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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of:

LISA HARBATKIN,

*Petitioner-Appellant,*

For a Judgment Pursuant to Article 78 of the  
N.Y. Civil Practice Law & Rules,

- against -

NEW YORK CITY DEPARTMENT OF RECORDS AND  
INFORMATION SERVICES; BRIAN G. ANDERSSON,  
in his official capacity as Commissioner of the New York  
City Department of Records and Information Services;  
KENNETH R. COBB, in his official capacity as Assistant  
Commissioner and Records Access Officer, New York  
City Department of Records and Information Services;  
and, EILEEN M. FLANNELLY, in her official capacity as  
Deputy Commissioner and FOIL Appeal Officer, New  
York City Department of Records and Information  
Services,

*Respondents-Respondents.*

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**BRIEF ON APPEAL FOR PETITIONER-APPELLANT LISA HARBATKIN  
IN SUPPORT OF PUBLIC ACCESS TO AGENCY RECORDS UNDER FOIL**

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GREENBERG TRAUIG LLP  
Michael J. Grygiel  
William A. Hurst  
Cynthia E. Neidl  
*Attorneys Pro Bono for Petitioner-Appellant  
Lisa Harbatkin*  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207  
(518) 689-1400  
grygielm@gtlaw.com

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## INTRODUCTION

Petitioner-Appellant Lisa Harbatkin (“Ms. Harbatkin” or “Petitioner”) respectfully submits the following brief in support of her appeal from the Judgment of Supreme Court, New York County (Hon. Marylin G. Diamond, J.S.C.) entered on March 18, 2010 (the “Judgment”). (R. 5)<sup>1</sup> In the Judgment, the lower court denied Ms. Harbatkin’s Petition, brought pursuant to New York’s Freedom of Information Law (“FOIL”), Article 6 of the N.Y. *Public Officers Law*, §§ 84-90 *et seq.*, for unrestricted public disclosure of the historic “anti-Communist” case files maintained by Respondent the City of New York’s Department of Records and Information Services (the “City”). (R. 6) The Judgment also granted, *sub silentio*, the City’s motion to dismiss the declaratory judgment aspect of this combined proceeding in which Ms. Harbatkin sought a determination that the City’s imposition of various restrictions on her use of the anti-Communist case files in her research and writing violated her rights of free speech protected under the federal and New York State Constitutions. (R. 7) For the reasons presented in the record, and as discussed more fully herein, this Court should reverse the Judgment, and further order the immediate disclosure of the records at issue in unredacted form while striking down the conditions the City has imposed on their use as flagrantly unconstitutional.

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<sup>1</sup> References denoted with the letter “R” refer to the corresponding page(s) of the Record on Appeal submitted herewith.

## PRELIMINARY STATEMENT

Ms. Harbatkin is a native New Yorker who has been actively engaged in scholarly research and writing related to the New York City Board of Education's notorious anti-Communist investigations which peaked in their intensity during the 1950's, known as the McCarthy Era and so-named for the anti-Communist practices of Sen. Joseph McCarthy. Her work includes, *inter alia*, research and writing pertinent to how the Board of Education's anti-Communist campaign affected New York City public school teachers who were subjected to — and, in many instances, victimized by — these political loyalty investigations, and the lingering effect of the investigations on public and educational policy. (R. 14)

In response to Ms. Harbatkin's FOIL requests, the City refused to disclose the names of individuals contained in the anti-Communist case files -- compiled from the 1930s through the 1960s, when the Board of Education was conducting investigations into the political beliefs and associations of "approximately 1,100" (R.16, 198) public school teachers -- ostensibly to protect their privacy. The lower court's cursory affirmation of the City's denials of access to these records should be reversed, and the City should be directed to disclose the requested information. Disclosure will provide the general public with an opportunity to assess the circumstances culminating in the Board of Education's anti-Communist investigations of the mid-twentieth century, including the City's use of informants

(both voluntary and involuntary) within the public school system to identify potential targets of those investigations. The public has the right to know this information consistent with FOIL's commitment to open government and public accountability on a matter that directly implicates an issue of significant historic concern to New York's citizens. Putting aside that these materials are historically dated, the transparently pretextual nature of the City's privacy claim, which the lower court accepted, is revealed by its willingness to supply the names of any and all teachers who were investigated to Ms. Harbatkin — *provided*, however, that she agrees not to publish them "in any form." The lower court erred because the City's conclusory assertion that disclosure of the requested records would result in an unwarranted invasion of personal privacy was insufficient to justify nondisclosure under FOIL in this instance.

The City's legal obstructionism did not stop with the mere denial of public access. Pursuant to a regulation<sup>2</sup> it enacted for the sole purpose of controlling public access to the anti-Communist case files, the City required Ms. Harbatkin — and all other citizens seeking access to the withheld records — to agree, in advance and as a condition of obtaining full disclosure, to obtain permission from its Department of Records/Municipal Archives before using "any direct quotation"

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<sup>2</sup> Section 3-02 ("Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files"), Chapter 2, Title 49 of the Rules of the City of New York ("Rule 3-02") and implementing Form MA-101D ("Form D"). (R. 68-69, R. 70) Subsequent to Ms. Harbatkin's initiation of the Article 78 proceeding in the lower court, the City apparently modified Section 3.02 by withdrawing its pre-publication approval requirement.

from the restricted materials in any publication. This was not only a direct and substantial impediment to Ms. Harbatkin's ongoing research, but a frontal assault on the First Amendment. Our constitutional system does not allow the government to impose prior restraints on speech, a form of censorship that is anathema to the marketplace of ideas.

