising someone it would do so. *See Matter of*

Washington Post Co. v New York State Ins. Dep't, 61 N.Y.2d 557, 567 (1984) ("To allow the government to make documents exempt by the simple means of promising confidentiality would subvert [FOIL's] disclosure mandate." (quoting *Washington Post Co. v. U.S. Dep't of Health & Hum. Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982))). In *Washington Post*, the Court of Appeals made clear that "promises of confidentiality by the Department do not . . . affect the applicability of any exemption." *Id*. It held that, despite promises a state agency made to insurance companies that it would keep certain records confidential, the agency had to disclose the records because no FOIL exemption applied to them. *Id*. at 563, 567 ("[R]espondent had no authority to use its label of confidentiality to prevent disclosure.").

Other courts have reached the same conclusion. Earlier this year, the Second Department held that a non-prosecution agreement between a district attorney's office and an individual had to be disclosed to a FOIL requester despite the agency's promise of confidentiality. *See Levy v. Suffolk Cty. Dist. Attorney's Off.*, 223 A.D.3d 904, 905 (2d Dep't 2024). The court explained that "any promise of confidentiality made to the petitioner did not afford a protection against disclosure of the non-prosecution agreement under FOIL." *Id*.; *see also* Comm. Open Gov't Advisory Op. 8241 (May 12, 1994), https://docsopengovernment.dos.ny.gov/coog/ftext/f8241.htm ("[A] promise or assertion of confidentiality cannot be upheld unless a statute specifically confers confidentiality."). The same holds here. An agency, in any effort to thwart its obligations under FOIL, cannot promise what it cannot provide. Without a FOIL exemption that squarely applies, the records must be released. The confidentiality claim that DOI makes on its Questionnaire thus has no bearing on whether the material must be released.

Second, DOI is similarly off-base in claiming that disclosure of the records would have a "chilling effect" on employment applicants, preventing the "candid disclosure of information to

DOI." Ex. D at 2. This argument fails for the same reason that DOI's promise of confidentiality does — there is no FOIL exemption pertaining to "chilling effects," and the exemptions that do exist must be "narrowly construed," not stretched capaciously to cover any hypothetical, future effects. *See Cap. Newspapers*, 67 N.Y.2d at 566. Furthermore, DOI offers no explanation for how disclosure of the two specific records that Mr. Coburn seeks, pertaining to nothing more than what is on a typical person's resume or LinkedIn page, could possibly dissuade someone from applying for a high-level city position or providing truthful information to DOI. The rest of the Questionnaire is not at issue here, as Mr. Coburn's FOIL request itself states that he does not seek any part of the Background Investigation Questionnaire except for the resume and "Academic Degrees" section. Ex. A. Simply put, no person qualified for public office would be chilled from seeking a position because the public could access their resume or educational background information.

Additionally, applicants who complete the Questionnaire are already on notice that their statements may be shared beyond DOI — and may result in serious consequences for themselves and their careers. The first page of the Questionnaire warns: "your questionnaire may be provided for use in another government agency's background investigation, or for the purposes of administrative action (e.g., internal investigations, disciplinary proceedings) by your agency, the City's Office of Administrative Trials and Hearings, the Conflicts of Interest Board, or others."[4] DOI offers no credible explanation — and there is none — for why disclosure of these records could have a "chilling effect." Even if some minimal effect did exist, any purported harm would be outweighed by the important public benefit of releasing the requested records, enabling the

[4] Background Investigation Questionnaire, Dep't of Investigation, https://www.nyc.gov/assets/doi/downloads/pdf/bg/BackgroundInvestigationQuestionnaire(March 2020).pdf.

public to understand the qualifications of one of the City's most powerful officials. *See Dobranski v. Harper*, 154 A.D.2d 736, 737 (3d Dep't 1989) (explaining that it would "balanc[e] the competing interests of public access and individual privacy").

