

STATE OF NEW YORK
SUPREME COURT

COUNTY OF NEW YORK

LISA HARBATKIN,

Petitioner-Plaintiff,

**For a Judgment Pursuant to Article 78 and/or Section
3001 of the N.Y. Civil Practice Law & Rules,**

Index No.

-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-Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
LISA HARBATKIN'S ARTICLE 78 PETITION FOR
PUBLIC DISCLOSURE OF RECORDS UNDER THE
FREEDOM OF INFORMATION LAW AND VERIFIED
COMPLAINT FOR DECLARATORY JUDGMENT**

HISCOCK & BARCLAY, LLP

Attorneys Pro Bono for Petitioner-Plaintiff

Lisa Harbatkin

Office and Post Office Address

7 Times Square

New York, New York 10022

Telephone: (212) 509-5212

Michael J. Grygiel
William A. Hurst
Charles Z. Feldman
of Counsel

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS	5
ARGUMENT	5
POINT I	
THE PETITION SHOULD BE GRANTED BECAUSE RESPONDENTS HAVE FAILED TO ESTABLISH THAT THE HISTORICAL INFORMATION COMPRISING THE CITY'S "ANTI-COMMUNIST" INVESTIGATION FILES IS SPECIFICALLY EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW	5
A. FOIL'S COMMITMENT TO OPEN GOVERNMENT PROMOTES ACCOUNTABILITY	5
B. RESPONDENTS CANNOT SATISFY THEIR BURDEN OF SHOWING A PARTICULARIZED AND SPECIFIC JUSTIFICATION FOR A DENIAL OF PUBLIC ACCESS TO THE "ANTI-COMMUNIST" CASE FILES MAINTAINED BY THE CITY OF NEW YORK'S MUNICIPAL ARCHIVES DIVISION.	8
1. RESPONDENTS CANNOT SATISFY THEIR BURDEN OF SHOWING THAT PUBLIC DISCLOSURE OF THE ANTI-COMMUNIST CASE FILES WOULD CAUSE AN UNWARRANTED INVASION OF PERSONAL PRIVACY UNDER <i>PUBLIC OFFICERS LAW</i> 89(2)(B).	10
2. GIVEN THE NATURE OF THE INFORMATION AT ISSUE, THE CITY'S PRIVACY CLAIM IS ATTENUATED.	12
3. THE PUBLIC INTEREST IN THE "SERIES 594" RECORDS FURTHER COMPELS DISCLOSURE.	14
POINT II	
THE CITY'S ADVANCE PERMISSION REQUIREMENT IS A PATENTLY UNCONSTITUTIONAL PRIOR RESTRAINT.....	15

POINT III

IN DEMANDING THAT PETITIONER CONSENT TO RESTRICTIONS ON HER FREE SPEECH RIGHTS, THE CITY IS IMPOSING UNCONSTITUTIONAL CONDITIONS ON HER RESEARCH ACTIVITIES, WHICH ALSO VIOLATE THE FIRST AMENDMENT'S CONTENT-NEUTRALITY REQUIREMENT AND ARE DEVOID OF THE NECESSARY PROCEDURAL SAFEGUARDS..... 17

- A. BY REQUIRING THAT PETITIONER REFRAIN FROM PUBLISHING CERTAIN INFORMATION AND ASSUME AN OBLIGATION TO INDEMNIFY THE CITY, RESPONDENTS ARE IMPOSING UNCONSTITUTIONAL CONDITIONS ON HER FIRST AMENDMENT RIGHTS..... 17
- B. THE CITY'S REGULATIONS RESTRICT PUBLICATION BASED ON CONTENT IN VIOLATION OF THE FIRST AMENDMENT..... 20
- C. THE CITY HAS NO COMPELLING INTEREST FOR MAINTAINING SECRECY OVER THE NAMES OF TEACHERS AND OTHER HISTORICAL INFORMATION CONTAINED IN THE CASE FILES..... 22
- D. THE CITY'S REGULATIONS FAIL TO COMPLY WITH CONSTITUTIONAL PROCEDURAL REQUIREMENTS..... 23

POINT IV

PETITIONER WILL CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION AGAINST THE CITY 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