There is no greater offense to the First Amendment and no greater harm to our constitutional order than a government that can prevent the publication of information with which it disagrees or of which it disapproves, which is exactly what the lower court has allowed here. By effectively affirming the validity and enforceability of Rule 3-02 and its implementing Form D, the lower court has allowed the City to require all individuals, as a condition of unrestricted access to the Board of Education's historic anti-Communist files, to certify that they will not "record, copy, disseminate or publish" any names or personally identifiable material contained in those files. (R. 70) This sweeping regulation, which holds those who would have unredacted access to the archives hostage to the conditions on publication imposed by the City, strikes at the very core of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This guiding principle constrains the

government in all of its varied activities, ranging from the direct (*e.g.*, by requiring official approval before information can be published) to the indirect (*e.g.*, through the imposition of an indemnification requirement as a precondition of protected expressive activity) regulation of speech.

It is not as if the law in this area is uncertain. In its misguided efforts at restricting access to the materials, the City has ignored (or disregarded) a long-established constitutional principle: the government may not withhold access to information as a vehicle to impose content-based restrictions on private speakers or to block the publication of disfavored subject matter. That is precisely what the lower court's Judgment allows to occur here.

In the end, there is surely something disturbing, and more than a little ironic, about the events that brought Ms. Harbatkin to court: the City now seeks, several decades after the fact, to prohibit Ms. Harbatkin from "naming names" in writing about this period in history. In a certain sense, this is the opposite of the practices reflected in the case files, when the Board of Education wielded its power and authority to compel the systematic identification of public school teachers suspected of ideological infidelity. In this day and age, there is no reason for continuing to keep that information behind the government's closed doors, where the political interrogations memorialized in the records at issue were first conducted more than a half a century ago.

There can be no doubt that the City's anti-Communist archives reflect a tragic, but important, chapter in not just the City's but the nation's history. Moreover, the City of New York is hardly the first governmental entity to seek to suppress embarrassing information about historic practices that were coercive or threatening to the citizens it was entrusted with governing. Yet if the lower court is right, Ms. Harbatkin may be deprived of complete access to that information and prohibited from publishing information contained in what are unquestionably historically valuable and authentic documents. The chilling effect on Ms. Harbatkin's First Amendment activities could hardly be more severe. It is not too much to say that, ostensibly to protect the privacy of those citizens subjected to the ideological purges undertaken by its Board of Education several decades ago, the City has replicated the system of censorship characteristic of the repressive Communist regimes that it was seeking to combat during the McCarthy period. If the lessons of the law and history have taught us anything, it is that the First Amendment does not tolerate such conduct.

### **QUESTIONS PRESENTED**

1). The City of New York is the custodian of records concerning widely condemned investigations conducted during the mid-Twentieth Century into the alleged Communist affiliations of New York City school teachers and others by the New York City Department of Law under the auspices of the New York City

Board of Education. In response to a FOIL request, the City partially disclosed some records, but withheld others and redacted the names of so-called confidential informants who reported on public school teachers during the anti-Communist investigations, the names of the targets of those investigations, the names of the public schools where the investigations were conducted nearly a half-century ago, and even the names of the neighborhoods in which those schools were located, all on the ostensible grounds of protecting the identity of informants and others swept up in the investigations. The City also cited decades-old promises of confidentiality to the voluntary and involuntary participants in those investigations. Did the City's denials of public access to the records in unredacted format adequately establish that disclosure would cause an unwarranted invasion of personal privacy under N.Y. *Public Officers Law* § 87(2)(b)?

*Supreme Court, New York County answered this question in the affirmative.*

2). As a precondition to the exercise of the right to review public records concerning its anti-Communist investigations (but not records on any other subject matter) for the purpose of scholarly research connected therewith, the City requires any party seeking access to certify that he/she will not “record, copy, disseminate or publish in any form any names or other identifying personal information” obtained from the restricted materials.<sup>3</sup> Has the City placed unconstitutional

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<sup>3</sup> In enacting a revised post-litigation version of Section 3-02, the City has apparently abandoned the requirements

conditions on the exercise of free speech and research activities, and do those conditions also violate the First Amendment's content-neutrality requirement and lack the necessary procedural safeguards?

*Supreme Court, New York County did not determine this question, yet nevertheless dismissed the declaratory judgment portion of this combined proceeding.*

### **STATEMENT OF THE CASE**

#### **A. Ms. Harbatkin's Historical Research Activities.**

Petitioner-Appellant Lisa Harbatkin ("Ms. Harbatkin") is a scholar actively involved in research and writing regarding the New York City Board of Education's notorious anti-Communist investigations into public school teachers' political beliefs between the 1930's and 1960's. During these investigations Saul Moskoff, Assistant Corporation Counsel assigned to the Board of Education and an individual well-known for his McCarthyism and anti-Communist sentiments, conducted extensive interrogations with numerous teachers suspected of espousing Communist beliefs. (R. 16) Each interrogation was transcribed and preserved by the City, along with additional records about the informants who identified individual teachers as suspected Communist sympathizers. (R. 17) Ms. Harbatkin

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that a party requesting access (1) obtain permission from the Department of Records/Municipal Archives for any direct quotation from the restricted materials to be used in any public presentation, and (2) indemnify the City against any claims or liability arising from unauthorized publication of the material. While the trial court did not address these flagrantly unconstitutional conditions on free speech challenged by Ms. Harbatkin below, they are no longer at issue in the case in view of their withdrawal by the City.

has a personal connection to the City's anti-Communist campaign: her parents, both public school teachers, were among those interrogated by the City when McCarthyism reached a fever pitch during the 1950's. Ms. Harbatkin's father was one of the 400 teachers forced to surrender his teaching license, and livelihood, in the wake of the City's interrogations. (R. 16)

**B. The City's Denial of Ms. Harbatkin's FOIL Request and Administrative Appeal.**

Through the course of her research, Ms. Harbatkin discovered that the New York City Municipal Archives, a sub-agency within the Department of Records and Information Services, housed records of the anti-Communist interviews and related materials. (R. 18) In June of 2007, Harbatkin contacted a City archivist and requested access to those files. (R. 18) The archivist informed her that the City was developing procedures to govern public access. (R. 18) After repeated assurances that such procedures were forthcoming, but faced with a continuing denial of access (R. 53-61), Ms. Harbatkin filed, as required by law, a FOIL request on October 17, 2008, seeking disclosure of the City's anti-Communist records. (R. 24) New York City Assistant Commissioner and Records Access Officer Kenneth R. Cobb denied Ms. Harbatkin's FOIL request in a letter dated November 6, 2008. (R. 24) Ms. Harbatkin filed an administrative appeal on November 26, 2008, which was denied in a letter dated December 9, 2008, from New York City Department of Records Deputy Commissioner and FOIL Officer Eileen M.