Third, DOI cites only a single case in support of its position, *Fisher v. City of New York Off. of the Mayor*, 220 A.D.3d 618 (1st Dep't 2023); *see* Ex. D, and that decision does not control; *Fisher* was focused entirely on the disclosure of appointment applications from judicial candidates, and its facts and context are wholly different than those here. First, the FOIL requester in *Fisher* sought a significantly broader array of information than Petitioners do here. He requested the entirety of multiple applications for judicial appointments — records that, according to the court, contained information "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." *Fisher*, 220 A.D.3d at 619. None of that information is at issue in this case, where Mr. Coburn seeks only a resume and basic educational information. Second, the requester in *Fisher* sought all applications for judicial appointments that were then pending, potentially including applications from individuals who were later denied appointment. The court was concerned 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*. This concern is also not relevant here, as Mr. Coburn is seeking only records pertaining to Ms. Lewis-Martin, and it is well known that she was hired as Chief Advisor — the Mayor's Office even announced it by press release. Not only was Ms. Lewis-Martin actually hired, but she remains a public official today. "Judicial decisions clearly indicate that public officers and employees

enjoy a lesser degree of privacy than others." Comm. Open Gov't Advisory Op. 17126 (April 18, 2008), https://docsopengovernment.dos.ny.gov/coog/ftext/f17126.html (citing, *inter alia*, *Cap. Newspapers*, 67 N.Y.2d 562). In short, *Fisher* deals with a wholly different situation than the facts of this case and does not control here.

Fisher is also wrongly decided. The court in that case failed to even cite *Kwasnik*'s "reject[ion]" of the argument that disclosing a public official's employment history, resume, or educational history could constitute "an unwarranted invasion of the employees' privacy." *Kwasnik*, 262 A.D.2d at 172; *see supra* § I. It also failed to cite the Court of Appeals' controlling decision in *Washington Post Co.*, in which the court held that an agency's "promises of confidentiality" do not "affect the applicability of any exemption" and it ordered an agency to release records even though the agency had promised they would remain confidential. 61 N.Y.2d at 567; *see supra* § II.[5] *Fisher* cannot overrule the Court of Appeals' holding.

Here, Mr. Coburn seeks a narrow collection of documents containing information that, according to multiple courts, is publicly accessible and does not violate personal privacy. Those records should be disclosed.

III. The Court Should Grant Petitioners Attorney's Fees and Litigation Costs.

Should Petitioners substantially prevail in this proceeding, this Court should also grant attorney's fees and other litigation costs. The legislature amended FOIL in 2017 to provide for mandatory attorney's fees in certain instances to "encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding" recognizing that, "[o]ften, people simply cannot afford to take a government agency to trial to exercise their right to access public information." *Reiburn v. N.Y. City Dep't of Parks & Recreation*, 171 A.D.3d 670,

[5] *Fisher* was also handed down before *Levy* held squarely that a "promise of confidentiality" could not supersede the terms of *FOIL*. 223 A.D.3d at 905.

671 (1st Dep't 2019) (quoting 2017 N.Y. Assembly Bill A2750). FOIL provides that where (1) a petitioner has "substantially prevailed" in an Article 78 proceeding to obtain the requested records; and (2) "the court finds that the agency had no reasonable basis for denying access," the court "*shall* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by [the petitioner]." N.Y. Pub. Off. Law § 89(4)(c) (emphasis added). For all the reasons described above, DOI has no reasonable basis for denying access to the records Mr. Coburn requested.

A petitioner "substantially prevails" in a FOIL proceeding when, in response to litigation, the petitioner receives the records he requested. *See Cobado v. Benziger*, 163 A.D.3d 1103, 1106 (3d Dep't 2018). "This does not mean that petitioner received every page of every document sought in [his] request, but that [he] obtained the 'full and only response available pursuant to the statute under the circumstances.'" *Lansner & Kubitschek v. N.Y. State Off. of Children & Family Servs.*, 64 Misc. 3d 438, 454 (Sup. Ct., Albany Cty. 2019) (quoting *Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3d Dep't 2013)); *see also Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 79 (2017) (awarding fees despite agency's redactions being upheld because "petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request"). Because DOI has no reasonable basis for denying access to the requested records, Petitioners request that the Court award attorney's fees and litigation costs.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition and (1) direct DOI to comply with FOIL and produce the requested records in full, unredacted, within twenty (20) days; (2) award Petitioners the attorney's fees and litigation costs incurred in

obtaining DOI's belated compliance with FOIL; and (3) grant Petitioners such further relief as the Court deems just and proper.

Dated: June 28, 2024

Respectfully submitted,

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SECTION 202.8-b CERTIFICATION

I, Michael Linhorst, do hereby certify that this document complies with the word count limit set forth in Section 202.8-b of the Uniform Civil Rules. The word count of this Memorandum of Law is 3,679 words. The word count excludes any caption, table of contents, table of authorities, and signature block, and it is compliant with the word count limit. This document was prepared using Microsoft Word. The font of this document is Times New Roman, size 12.

/s/ *Michael Linhorst*
Michael Linhorst