<i>Able v. United States</i> , 88 F.3d 1280 (2d Cir. 1996).....	24
<i>Arrington v. New York Times Co.</i> , 55 N.Y.2d 433 (1982)	14
<i>Ashcroft v. Am. Civil Liberties Union</i> , 542 U.S. 656 (2004).....	22
<i>Bahnken v. New York City Fire Dep't</i> , 17 A.D.3d 228 (1st Dep't 2005)	9
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	16
<i>Bery v. City of New York</i> , 97 F.3d 689 (2d Cir. 1996).....	24
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982).....	18, 23
<i>Brooklyn Institute of Art and Services v. City of New York</i> , 64 F.Supp.2d 184 (2d Cir. 1999)	19
<i>Buffalo News v. Buffalo Mun. Housing Authority</i> , 163 A.D.2d 830 (4th Dep't 1990).....	7
<i>Capital Newspapers Div. of the Hearst Corp. v. Burns</i> , 67 N.Y.2d 562 (1986)	6, 7, 8, 9
<i>Capital Newspapers Div. of the Hearst Corp. v. Whalen</i> , 69 N.Y.2d 246 (1987)	6
<i>Carroll v. President and Comm'rs of Princess Anne</i> , 393 U.S. 175 (1968).....	16
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986).....	24
<i>Dillon v. Cahn</i> , 79 Misc.2d 300 (Nassau Co. Sup. Ct., 1974)	12
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	17
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	24
<i>Farbman & Sons v. New York City Health and Hosp. Corp.</i> , 62 N.Y.2d 75 (1984).....	8
<i>Forsyth County v. National Movement</i> , 505 U.S. 123 (1992).....	21
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965).....	23
<i>Gould v. New York City Police Dep't.</i> , 89 N.Y.2d 267 (1996)	6
<i>Hall v. Bd. of Comm'rs of Mobile County</i> , 681 F.2d 965 (5th Cir. 1982)	21
<i>Hanig v. State Dept. of Motor Vehicles</i> , 79 N.Y.2d 106 (1992)	7
<i>Hannegan v. Esquire, Inc.</i> , 327 U.S. 146, 151 (1946).....	18
<i>Hopkins v. City of Buffalo</i> , 107 A.D.2d 1028 (4th Dep't 1985).....	7
<i>Howell v. New York Post Co.</i> , 81 N.Y. 2d 115 (1993)	14, 23
<i>John Doe, Inc. v. Mukasey</i> , 549 F.3d 861 (2d Cir. 2008).....	16
<i>Journal Publishing Co. v. Office of Special Prosecutor</i> , 131 Misc.2d 417 (N.Y. Co. Sup. Ct., 1986).....	6
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	23

<i>Lusk v. Village of Cold Spring</i> , 475 F.3d 480 (2d Cir. 2007).....	16
<i>Mantica v. New York State Dep't of Health</i> , 94 N.Y.2d 58 (1999).....	6
<i>Mastrovincenzo v. City of New York</i> , 435 F.3d 78 (2d Cir. 2006).....	22
<i>Matter of City of Newark v. Law Dep't of the City of New York</i> , 305 A.D.2d 28 (1st Dept. 2003).....	10
<i>Matter of DJL Rest. Corp. v. Dep't of Buildings</i> , 273 A.D.2d 167 (1st Dep't 2000).....	10
<i>Matter of Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979).....	7, 8
<i>Matter of New York Times Co. v. City of New York Fire Dep't</i> , 4 N.Y.3d 477 (2005).....	10, 12, 13
<i>Matter of Newsday, Inc. v. Empire State Develop. Corp.</i> , 98 N.Y.2d 359 (2002).....	6
<i>Matter of Professional Standards Review Council of America v. New York State Dep't of Health</i> , 193 A.D.2d 937 (3d Dep't 1993).....	10
<i>Matter of The Washington Post Co. v. New York State Ins. Dep't</i> , 61 N.Y.2d at 557 (1984).....	10
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	16
<i>Nebraska Press Assoc. v. Stuart</i> , 427 U.S. 539 (1976).....	16, 17
<i>New York Magazine v. Metropolitan Transportation Authority</i> , 136 F.3d 123 (2d Cir. 1998).....	25
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	16
<i>Newsday, Inc. v. Sise</i> , 71 N.Y.2d 146 (1987), <i>cert. denied</i> , 486 U.S. 1056 (1988).....	6
<i>Niemotko v. Maryland</i> , 340 U.S. 268 (1951).....	21
<i>O'Malley v. City of Syracuse</i> , 813 F.Supp. 133 (N.D.N.Y. 1993).....	25
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971).....	16
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	17, 19
<i>Police Dept. of the City of Chicago v. Mosley</i> , 408 U.S. 92 (1972).....	20
<i>Russo v. Nassau Community College</i> , 81 N.Y.2d 690 (1993).....	6, 7, 8
<i>Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse</i> , 65 N.Y.2d 294 (1985).....	7
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969).....	22
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	23
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	18
<i>Stephano v. News Group Publs.</i> , 64 N.Y.2d 174 (1984).....	14
<i>Teitel Film Corp. v. Cusack</i> , 390 U.S. 139 (1968).....	23
<i>Times Square Books, Inc. v. City of Rochester</i> , 223 A.D.2d 270 (4th Dep't 1996).....	24
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943).....	3