Flannelly. (R. 25, 34-35, 182-183) The appeal denial letter, which marked the City's final and binding decision regarding Ms. Harbatkin's FOIL request, informed Ms. Harbatkin that complete access to the anti-Communist records would be contingent upon her compliance with the City's newly created Section 3-02 of Title 49, Rules of the City of New York titled "Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files" ("Rule 3-02"), enacted as a direct response to her efforts to gain access to these historic materials. (R. 24, 34-35)

C. **The Unconstitutional Conditions Imposed by Rule 3-02/Form D.**

Rule 3-02 was officially adopted by the City in February of 2008 and took effect on March 26, 2008. (R. 20, 68-69) It states that "the individuals who are the subject of these [anti-Communist] files have a privacy right regarding information of a personal nature contained in them; this includes a privacy right regarding the fact that the subject case file exists." (*Id.*) Additionally, Rule 3-02 outlined further regulations and/or procedures governing the public's access to the anti-Communist files. These include requirements that: (1) individuals requesting a specific file must obtain permission to access it from the subject of that file, or if deceased, from the subject's heirs; (2) individuals conducting general research must certify that they will not record or use any names or personally identifiable material from the file; (3) when a researcher accesses a file with the permission of the subject of

that file, the Archives will redact the names of individuals whose permission has not been obtained; and (4) all photocopies will be redacted to remove information identifying individuals whose permission has not been obtained.<sup>4</sup> (R. 21-22, 70)

Pursuant to these requirements, the City sought to compel Ms. Harbatkin to complete Form MA-101D (“Form D”) as a precondition of granting access to certain anti-Communist files. (R. 70) In its present iteration, Form D requires a party seeking access to the anti-Communist files to certify that he/she will (1) not disseminate or publish “in any form any names or other identifying personal information” obtained from the restricted materials.

**D. Ms. Harbatkin’s Commencement of the Underlying Article 78 Proceeding to Obtain Public Access to Historically Valuable Information.**

As a survivor of individuals who were interrogated, Ms. Harbatkin was granted full access to files containing information about her parents, Sidney and Margaret Harbatkin. (R. 22) Through her review of these and other materials, Ms. Harbatkin was able to ascertain that considerable historical information is contained in the City’s catalog of anti-Communist files. She discovered significant facts about the nature of the interrogations, including the content of the questions asked of the subjects, and the implicit threats of job loss contained in those questions. (R. 22-23) Recognizing the historical importance of the information contained in the anti-Communist files, and because the conditions imposed by Rule

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<sup>4</sup> These restrictions remain in full force and effect in the current version of Rule 3-02 enforced by the City. (R. 317)

3-02 and Form D violated her right to freedom of speech, Ms. Harbatkin refused to sign Form D. As a result of the City's denial of access, Ms. Harbatkin filed an Article 78 petition pursuant to *CPLR 7803* in the Supreme Court of the County of New York on April 6, 2009, challenging Rule 3-02 as arbitrary and capricious and an abuse of discretion in conjunction with a Complaint seeking a judgment declaring Rule 3-02 and its attendant forms and regulations violations of the First and Fourteenth Amendments. (R. 9-182)

**E. The City's Post-Litigation Offer of Settlement.**

In a letter dated June 15, 2009 – the day before the City's responding papers were due in the litigation below – Assistant Corporation Counsel Marilyn Richter transmitted a letter to Ms. Harbatkin's counsel following up on previous discussions in order to “memorialize in writing the respondents' current position ... concerning [Petitioner's] request to access voluminous records from the restricted records of the New York City Board of Education's anti-communist investigations.” (R. 205-207) The City's June 15, 2009, offer of settlement stated that respondent would “provide either of the following forms of access to your client, Ms. Harbatkin:

- 1) Ms. Harbatkin may obtain copies of the documents, with the personally identifying information concerning individuals discussed in these documents redacted, to protect the personal privacy of those individuals and, if deceased, the personal privacy of their surviving relatives. Please note that there is a copying charge of \$0.25

per page. (DORIS does not have a redacted set of the documents, and will have to copy the unredacted set and then make the redactions.)

2) Ms. Harbatkin may access unredacted copies of the documents, provided that she agrees, in writing, not to record, copy, disseminate or publish in any form any names or other identifying personal information obtained from the records. A copy of the written application that Ms. Harbatkin will be required to sign, containing the terms of the agreement, is enclosed.

(*Id.*) The June 15, 2009, correspondence included a new form, to be signed by Ms. Harbatkin, indicating her consent to the above conditions. (R. 317)

Accordingly, the City was prepared abruptly to jettison Rule 3-02's unconstitutional requirements, as listed in Form D, that Ms. Harbatkin obtain official government permission before publishing any direct quotations from the anti-Communist case files and provide indemnification to the City and its employees.<sup>5</sup> However, the "new" conditions contained in the City's June 15, 2009, offer and its accompanying revised form were in certain respects *more stringent* than those contained in Form D. First, the City's June 15, 2009, letter expanded the prohibition against "disseminat[ing] or publish[ing]" names or other identifying information obtained from the restricted records to include a previously nonexistent ban against any attempt to "record [or] copy" such names or other identifying information. (R. 317) Consequently, Ms. Harbatkin *would be prohibited from even writing the names down on a piece of paper for the purpose*

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<sup>5</sup> As stated above, the City has abandoned these requirements in enacting a modified version of Rule 3-02.

