

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. 09/104933
(Hon. Marilyn G. Diamond)
(IAS Part 48)**

-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.

**REPLY BRIEF IN FURTHER SUPPORT OF
PUBLIC DISCLOSURE OF RECORDS UNDER FOIL AND
VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT**

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PRELIMINARY STATEMENT

Lisa Harbatkin respectfully submits this reply brief in further support of her Article 78 Petition, pursuant to New York's Freedom of Information Law ("FOIL"), Article 6 of the *Public Officer's Law*, §§ 84-90, for unredacted 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") *et seq.*, and Verified Complaint seeking a judgment pursuant to *CPLR* 3001 declaring that the City's imposition of unconstitutional restrictions on her use of those records in her research and writing has violated her rights of free speech protected under the federal and State Constitutions.

In its opposing papers, the City asserts two reasons for denying unredacted access to its historically significant anti-Communist case files: (1) a right of privacy on the part of the teachers who were investigated (and their family members) owing to the "sensitive nature" (City Br., 6) of the information at issue; and (2) the promises of confidentiality made to those who were interrogated by their interrogators. As discussed more fully below, neither reason is sufficient to support the continuing nondisclosure of the complete historical record from this debilitating period in our nation's history – when tyranny masqueraded as patriotism – as requested by Ms. Harbatkin.

This reply brief responds to the City's principal contentions.

ARGUMENT

POINT I

BY ITS EXPRESS TERMS, THE SOLE FOIL EXEMPTION RELIED ON BY THE CITY DOES NOT APPLY TO THE BOARD OF EDUCATION'S "ANTI-COMMUNIST" CASE FILES

In resisting unredacted disclosure of the “anti-Communist” case files, the City relies on section 89(2)(b)(v) of FOIL (City Br., 11), which provides that an unwarranted invasion of personal privacy includes the “disclosure of information of a personal nature reported in confidence to an agency and *not relevant to the ordinary work of such agency.*” N.Y. *Pub. Off. Law* § 89(2)(b)(v) (McKinney 2001) (emphasis supplied). By its express terms, therefore, this exemption does not apply in this instance because the interrogations conducted by the Board of Education’s counsel, Saul Moskoff, and memorialized in the records at issue were directly relevant to its mission at the time – determining whether past or present membership in the Communist Party disqualified a teacher from continued employment in the New York City public school system¹ – as the City’s opposing papers confirm. (*See Ver. Ans., Ex. D, p. 2*)

Perhaps to distract from the fact that it does not qualify for the specific FOIL exemption it asserts as the basis for withholding what it acknowledges (as it must) are “records of historical significance” (*Ver. Ans., ¶ “73”*), the City chastises Ms. Harbatkin for not citing *Cirino v. Board of Education of the City of New York*, N.Y.L.J., July 10, 1980, No. 0011117/1980 (N.Y.Co. Sup. Ct., 1980), an unreported decision nearly thirty (30) years old which has never been cited by any

¹ 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 it itself, a sufficient basis for termination of employment. (*See ex. D to Ver. Ans., at p. 2 and 21-22 n. 8, infra*)

court, in New York State or any other jurisdiction.² The City characterizes *Cirino* as “exactly the same as” the instant case. (City Br., 13) It plainly is not.

In *Cirino*, petitioner was researching the “impact and sequelae of the Feinberg Act³ on the lives of those who were adversely affected by that Act,” which was “spawned in a dark time in our history in the 1950’s known as the McCarthy Era” when “the lives of many people were ruined as a result of ‘witch hunts’ for Communists and other alleged ‘subversives’” This Court held that FOIL required redaction of “identifying details” from the Board of Education’s files of *living* subjects of the investigations – the only records addressed in the *Cirino* decision. Equally as important, *Cirino* was decided in a framework and with the understanding that even the records “of individuals who were still alive” (City Br., 13 n.6) would remain sealed only “until the year 2000 on the grounds that they were [act]ive in nature.” In other words, those records would be made available in the public domain in their entirety at the beginning of the second millennium because of the withering of any privacy interest that occurs commensurately with the passage of time and actuarially with the death of the subjects. It can no longer realistically be maintained that disclosure would result in economic or personal hardship to the teachers – whether living or deceased – who were targeted because of their political beliefs and associations. This is reinforced by the Court’s forceful recognition in *Cirino* that “any such hardship resulted from the McCarthy era witch hunt conducted under the aegis of the Feinberg Act, and not from disclosure of the abuses conducted in the name of patriotism.”