<i>Westchester Rockland Newspapers, Inc. v. Mosczydowski</i> , 58 A.D.2d 234 (2d Dep't 1977)	6, 7, 8
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	20

Statutes

N.Y. <i>Civil Rights Law</i> § 50	14
<i>Public Officer's Law</i> , Article 6	<i>passim</i>
Restatement (Second) of Torts, § 652D	14

Other Authorities

Governor's Memorandum L. 1974, Chs. 578-580, 1974 Legis. Ann., at 392	6
<i>Sullivan</i> , "Unconstitutional Conditions," 102 HARV. L. REV. 1413, 1415 (1989)	17

PRELIMINARY STATEMENT

Lisa Harbatkin, a researcher and writer, respectfully submits the following memorandum of law in support of her Article 78 Petition for unrestricted public disclosure of the historic “anti-Communist” case files maintained by Respondent-Defendant the City of New York’s Department of Records and Information Services (the “City”) pursuant to New York’s Freedom of Information Law (“FOIL”), Article 6 of the *Public Officer’s Law*, §§ 84-90 *et seq.*, and Verified Complaint seeking a judgment pursuant to *CPLR* 3001 declaring that the City’s imposition of unconstitutional restrictions on Petitioner’s use of those records in her research and writing has violated her rights of free speech protected under the federal and State Constitutions. For the reasons presented in the combined Verified Petition/Declaratory Judgment Complaint, and as discussed more fully below, the Court should grant the relief requested and order 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.

In response to Ms. Harbatkin’s FOIL requests, the City has refused to disclose the names of individuals contained in the anti-Communist case files – compiled from the 1930s through the 1960s, when the New York City Board of Education was conducting investigations into the political beliefs and associations of public school teachers – ostensibly to protect their privacy. Respondents-Defendants’ 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 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 public concern to New York's citizens. This right cannot be abridged by the City's recalcitrance with respect to its disclosure obligations under FOIL. Putting aside that these materials are historically dated, the transparently pretextual nature of the City's claim is revealed by its willingness to provide the names of teachers who were investigated to Petitioner – *provided*, however, that she agrees not to publish them “in any form” and further agrees to indemnify the City in the (implausible) event that a claim is asserted against it arising from publication of the restricted material. The City's conclusory assertion that disclosure of the requested records would result in an unwarranted invasion of personal privacy is insufficient to justify nondisclosure in this instance.

The City's legal obstructionism does not stop there. Pursuant to a regulation¹ it has enacted for the sole purpose of controlling public access to the anti-Communist case files, the City has required Petitioner – 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” from the restricted materials in any publication. This is not only a direct and substantial impediment to Ms. Harbatkin's ongoing research, but is a frontal assault on the First Amendment. Our

¹ 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”). (See Petition, ¶¶ 24-26 and Ex. 11)

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 seeks to prevent the publication of information with which it disagrees or of which it disapproves. In adopting Rule 3-02 and its implementing Form D, the City requires all individuals, as a condition of receiving unrestricted access to the Board of Education's historical anti-Communist files, to certify that (1) they will not publish or disseminate "any names or other identifying personal information" contained in those materials; (2) they will not publish "any direct quotation" from the materials without obtaining permission in advance from the Department of Records/Municipal Archives; and (3) they will agree to indemnify the City and its employees "with respect to any claim, liability, and expense" which may arise from "publication or other use" of the materials. (Petition, ¶ 26 and Ex. 11) These sweeping regulations, which hold those who would have unrestricted access to the archives hostage to the draconian conditions imposed by the City, violate 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 Board of Education 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 well-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 has occurred here. If this were not enough, the complete lack of any policies, rules or procedures governing the City's *ad hoc* determinations as to which information from the anti-Communist files may be quoted in published works provides yet another reason why its actions violate the First Amendment.

In the end, there is surely something disturbing, and more than a little ironic, about the events that bring us to this Court today: 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 half a century ago.

There can be no doubt that the City's anti-Communist archives reflect a sad 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 City is right, Ms. Harbatkin may be deprived of complete access to that information, prohibited from quoting from what are unquestionably historically valuable and authentic documents, and

required to put up her own personal resources to hold the City harmless in the event of an invasion of privacy lawsuit based on publication of the withheld information. The chilling effect on Petitioner'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 law and history have taught us anything, it is that the First Amendment does not tolerate such conduct.