*of conducting further research.* And because the language used in the new form is overly broad, she would be prohibited from publishing “any names” – not just those names that the City had redacted in the purported interest of protecting personal privacy. (*Id.*)

Second, the City attempted to impose on Ms. Harbatkin – a freelance writer and researcher – the cost of reproducing two (2) complete sets of responsive records due to the cumbersome and inefficient redaction protocols followed by the Municipal Archives, which entail making a complete copy set of the requested records; making redactions to those copies; then producing, in effect, a copy of the redacted copy, but billing the requesting party for both sets. The requirement of reimbursing the City for the cost of two (2) sets of records, when only one is actually produced, not only directly contravenes FOIL, but presents a financial impediment which further chills the exercise of Ms. Harbatkin’s constitutional free speech rights. (R. 26-27)

On June 16, 2009, Petitioner’s counsel transmitted a letter to Assistant Corporation Counsel Richter, rejecting the City’s June 15, 2009, offer and seeking confirmation that “the City has abandoned and will not seek to enforce these two [advance approval and indemnification] requirements against Ms. Harbatkin.” (R. 269-270) The City’s counsel replied, in pertinent part, by stating “that respondents will not subsequently ask Ms. Harbatkin to sign an agreement containing the two

requirements that are not included in the revised application form.” (R. 271) Thus, the City’s response appeared to confirm that it had merely ginned up a revised form to govern *only* Ms. Harbatkin’s request for unredacted disclosure of agency records.

**F. The March 18, 2010, Judgment Appealed From.**

Despite having copies of the actual settlement correspondence in the record dated June 15, 2009, the lower court erroneously determined that the City “had eliminat[ed] the requirements concerning quotation and indemnification, [and] offered to allow access to the unredacted files subject only to an agreement not to publish the names of individuals identified in the records” in a letter dated “June 15, 2008.” (R. 5) Based on that erroneous factual finding, the lower court simply failed to consider Harbatkin’s constitutional claims and never passed on the validity of Rule 3-02.

In fact, the correspondence between the parties in June of 2009 occurred long after the administrative record closed on December 9, 2008, and Ms. Harbatkin’s counsel summarily rejected the City’s offer of compromise in correspondence transmitted the next day. (R. 269-270) Consequently, the City’s unaccepted settlement offer should have had no bearing whatsoever on the lower court’s determination in this matter. It clearly did, however: “In light of the sensitive nature of the information, *the minimal burden that compliance with the*

*respondents' offer places on the petitioner* and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents have properly refused petitioner access to the unredacted files *unless she agrees not to publish the names of individuals identified in the records.*"<sup>6</sup> (R. 7) (Emphasis supplied)

As to the lower court's legal analysis, it first applied a "rational basis" standard of review — one reserved for findings of fact — to the purely legal question of whether FOIL's exemptions had been satisfied. It then held that the test of whether an administrative agency complied with the plain text of FOIL was somehow a matter of "interpretation . . . by the agency charged with its enforcement," when the question is purely one of law, and therefore subject to *de novo* review by this Court. *Matter of Toys R Us v. Silva*, 89 N.Y.2d 411, 419 (1996) (issue of whether party invoking a FOIL exemption has met its burden is one of "pure legal interpretation").

While typically an agency action is reviewed under an "arbitrary and capricious" standard, Supreme Court's application of that standard to the City's refusal to disclose the subject records was incorrect. ***When reviewing the denial of FOIL request, a court must apply a far different rule. It is to presume that all records of a public agency***

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<sup>6</sup> Additionally, Ms. Harbatkin never argued in the court below that the City intended to "frustrate the petitioner in the conduct of her scholarship," nor is it her burden under FOIL to make such a demonstration. (R. 7) Rather, her position was -- and remains -- that the City's confidentiality concerns, attenuated because asserted 50-70 years after the fact, are a mere pretext for the City's real objective of avoiding the publication of information arising from a politically embarrassing, City-sponsored ideological witch-hunt that had devastating consequences for successive generations of public school teachers (and their students).

***are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to the disclosure.***

*New York Comm. for Occupational Safety and Health v. Bloomberg*, 72 A.D. 3d 153, 158 (1st Dep't 2010) (emphasis supplied) (citations omitted); *see also Bahnken v. New York City Fire Dept.*, 17 A.D.3d 228, 230 (1st Dep't 2005) (“the motion court erred in applying the normal article 78 ‘arbitrary and capricious’ standard of review”); *see generally Smith v. Donovan*, 61 A.D.3d 505, 508-09 (1st Dep't 2009) (rejecting judicial deference to agency’s interpretation of statute where question presented pure statutory reading and analysis, because there is no reason to rely on any special competence or expertise of the administrative agency).

The lower court then cited *Cirino v. Bd. of Educ. of the City of New York*, an unpublished, thirty-year-old case in which New York County Supreme Court denied unredacted public access to “essentially the same information” (R. 6) based on the express representation that they would be fully disclosed in the year 2000 (and which is therefore of dubious precedential value here, where the records remain subject to redaction notwithstanding the City’s prior promise), and concluded, remarkably, that Ms. Harbatkin had not “shown that the information was relevant to the Department of Education’s ordinary work of teaching students,” although the record shows that in December of 1951 the Board of

Education adopted a resolution formalizing its previous policy and practice that a public school teacher's "present membership in the Communist Party" was, in and of itself, a sufficient basis for termination of employment. (R. 23/R.219)

Finally, the lower court also cited, and ultimately found dispositive, this Court's decision in *Matter of Bellamy v. New York City Police Dep't*, 59 A.D.3d 353 (1st Dep't 2009), and the New York Court of Appeals's decision in *Matter of New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477 (2005). As explained below, these decisions are completely inapposite here.

## ARGUMENT

### **I. THE LOWER COURT ERRED IN FINDING THAT THE CITY CARRIED ITS BURDEN OF ESTABLISHING THAT HISTORICAL INFORMATION CONTAINED IN ITS "ANTI-COMMUNIST" INVESTIGATION FILES IS SPECIFICALLY EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW**

#### **A. FOIL's Commitment to Open Government Promotes Accountability.**

The purpose of New York's Freedom of Information Law ("FOIL") is to promote the public's right to be informed about the processes of governmental decision making. N.Y. PUB. OFF. LAW § 84 (McKinney 2008); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-67 (1986); *Matter of Westchester Rockland Newspapers, Inc. v. Mosczydlowski*, 58 A.D.2d 234, 236

(2d Dep't 1977). The statute was enacted by the Legislature because access to governmental information "should not be thwarted by shrouding it with a cloak of secrecy or confidentiality." N.Y. PUBLIC OFFICERS LAW § 84. In signing FOIL into law, then Governor Wilson stressed the importance of open government to a free society and the need for FOIL to engender public understanding and participation. Governor's Memorandum L. 1974, Chs. 578-580, 1974 Legis. Ann., at 392, cited in *Matter of Russo v. Nassau County. College*, 81 N.Y.2d 690, 697 (1993).

The New York Court of Appeals has consistently ruled "that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Matter of Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987), cert. denied, 486 U.S. 1056 (1988); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987). FOIL's broad standard of disclosure is intended to maximize public access to records and information possessed by state and local government agencies. *Matter of Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 361-62 (2002); *Matter of Mantica v. New York State Dep't of Health*, 94 N.Y.2d 58, 61 (1999); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996). "In short, FOIL gives a sweeping right to public records and only narrow grounds for resisting disclosure."

*Journal Publishing Co. v. Office of Special Prosecutor*, 131 Misc.2d 417, 420 (N.Y. Co. Sup. Ct., 1986).

Under FOIL, all government records are presumptively subject to disclosure unless they fall within one of the specific exemptions provided in *Public Officers Law* § 87(2). *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (“The balance is presumptively struck in favor of disclosure”); *Matter of Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 296-97 (1985); *Hanig v. State Dep’t of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992); *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 50-1 (2008); *New York Comm. for Occupational Safety and Health v. Bloomerg*, 72 A.D.3d at 158; *Buffalo News v. Buffalo Mun. Hous. Auth.*, 163 A.D.2d 830, 830 (4th Dep’t 1990). The burden of proof rests upon the government agency claiming the exemption to establish that the requested material is exempt from disclosure. N.Y. PUBLIC OFFICERS LAW § 89(4)(b) (McKinney 2008); *Matter of Russo*, 81 N.Y.2d at 697-98; *Matter of Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980); *Matter of Johnson v. New York City Police Dep’t*, 257 A.D.2d 343, 346 (1st Dep’t 1999); *Matter of Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 1029 (4th Dep’t 1985).

Here, Respondents did not sustain their burden of showing that nondisclosure of the Board of Education’s records – which the City acknowledged,

as it must, are “historically important materials” (R. 34) – requested by Ms. Harbatkin is justified under FOIL’s narrow exemptions. *Capital Newspapers v. Burns, supra*, 67 N.Y.2d at 566. The City disclaimed its obligation to provide “un-redacted” [*sic*] (R. 34) public access based on its wholly speculative conclusion that disclosure of the “anti-Communist” case files – which consist of internal memoranda, witness statements and transcripts of interrogations concerning widely reported matters occurring more than a half-century ago – would result in an “unwarranted invasion of personal privacy.” The lower court endorsed this fiction by finding that “whatever limited scholarship interest the petitioner may have in exposing the identities of those who named names is clearly outweighed by the City’s promise of confidentiality made to its employees and the potential embarrassment to, and harassment of, at least some of these individuals and their families.” (R. 7)

In fact, the only targets of the City’s anti-Communist investigations whose current positions are evident in the record actually *supported* full disclosure. (R. 309-311) In other words, the “potential embarrassment to, and harassment of, at least some” of those targets and their families is purely speculative and lacks any support in the record. Respondents’ conclusory denials below did not disclose any privacy concerns raised by representatives of the City’s interrogation targets or informants, most of whom are presumably now deceased (*see* R. 26), and failed to

particularize exactly how an invasion of privacy would result from unredacted disclosure of the agency's records. The City's denial of public access should therefore be reversed.

**B. Respondents Failed to Show a Particularized and Specific Justification for a Denial of Complete Access to the "Anti-Communist" Case Files Maintained by the City of New York's Municipal Archives Division.**

**1. There is no Support in the Record for the Speculative Privacy Interest Asserted by the City.**

In emphasizing the broad scope of disclosure under FOIL, the Court of Appeals has stated:

To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency *convincingly demonstrates* its need, disclosure will not be ordered (*Public Officers Law*, § 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. *Rather, it is required to articulate a particularized and specific justification* and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (*See, Church of Scientology of N.Y. v. State of New York*, 46 NY 2d 906, 908). *Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.*

*Matter of Fink*, 7 N.Y.2d at 571 (emphasis supplied). Indeed, the Court of Appeals has repeatedly held that "exemptions [under FOIL] are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL

exemption by articulating a particularized and specific justification for denying access.” *Burns*, 67 N.Y.2d at 566; *see also Matter of Russo*, 81 N.Y.2d at 697-98; *Matter of Farbman & Sons v. New York City Health and Hosp. Corp.*, 62 N.Y.2d 75, 80 (1984); *Kimball*, 50 N.Y.2d at 580.