STATEMENT OF FACTS

The relevant facts are set forth in the Verified Petition/Verified Complaint for Declaratory Judgment dated April 6, 2009.

ARGUMENT

POINT I

**THE PETITION SHOULD BE GRANTED BECAUSE
RESPONDENTS HAVE FAILED TO ESTABLISH THAT
THE HISTORICAL INFORMATION COMPRISING THE
CITY'S "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. *Public*

Officers Law § 84 (McKinney 2001); *Capital Newspapers Div. of the Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-67 (1986); *Westchester Rockland Newspapers, Inc. v. Mosczydowski*, 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." Legislative Declaration, *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 *Russo v. Nassau Community 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." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987), cert. denied, 486 U.S. 1056 (1988); *Capital Newspapers Div. of the 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 Develop. Corp.*, 98 N.Y.2d 359, 361-62 (2002); *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”); *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 296-97 (1985); *Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992); *Buffalo News v. Buffalo Mun. Housing Authority*, 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. *Public Officers Law* § 89(4)(b)(McKinney, 2001); *Russo v. Nassau Community College, supra*, 81 N.Y.2d at 697-98; *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980); *Hopkins v. City of Buffalo*, 107 A.D.2d 1028, 1029 (4th Dep’t 1985).

Here, Respondents cannot sustain their burden of showing that nondisclosure of the Board of Education’s records – which the City acknowledges, as it must, are “historically important materials” (Ex. 2 to Petition) – requested by Ms. Harbatkin is justified under FOIL’s narrow exemptions. *Capital Newspapers v. Burns, supra*, 67 N.Y.2d at 566. The City has disclaimed its obligation to provide “un-redacted” [*sic*] (*id.*) 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 interviews concerning widely reported matters – would result in an “unwarranted invasion of personal privacy.” Respondents’ conclusory denials do not disclose any privacy concerns raised by representatives of the City’s investigative targets or informants (most of whom are presumably now deceased, *see* Petition at ¶ 40), and fail 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 Cannot Satisfy Their Burden of Showing a Particularized and Specific Justification for a Denial of Public Access to the “Anti-Communist” Case Files Maintained by the City of New York’s Municipal Archives Division.

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 v. Lefkowitz, supra, 47 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.” *Capital Newspapers v. Burns, supra*, 67 N.Y.2d at 566; *see also Russo v. Nassau Community College, supra*, 81 N.Y.2d at 697-98; *Farbman & Sons v. New York City Health and Hosp. Corp.*, 62 N.Y.2d 75, 80 (1984); *Westchester Rockland Newspapers, Inc. v. Kimball, supra*, 50 N.Y.2d at 580.

Remarkably, the City has offered little more than unsubstantiated speculation to prop up its erroneous conclusion that disclosure of the requested archival materials relative to the Board of Education’s investigations would invade the privacy of individuals named in certain files.

(See Ex. 1 to Petition) 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 Petitioner's FOIL requests. *Cf. Bahnken v. New York City Fire Dep't*, 17 A.D.3d 228, 229 (1st Dep't 2005) ("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 § 89(2)(b) must be supported by a particularized and specific evidentiary showing. *Capital Newspapers v. Burns*, *supra*, 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 v. New York City Fire Dep't*, *supra*, 17 A.D.3d at 230, the agency's determination must be annulled and disclosure of the records ordered.

The City's conclusory denials fall far short of satisfying FOIL's requirement of "articulating a particularized and specific justification for denying access." *Capital Newspapers v. Burns*, *supra*, 67 N.Y.2d at 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 (citing *Matter of 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 at 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 Professional 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.

1. Respondents Cannot 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. *Public Officers Law* § 89(2)(b) (McKinney 2001). 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,² as well as oral histories, which consisted of interviews with firefighters in

² 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 4 N.Y.3d at 485.

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). *Id.* at 484.³

The privacy interest at issue in *Matter of New York Times* belonged to the “surviving relatives:”⁴

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 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 485.

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 Petitioner’s research by identifying many of the details of the

³ 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, supra*, 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 is considerable in full disclosure of the historically valuable information at issue in the instant case, 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, 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.

⁴ Petitioner acknowledges, as the *New York Times* decision recognizes, that a privacy interest may exist “in the feelings and experiences of people no longer living.” 4 N.Y.3d at 484. However, the solicitude for that interest in *New York Times* was attributable to the highly 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 very different from those at issue in *New York Times*, and the privacy interest is not of comparable strength. See POINTS IB2. and 3., *infra*.