Remarkably, the City relied on little more than unsubstantiated speculation to prop up its erroneous contention that unredacted disclosure of the requested archival materials relative to the Board of Education’s investigations would invade the privacy of individuals named in certain files. (R. 33) There is no indication that the agency had actually consulted with individuals mentioned in the restricted case files regarding the putative impact of public disclosure before denying Ms. Harbatkin’s FOIL requests. *Cf. Bahnken*, 17 A.D.3d at 229 (“Clearly, the hospitals themselves would have seen fit to intervene if this issue were as crucial to their well-being as argued by respondent. Their declination to do so speaks for itself.”). Nor did the City articulate any basis whatsoever – let alone a reasonable basis – to support the implausible claim that public disclosure would cause an invasion of privacy, particularly given that many details concerning the Board of Education’s anti-Communist investigations conducted several decades ago have been widely reported in the public domain.

While it is true that records the disclosure of which may constitute an unwarranted invasion of personal privacy may be withheld from the public, their

exemption under § 87(2)(b) must be supported by a particularized and specific evidentiary showing. *Burns*, 67 N.Y.2d at 566. Where, as here, the ostensible reasons for nondisclosure of the City’s anti-Communist case files are speculative and “unsupported by any evidentiary documentation,” *Bahnken*, 17 A.D.3d at 230, the agency’s determination should have been annulled and disclosure of the records ordered. The lower court got it wrong.<sup>7</sup>

The City’s conclusory denials, erroneously deemed adequate by the lower court, fall far short of satisfying FOIL’s requirement of “articulating a particularized and specific justification for denying access.” *Burns*, 67 N.Y.2d at

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<sup>7</sup> The lower court’s finding that “[n]or has the petitioner shown that the information was relevant to the Board of Education’s ordinary work of teaching students” (R. 6) not only impermissibly reverses the controlling burden of proof, which falls squarely on the agency to establish, through a particularized justification, its entitlement to an enumerated FOIL exemption, but also belies a fundamental misunderstanding of the administrative record. In nearly every interrogation set forth on the current record, Saul Moskoff opened by noting that he was “acting in behalf of, and under the authority of [then Superintendent of the NYS Board of Education] Dr. Jansen.” (*See, e.g.*, R. 219) Further, Mr. Moskoff repeatedly drew a direct connection between the investigations and official Board of Education policy:

[B]efore I put any questions to you, so that you may guide yourself accordingly, I want to, as I do in each case, refresh your recollection as to what the policy of the Board of Education is, and has been with regard to this subject matter, whether or not it applies, of course. The Board in December of 1951 adopted a resolution which reiterated a then existing policy which in substance, said this; that present membership in the Communist Party is a sufficient basis for disqualification from continued employment. The Board said that past membership in the Communist Party standing alone did not in and of itself require disciplinary proceedings but that each case of past membership would depend upon the particular facts and circumstances in the case, including the nature of the membership, the extent, of the period of time during which there was membership, but most important of all, as to whether or not there had been a complete and honest severance from the Communist Party. *The Board said that there was a relationship between past membership in the Communist Party and present fitness to teach and that therefore there was an obligation on the part of teachers to make full, free and frank disclosures as to the facts.*

(R. 219-20) (emphasis supplied). Accordingly, these were not *ad hoc* or unauthorized investigations disconnected from the Board of Education’s mission and agenda, as the lower court seemed to believe. To the contrary, they were at the center of the Board’s express official policy of eliminating Communist Party associates, real or perceived, from the teaching ranks of the NYC public school system for the declared purpose of shielding students from them - or, more precisely, from their suspected political beliefs. Again, the lower court got it wrong.

566. New York courts have uniformly held that “merely repeating the statutory phrasing of an exemption [is] insufficient to establish the requirement of particularity.” *Matter of City of Newark v. Law Dep’t of the City of New York*, 305 A.D.2d 28, 34 (1st Dep’t 2003) (citing *DJL Rest. Corp. v. Dep’t of Buildings*, 273 A.D.2d 167, 168-69 (1st Dep’t 2000)); *Matter of The Washington Post Co. v. New York State Ins. Dep’t*, 61 N.Y.2d 557, 567 (1984) (agency did not satisfy its burden of proof where claimed exemption was “presented in the form of conclusory pleading allegations and affidavits”); accord *Matter of Prof’l Standards Review Council of America v. New York State Dep’t of Health*, 193 A.D.2d 937, 939 (3d Dep’t 1993). That is the case here.

**2. Respondents Did Not Satisfy Their Burden of Showing That Public Disclosure of the Anti-Communist Case Files Would Cause an Unwarranted Invasion of Personal Privacy Under *Public Officers Law* § 89(2)(b).**

The reason the City failed to particularize the grounds supporting its denial of public access is clear: it cannot demonstrate that disclosure of the anti-Communist case files would result in an “unwarranted invasion of personal privacy” of the teachers who are the subjects of the files. N.Y. PUB. OFF. LAW § 89(2)(b) (McKinney 2008). The City’s conclusory assertion amounts to nothing more than a repetition of the statutory language.

The decision by the Court of Appeals in *Matter of New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477 (2005), clarified the parameters of

FOIL's "personal privacy" exemption. In that case, press representatives and the families of certain persons who perished in the terrorist attacks of September 11, 2001, sought public disclosure of portions of the tapes and transcripts of calls made on that date to the New York City Fire Department's 911 emergency service,<sup>8</sup> as well as oral histories, which consisted of interviews with firefighters in the days following the attacks. The Fire Department denied public access to the records citing, *inter alia*, the personal privacy exemption of *Public Officers Law* § 87(2)(b).<sup>9</sup> *Id.* at 484. The privacy interest at issue in *Matter of New York Times* belonged to the "surviving relatives."<sup>10</sup>

Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life of one's

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<sup>8</sup> As indicated below in the text, the families of other World Trade Center terrorism victims opposed FOIL disclosure of tapes of the 911 calls made by the deceased during their final living moments. See *Matter of New York Times*, 4 N.Y.3d at 485. The City has presented no such evidence in the administrative record concerning the positions of family members of the subjects of the Board of Education's ideological interrogations.