City's investigation. 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.

Because the City has issued little more than conclusory denials of public access, this Court is unable to make the particularized findings required to justify nondisclosure under the personal privacy exemption. Since the burden of justifying the applicability of a particular exemption is on the agency, and the City has failed to sustain that burden, its attempt to shield permanently the names of individuals targeted in its anti-Communist investigations must fail.

Precisely the reason denials of access to agency records under FOIL are reviewable in courts of law is to protect the public from self-serving conclusions by government officials that disclosure is not available:

Certainly, it would frustrate the intent and policy of the Freedom of Information Law to permit a public official to determine according to his own judgment what is, or is not, confidential and to withhold disclosure accordingly . . . The Court, on a proper application, is the forum to determine the validity of the classification by the public official in each particular case.

Dillon v. Cahn, 79 Misc.2d 300, 303 (Nassau Co. Sup. Ct., 1974). That is this case, and unrestricted public access to the City's anti-Communist case files should be ordered.

2. Given the Nature 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.'" *New York Times*, *supra*, 4 N.Y.3d at 485. For example, 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 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. There is no basis upon which to conclude 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,⁵ or of the surviving relatives.

The City’s conclusory denials do not identify *any*, let alone a “compelling” (*see Matter of New York Times*, 4 N.Y.3d 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 Petitioner’s scholarly research (or anywhere else, for that matter). *See also id.* at 486 (“[s]urviving callers who want disclosure are entitled to it”).

The true reason for the City’s refusal to provide unrestricted access is revealed by Form D’s indemnification requirement: the City is less concerned about protecting the privacy of those

⁵ 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.” (*See* Rule 3-02 and Petition, ¶ 24) 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 (*see* Petition, ¶ 40).

public school teachers who were investigated for their political beliefs and more concerned about protecting itself from any financial exposure arising from lawsuits based on publication of this information. The City's anticipation is 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. *Civil Rights Law* § 50 (McKinney 2007). No other form of common law privacy claim is recognized in this State, including unreasonable publicity given to another's private life (*see Restatement (Second) of Torts*, § 652D); unreasonable intrusion upon seclusion (*id.*, §652B); and publicity that unreasonably places another in a false light (*id.*, §652E). *Howell v. New York Post Co.*, 81 N.Y. 2d 115, 123 (1993). *See also Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440 (1982); *Stephano v. News Group Publs.*, 64 N.Y.2d 174, 184 (1984).

3. The Public Interest in the "Series 594" 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 anti-Communist case files. Indeed, the City's policies and practices during the anti-Communist era shaped 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 undeniable.

In this regard, the City's denial of access to what it acknowledges are "historically important materials" (Ex. 2 to Petition) 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? What kinds of "deals" were made in specific situations? Why did some teachers wind up in the headlines, while others who refused to inform were permitted to continue with their careers? Disclosure of the requested information will enable Ms. Harbatkin, as well as other historians, authors and researchers, to explore these issues on an informed basis through a complete examination of the historical record.

As stated above, the sole basis asserted by the City in denying Ms. Harbatkin's FOIL request and appeal is that nondisclosure is "necessary to protect the privacy of individuals named in certain files." (*See Ex. 1 to Petition*) While the standard concerning privacy is flexible and requires a balancing of the relevant interests in the context of a particular FOIL request, the City is not entitled to rely on it here as a basis for refusing to disclose the names of teachers whose careers were derailed and lives disrupted because of their suspected political affiliation with or support of a disfavored political party.

POINT II

THE CITY'S ADVANCE PERMISSION REQUIREMENT IS A PATENTLY UNCONSTITUTIONAL PRIOR RESTRAINT

The City's extraordinary requirement that its permission be obtained *before* any quoted material from the anti-Communist series of case files is used "in any public presentation, thesis,

dissertation, web site, or any other publication” is a classic prior restraint⁶ on free speech, the prevention of which was a primary reason for adoption of the First Amendment. *Near v. Minnesota*, 283 U.S. 697, 713 (1931); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175 (1968). As the Supreme Court has repeatedly emphasized, any system of prior restraint is presumptively invalid under the First Amendment.⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *Nebraska Press Assoc. v. Stuart*, 427 U.S. at 556-59. A prior restraint is subject to the strictest level of constitutional scrutiny. *Lusk v. Village of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007). Further, when it regulates speech based on its content, a prior restraint will be held unconstitutional unless the government can show that it has a compelling interest and that it has employed the least restrictive means of advancing that interest. *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008).