<sup>9</sup> The Court of Appeals observed that *Public Officers Law* 87(2)(b) exempts from public disclosure only those records that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of [FOIL]." *Matter of New York Times*, 4 N.Y.3d at 484. However, when, as here, "[n]one of the six [specific kinds of disclosure listed in *Public Officers Law* 89(2)(b)] is relevant . . . [the Court] must decide whether any invasion of privacy . . . is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information." *Id.* at 485. As discussed below in the text, the public interest in full disclosure of the historically valuable information at issue in the instant case is considerable, whereas any privacy interest is severely attenuated by the age of the information (which the City compiled from the 1930s through the 1960s) and, more importantly, by the fact that there is nothing inherently stigmatizing about being identified as the victim of a government investigation which the judgment of history has condemned as an ideological witch hunt entailing the systematic abuse of civil rights and liberties. To the contrary, the stigma falls on the government which conducted the unlawful investigations into the political beliefs of its citizens.

<sup>10</sup> Ms. Harbatkin acknowledges, as the *New York Times* decision recognizes, that a privacy interest may exist "in the feelings and experiences of people no longer living." *Matter of New York Times*, 4 N.Y.3d at 484. However, the solicitude for that interest in *Matter of New York Times* was attributable to the deeply personal nature of the 911 calls of those trapped in the inferno that was the World Trade Center towers on September 11, 2001. The nature of the historical records here is intrinsically different from those at issue in *Matter of New York Times*, and the privacy interest is not of comparable strength.

deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead.

*Id.* at 484-5.

In contrast, the instant record does not reveal any objections from surviving relatives to full disclosure of the anti-Communist case files. Further, some of those targeted by the government have contributed to Ms. Harbatkin's research by identifying many of the details of the City's investigation. (R. 298-310) Unlike in *Matter of New York Times*, the current record is devoid of any privacy claims made by or on behalf of any surviving relatives.

### **3. Given the Nature and Age of the Information at Issue, The City's Privacy Claim is Attenuated.**

Further, "[t]he recognition that surviving relatives have a legally protected privacy interest . . . is only the beginning of the inquiry. [The courts] must decide whether disclosure . . . would injure that interest, or [a] comparable interest . . . and whether the injury to privacy would be 'unwarranted.'"<sup>11</sup> *Id.* at 485. For example,

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<sup>11</sup> A reviewing court is obligated to balance the relevant interests in a given case in determining whether disclosure would injure the asserted privacy interest and, further, whether the "injury to privacy would be 'unwarranted' within the meaning of FOIL's privacy exception." *Matter of New York Times*, 4 N.Y.3d at 485. The City's argument proceeds as if the Court of Appeals' recognition that "a privacy interest remains even after death", conjoined with the limited privacy interest of those teachers who may still be alive, as upheld in *Cirino v. Bd. of Educ. of the City of New York* – a decision which, as discussed above in the text, presupposed complete (*i.e.*, unredacted) disclosure of the entire series of anti-Communist case files *in the year 2000* – somehow displaces or truncates the requisite

the Court of Appeals determined that the privacy interests in the content of 911 calls made on September 11, 2001, were particularly compelling because of the uniquely tragic circumstances in which the calls were made:

The privacy interests in this case are compelling. The 911 calls undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller – or the caller, if he or she survived – might reasonably be deeply offended at the idea that these words could be heard on television or read in the *New York Times*.

*Id.* at 485. There is no support for the lower court’s conclusion that unredacted disclosure of the anti-Communist case files sought by Ms. Harbatkin here would impinge upon any similarly “compelling” privacy interests of the deceased,<sup>12</sup> or of the surviving relatives.

Given that § 89(2)(b)(v) of FOIL was not cited by Respondents as a ground for nondisclosure here, the City is necessarily remitted to the general balancing-of-

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balancing analysis and mandates nondisclosure. It does not. The City even goes so far as to claim that there is “a privacy right regarding the fact that the subject case file exists” (R. 195), without providing any authority in support of this breathtaking – indeed, Orwellian – assertion. To the contrary, the balancing analysis required by the *New York Times* decision is contextual and fact-specific, and depends principally on an evaluation of the *content* of the records at issue to determine whether a privacy interest on the part of a surviving family member is sufficient to overcome the public’s presumptive right of access under FOIL.

<sup>12</sup> The City acknowledges that the individuals are named in files that pertain to the Board of Education’s anti-Communist investigations “from the 1930s through the 1960s.” (R. 68) This information is therefore unquestionably historical in nature and, presumably, virtually all of the teachers who are the subject of the files are now deceased, as is the case with Ms. Harbatkin’s own parents. (R. 40) While not dispositive, the “age of information sought to be redacted” is unquestionably relevant to the propriety of the privacy exemption asserted by the City. *Matter of Bellamy*, 59 A.D.3d at 355.

interests analysis adopted by the Court of Appeals in *Matter of New York Times*. See *id.* at 485 (stating that because none of the six privacy exemptions to FOIL were applicable, the court had to decide “whether any invasion of privacy here is ‘unwarranted’ by balancing the privacy interests at stake against the public interest in disclosure of the information.”). Based on the “extraordinary facts in th[at] case,” *id.* at 484, a privacy interest was recognized on behalf of the surviving relatives of those who, confronted with their imminent demise, placed emergency 911 calls.