Other than speculative and attenuated privacy concerns asserted on behalf of third parties, the City has not even attempted to justify the extraordinary burdens on free speech imposed by its permission-in-advance-of-publication requirement. Both on its face and as applied, that

⁶ There can be no real dispute that Form D’s requirement that approval must be forthcoming from the New York City Municipal Archives *before* “any direct quotation from the restricted materials” may be published constitutes a prior restraint. In short, neither Ms. Harbatkin nor any other researcher may publicly present any verbatim information from the records in their possession without advance authorization from the City. Such an effort to control speech constitutes the “most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 556 (1976).

⁷ A prior restraint on publication may be constitutionally permissible if necessary for a government to “prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” *Near v. Minnesota*, *supra*, 283 U.S. at 716. Unlike the certain, immediate harm that would flow from this type of publication, no such exceptional military security concerns are implicated by the historical archives at issue here. Accordingly, a prior restraint in this context is not an available option.

requirement is plainly invalid under the First Amendment. *Nebraska Press Assoc.*, 427 U.S. at 599 (noting that First Amendment provides a “blanket prohibition against prior restraints”) (Brennan, J., concurring).

POINT III

**IN DEMANDING THAT PETITIONER CONSENT TO
RESTRICTIONS ON HER FREE SPEECH RIGHTS,
THE CITY IS IMPOSING UNCONSTITUTIONAL
CONDITIONS ON HER RESEARCH ACTIVITIES,
WHICH ALSO VIOLATE THE FIRST
AMENDMENT’S CONTENT-NEUTRALITY
REQUIREMENT AND ARE DEVOID OF THE
NECESSARY PROCEDURAL SAFEGUARDS**

A. By Requiring that Petitioner Refrain From Publishing Certain Information and Assume an Obligation to Indemnify the City, Respondents Are Imposing Unconstitutional Conditions on Her First Amendment Rights.

The Supreme Court has repeatedly ruled that, “[u]nder the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government.” *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). See also *Sullivan*, “Unconstitutional Conditions,” 102 HARV. L. REV. 1413, 1415 (1989) (“government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether” in the first instance). In the leading case of *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that a state college could not refuse to renew a non-tenured professor’s contract because of his public criticism of the college administration’s policies. *Id.* at 594-95. The Supreme Court flatly rejected the government’s

argument that its actions were permissible because the professor had no right to a government benefit:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. ***It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.*** This would allow the government to “produce a result which [it] could not command directly.”

Id. at 597 (emphasis supplied) (citation omitted).

This is a well-established and uncontroversial principle of constitutional law that has been applied in a wide variety of contexts. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that while the government may decide whether or not to grant tax exemptions, it may not impose a loyalty oath as a condition to receipt of a property tax exemption, for “the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech”); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151, 156 (1946) (holding that although the government funds the mail service, it may not charge a higher postage rate or refuse to carry mail that it deems offensive). *See also Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (the removal of government-purchased books from a school library violates the First Amendment if it is done to suppress ideas).

Here, the City could hardly be clearer that in order for Petitioner to be granted unrestricted access to a uniquely valuable repository of historical information, she cannot identify the individuals targeted in the Board of Education’s attempts at ideological cleansing,

cannot quote from the information without first receiving official permission, and must agree to assume complete financial responsibility in the event of a lawsuit against the City arising from publication of the material.⁸ The City has therefore placed unconstitutional conditions on Ms. Harbatkin's protected expressive activities: she must either give up her First Amendment rights or give up full access to the anti-Communist files. "[A]lthough the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit." *Brooklyn Institute of Art and Services v. City of New York*, 64 F.Supp.2d 184, 200 (2d Cir. 1999) (held, withholding of public funds to art museum because Mayor of City of New York objected to exhibit as offensive violated First Amendment). The result is the very "penaliz[ation] and inhibit[i]on" of Petitioner's freedom of speech rejected as inimical to the First Amendment in *Perry v. Sindermann*, 408 U.S. at 597.

If this Court does not enjoin the City from conditioning Ms. Harbatkin's access to the historic anti-Communist case files on her refraining from the exercise of her First Amendment rights, her scholarly research and writing will be directly and inalterably impaired. "Such interference with constitutional rights is impermissible." *Perry v. Sindermann*, 408 U.S. at 597.

⁸ The coercive burden imposed on Ms. Harbatkin (and on other researchers) by Rule 3-02's indemnification requirement "is real, severe and unacceptable" under the First Amendment. *Coe v. Town of Blooming Grove*, 567 F.Supp.2d 543, 564 (S.D.N.Y. 2008). That is because "the realities" of the indemnification provision "require all but the judgment-proof and the foolhardy to give very serious consideration to purchasing private insurance" in order to satisfy it – a patently unconstitutional restraint on free speech. *Van Arnam v. GSA*, 332 F.Supp.2d 376, 406 (D.Mass. 2004) (held, federal agency's imposition of indemnification requirement on permit applicant violated First Amendment). Courts have not hesitated to strike down regulations that impose prohibitive financial costs on the exercise of First Amendment rights. "Freedom of speech, . . . [is] available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). See generally *Invisible Empire Knights of Ku Klux Klan v. West Haven*, 600 F.Supp. 1427, 1435 (D.Conn. 1985) ("It has been well established in recent years that the exercise of fundamental constitutional rights cannot be conditioned upon an individual's wealth."); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1055-57 (2d Cir. 1983) (held, mandatory insurance requirement invalid under First Amendment).

The result – not only unfortunate but unconstitutional – will be the impoverishment of public discourse because of the City’s permanent embargo on information from the historical record, to the detriment of an informed public.

B. The City’s Regulations Restrict Publication Based on Content In Violation of the First Amendment.

The publication restrictions imposed by Rule 3-02 and Form D are anything but content neutral. They do not apply to all of the records maintained by the City’s Municipal Archives Division, but only those records involving the “Board of Education’s anti-Communist investigations (Series 590-597).” (Ex. 11 to Petition) As the regulations do not attempt to restrict access to records relating to any other type of information – in fact, every other category of record maintained by the Municipal Archives is unaffected by the regulations, which were apparently adopted in direct response to Ms. Harbatkin’s requests for access (*see* Petition, ¶¶ 16-26) – the City’s requirements classify and regulate on the basis of content. They are therefore subject to the “most exacting scrutiny” under the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see also Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (“government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

The unprecedented nature of the City’s requirement that advance approval be obtained – pursuant to the standardless exercise of discretion, by unidentified government officials – involves yet another First Amendment violation by the City. Where a law authorizes a prior licensing system, the Supreme Court has repeatedly required the delegation to provide “narrowly drawn, reasonable and definite standards for the [administering] officials to follow.” *Niemotko v.*

Maryland, 340 U.S. 268, 271 (1951). Here, the complete absence of any standards by which the City determines whether permission will be granted to quote the archival material in published works cannot even begin to satisfy the First Amendment's content-neutrality requirement. Under Form D, the City retains the unfettered ability to determine who will be granted permission, what may be published, and for what reason. "Under these policies there exists an unfettered discretion over the exercise of First Amendment freedoms which is unacceptable." *Hall v. Bd. of Comm'rs of Mobile County*, 681 F.2d 965, 971 (5th Cir. 1982). Even assuming that a municipal government could ever be constitutionally called on to determine such publication rights, there are no standards, principles, or guidelines in place to govern the City's decision-making in this regard.⁹ There is nothing to prevent City officials from "encouraging some views and discouraging others" through the arbitrary application of Form D's mandatory permission requirement. *Forsyth County v. National Movement*, 505 U.S. 123, 133 (1992). The lack of any such standards reinforces the conclusion that the City exercises unchallengeable veto power over what gets published and whether it gets published – in a word, official censorship, which is anathema to the First Amendment.

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license

⁹ Simply put, "accompanying such discretion is the opportunity to discriminate against a licensee on the basis of what the licensee intends to say." *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 675 (11th Cir. 1984). See also *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) (a licensing scheme "is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."); *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (invalidating overbroad rule that, on its face, banned all "First Amendment activities" in airport, and rejecting limiting construction that would give airport "official alone the power to decide in the first instance whether a given activity"); *Houston v. Hill*, 482 U.S. 451 (1987) (overturning rule that banned interruption of police officers, in part because it gave them "unfettered discretion to arrest individuals for words or conduct that annoy or offend them").

which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

C. The City Has No Compelling Interest For Maintaining Secrecy Over the Names of Teachers and Other Historical Information Contained in the Case Files.