Unlike the compelling and particularized privacy interest that informed the *sui generis* holding in *Matter of New York Times*,<sup>13</sup> the core of the City’s privacy argument below was that the teachers who were interrogated (“the persons interviewed,” in the City’s trivializing parlance) and their surviving relatives would be “distressed” by belated public disclosure of their association with the Communist Party, particularly if they may not have been truthful with family members about their involvement. Simply put, the City is purportedly concerned at this late stage about protecting the subjects of the anti-Communist files and their relatives from the embarrassment that it perceives would follow from disclosure of their names. This claim is wholly speculative. It stands in stark contrast to the

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<sup>13</sup> The Court of Appeals noted that a diminished privacy claim would arise from transcripts of other, more typical calls made to 911, thereby clearly suggesting that the specific and exceptional nature of the calls in that case – which it viewed as tantamount to dying declarations – warranted enhanced privacy protection. *Matter of New York Times* 4 N.Y.3d at 485-86.

demonstrable personal anguish and trauma “those who suffered the loss of loved ones” on September 11, 2001, would experience from public disclosure and likely repetition in the media of the “dramatic, highly personal utterances” of those who perished. *Id.* at 492 (Rosenblatt, J., dissenting in part). Tellingly, the City’s conjectural privacy claim is not in any way supported by the interrogation transcripts it submitted in the record below – every one of which confirms that the teachers in question had affiliated with the Communist Party for, at worst, understandable personal and, at best, admirable – even laudatory – reasons: as a matter of intellectual attraction because it was “humanitarian” to do so; to assist in fighting poverty in California; to rescue a failing marriage; to oppose Hitler and the rise of Fascism in the world; and to improve learning conditions in New York City’s public schools. (R. 264-267) In short, it is just as likely that unredacted disclosure of the records will allow relatives, researchers, historians and citizens alike to “admire their courage, and to be justly enraged” by the Board of Education’s ideological inquisition that purged many experienced, dedicated and competent teachers from employment in the City’s public school system. *Id.* at 486. “Precisely because of the importance” of the abusive practices that took place under the banner of patriotism during the McCarthy period – leading, in effect, to the loss of a generation of public school teachers – “Americans deserve to have as full an account of that event as can be responsibly furnished.” *Id.* at 492

(Rosenblatt, J., dissenting in part).

As the record demonstrates, no such unique privacy interest comparable to that in *Matter of New York Times* can be found in the instant case. Even assuming, as the City contends, that Communist Party membership more than half a century ago showed a lack of judgment and/or naïveté – a claim which is much easier to make with the benefit of several decades of hindsight, the end of the Cold War and the disintegration of the former Eastern Bloc – it does not rise to a level sufficient to block unredacted disclosure of these historically valuable records. In the final analysis, disclosure without redactions would not be “objectionable to a reasonable person of ordinary sensibilities.” (R. 260)

The City’s conclusory denials do not identify *any*, let alone a “compelling,” *id.* at 485, privacy interest sufficient to continue the selective withholding of the records that are the subject of Ms. Harbatkin’s FOIL requests. Indeed, there is not a shred of evidence that any person, including the relatives of the teachers who were investigated, “might reasonably be deeply offended”, *id.*, by disclosure of further details concerning the Board of Education’s Communist Party witch hunts or by the prospect that such details may be published as part of Ms. Harbatkin’s scholarly research (or anywhere else, for that matter). *See id.* at 486 (“[s]urviving callers who want disclosure are entitled to it”).

The City’s claimed justification for refusing to provide unrestricted access is

belied by Form D's former indemnification requirement: the City was less concerned about protecting the privacy of those public school teachers who were investigated for their political beliefs and more concerned about protecting itself from anticipated financial exposure arising from lawsuits based on publication of this information. The City's anticipation was ill-founded, however, because the only cause of action sounding in privacy in New York State is codified in Section 50 of the *Civil Rights Law*, which prohibits the use of a *living* person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent (*i.e.*, a commercial misappropriation claim). N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009). No other form of common law privacy claim is recognized in this State,<sup>14</sup> including unreasonable publicity given to another's private life (*see* RESTATEMENT (SECOND) OF TORTS, § 652D) (1997); unreasonable intrusion upon seclusion (*id.* at §652B); and publicity that unreasonably places another in a false light (*id.* at §652E).

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<sup>14</sup> Notably, the generalized privacy interest the City is urging on this Court does not exist in the common law of New York State. The Court of Appeals has made this abundantly clear: "in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; *we have no common law of privacy.*" *Howell v. New York Post Co.*, 81 N.Y.2d 115, 123 (1993) (*emphasis supplied*) (*citing Stephano v. News Group Publs.*, 64 N.Y.2d 174, 185 (1984); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440 (1982); *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 497 n. 2 (1978); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280 (1959)). Further, it is well established that an aversion to mere embarrassment of the type posited by the City is insufficient as a matter of law to sustain a privacy claim. "There is, of course, no cause of action in this State for publication of truthful but embarrassing facts." *Howell*, 81 N.Y.2d at 124. The argument advanced by the City that allowing unredacted access to the Moskoff transcripts will embarrass the subjects and their survivors is therefore a tenuous basis for a privacy claim. We respectfully submit that, in balancing the competing interests in this proceeding, the Court should be mindful of the lack of support in the law for privacy claims in this State.

#### **4. The Strong Public Interest in the Historic “Series 590-597” Records Further Compels Disclosure.**

Without question, “there is a legitimate public interest in the disclosure” (*Matter of New York Times*, 4 N.Y.3d at 485) of the City’s historic series of anti-Communist case files. Indeed, the City’s policies and practices during the McCarthy period impacted political discourse as well as educational programs and values in the City of New York and elsewhere for decades. Complete public disclosure of the archived case files can only further illuminate the widespread political suppression that occurred during this period. The public interest in this issue is compelling and undeniable.

In this regard, the City’s denial of access to what it acknowledges are “historically important materials” (R. 34-35) has significantly impeded Ms. Harbatkin’s ongoing research, as the anti-Communist case files are an especially valuable resource for examining the ways governments conduct investigations of political dissenters and possibly subversive activities. Without the requested access, Ms. Harbatkin is unable to answer several fundamental questions: how did the Board of Education decide which teachers (including her own parents) to investigate? Where did the investigators get their information, and how did they get it? How did the Board’s investigators work with a network of informants and undercover agents both inside and outside of the public school system? Were some teachers coerced into acting as informants? What kinds of “deals” were