A government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, is precisely tailored to serve that interest, and is the least restrictive means available for protecting that interest. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004). *See also Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 n.15 (2d Cir. 2006). The City has failed to show that it has a compelling interest in imposing content-based restrictions on the publication of information from the anti-Communist case files. The government has no good reason for maintaining selective secrecy over this historical information. Although the City may purport to protect the privacy of individuals named in these decades-old documents, Form D's requirements are transparently pretextual in this regard. The City will apparently readily disclose the complete, unredacted series-500 files – including the names of the teachers in the public school system who were the targets of the Board of Education's anti-Communist purges commenced as early as the 1930's – to anyone who asks, as long as the requester agrees not to include those names in any published work. We note that the agency compromises the privacy of the individuals named in the anti-Communist case files each time the agency discloses their identities to compliant requesters – *i.e.*, to those who are compelled to sacrifice their rights by signing Form D. This suggests that the real reason for the restriction is the City's concern over

what it perceives will be adverse publicity based on the publication of this information from a very dark chapter in the City's (and the nation's) history. "There is, of course, no cause of action in this State for publication of truthful but embarrassing facts." *Howell v. New York Post Co.*, 81 N.Y.2d at 124.

D. The City's Regulations Fail to Comply With Constitutional Procedural Requirements.

Even in cases where, unlike here, the government is permitted to regulate content, it remains the case that the First Amendment requires both "a set of sufficiently objective criteria for the identification of speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases. . . ." *Board of Education v. Pico*, 638 F.2d 404, 418 n.13 (2d Cir.), *aff'd*, 457 U.S. 853 (1982).

The constitutional infirmities of Form D are compounded by the City's failure to establish procedures which provide for a prompt initial determination of an applicant's publication rights along with an expedited final judicial decision with respect to those rights. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (striking down, for lack of procedural safeguards, motion picture censorship statute which required exhibitors to submit films to administrative board prior to showing); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968) (50 to 57 days too long). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (municipal board's denial of permission to perform rock musical "Hair" in municipal auditorium "was not implemented by the board under a system with appropriate and necessary procedural safeguards."); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

“The purpose of these safeguards is to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns.” *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (invalidating union dues rebate scheme, in part because it failed to afford a reasonably prompt opportunity for dissenters to challenge amount of the fee before an impartial arbiter). That purpose has been undermined in this instance by the complete absence of the requisite procedural safeguards, which has made it necessary for Ms. Harbatkin to commence legal action in order to vindicate her free speech rights.

POINT IV

PETITIONER WILL CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION AGAINST THE CITY

Ms. Harbatkin will continue to suffer irreparable injury if the City is not enjoined from restricting the exercise of her First Amendment rights to research and publish information contained in the Board of Education’s anti-Communist case files. As New York’s federal and state courts have held on numerous occasions, “[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.” *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). This is true even when, in contrast to the instant case, the First Amendment violation is claimed to be “minimal.” *Able v. United States*, 88 F.3d 1280, 1288 (2d Cir. 1996). “Infringement of the constitutionally guaranteed right of free expression, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’ ” *Times Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep’t 1996) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *O’Malley v. City of Syracuse*, 813 F.Supp. 133, 140

(N.D.N.Y. 1993) (“Inasmuch as the City’s enforcement of its ordinances . . . for even one evening would result in a loss of First Amendment rights, that enforcement would *per se* constitute irreparable injury to these plaintiffs.”). Where, as here, the facts presented in the Petition/Complaint demonstrate the direct and continuing abridgment of her First Amendment rights, Ms. Harbatkin has “established *a fortiori* . . . irreparable injury. . . .” *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 127 (2d Cir. 1998).

Thus, Petitioner has satisfied the requisite element of irreparable harm by the very nature of the regulations imposed by the City, which are constitutionally off-limits.

CONCLUSION

Based on the foregoing reasons, and those in the Verified Petition/Verified Complaint for Declaratory Judgment dated April 6, 2009, Respondents-Defendants’ determinations denying Petitioner’s FOIL requests should be annulled and public disclosure of the City of New York’s “Anti-Communist” Case Files ordered in unredacted form, and the City’s Department of Records and Information Services should be permanently enjoined from enforcing Section 3-02, Chapter 2, Title 49 of the Rules of the City of New York and accompanying Form MA-101D which, on their face and as applied, should be declared and adjudged unconstitutional because in violation of Petitioner’s exercise of her rights of freedom of speech protected by the First Amendment to the United States Constitution and Article 1, Section 8, of the New York State Constitution, along with an award of litigation costs, including attorneys’ fees, to Petitioner, together with such other and further relief as the Court deems just and proper.

DATED: April 6, 2009
New York, New York

HISCOCK & BARCLAY, LLP

By: _____

Michael J. Grygiel, Esq.
William A. Hurst, Esq.
Charles Z. Feldman, Esq.
Attorneys Pro Bono for Petitioner
7 Times Square
New York, New York 10022
Tel. (212) 509-1212