² As of July 2, 2009, a computerized case name search of all LEXIS state and federal court databases using the term “*Cirino*” yielded no results concerning the decision referred to by the City.

³ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967) (in holding portions of the Feinberg Act which barred public employment to members of listed organizations unconstitutional, Supreme Court stated that “[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants”).

If, as the City contends, the result reached in *Cirino* “should be no different here” (City Br., 13), then disclosure of the investigative files of teachers who are now deceased – a number which no doubt has increased considerably since 1980 – should occur forthwith, as those records were not at issue in *Cirino*, where the judgment was limited to redaction of the files of living individuals. (Ver. Ans., ¶ “94”) A careful reading of *Cirino* therefore reveals that it actually undermines, rather than supports, the nondisclosure position asserted by the City. Almost three decades have passed since the case was decided, in which time the Berlin Wall has been dismantled, the former Soviet empire has collapsed, and Marxism has been pervasively discredited as a theory of political and economic organization. Whatever privacy interest might be said to have existed during an earlier, and regrettable, chapter in our nation’s history has long since faded away and can no longer prevent full disclosure of the historical record “pertain[ing] to the ‘anti-Communist’ activities of the Board from the 1930s through the 1960s.” (Ver. Ans., ¶ “77”)

POINT II

THE DEFAULT BALANCING ANALYSIS APPLICABLE UNDER FOIL IN THIS CONTEXT REQUIRES DISCLOSURE OF THE COMPLETE HISTORICAL RECORD

A. **There Is No Support in the Record for the Speculative Privacy Interest Asserted by the City.**

Given that § 89(2)(b)(v) of FOIL is not “[o]f relevance here” (City Br., 11), the City is necessarily remitted to the general balancing-of-interests analysis adopted by the New York Court of Appeals in *New York Times Co. v. City of New York Fire Dept.*, which involved a

request for FOIL disclosure of calls made on the tragic morning of the September 11, 2001, to the City Fire Department's 911 emergency system. 4 N.Y.3d 477, 485 (2005) (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 relatives⁴ of those who, confronted with their imminent demise, placed emergency 911 calls:

The privacy interests in this case are compelling. The 911 calls at issue 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.

⁴ As stated in her opening memorandum of law, Ms. Harbatkin does not take issue with the proposition that a privacy interest may continue beyond death. (Pet. Br., 12-13) However, as the Court of Appeals emphasized in *New York Times v. City of New York Fire Dept.*, that is "only the beginning of the inquiry." 4 N.Y.3d at 485. 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." *Id.* The City's argument proceeds as if the recognition that "a privacy interest remains even after death" (City Br., 19), conjoined with the limited privacy interest of those teachers who may still be alive, as upheld in *Cirino* – a decision which, as discussed above in the text, presupposed complete (i.e., unredacted) disclosure of the entire series of anti-Communist case files after the year 2000 – is a talisman that somehow displaces or truncates the requisite balancing analysis and mandates nondisclosure. It is not, and it does not. The City goes so far as to claim that there is "a privacy right regarding the fact that the subject case file exists." (Ver. Ans., ¶ "79") The City has provided no authority in support of this breathtaking – indeed, Orwellian – assertion. To the contrary, the *New York Times* decision's default balancing analysis 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.

Unlike the compelling and particularized privacy interest that informed the *sui generis* holding in *New York Times*,⁵ the core of the City’s privacy argument – adumbrated on page 16 of its brief – is 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. (City Br., 16) Simply put, the City is ostensibly 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.⁶ This claim is wholly speculative and conclusory. It stands in stark contrast to the 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. 4 N.Y.3d 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 has submitted in the record – every one of which confirms that the teachers in question had affiliated with the Communist Party for, at worst,

⁵ The Court of Appeals noted that a diminished privacy claim would arise from transcripts of other, more conventional calls made to 911, 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. 4 N.Y.3d at 485-86.

⁶ 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*, 81 N.Y.2d 115, 123 (1993) (*emphasis supplied*) (*citing Stephano v. News Group Pubs.*, 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 solicitude in the law for privacy claims in this State.

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. (Grygiel Rep. Aff., ¶ “5”) 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 *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 naivete” (City Br., 16) – 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 the 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.” (Richter Aff., ¶ “6”)

B. Ms. Harbatkin's Reasons for Requesting the Records Are Irrelevant to the Controlling FOIL Analysis.

Finally, the City questions whether Ms. Harbatkin intends to use the information at issue “in support of some identifiable public objective.” (City Br., 21) It not only has no right to make this inquiry but completely misses the mark in doing so because, as a matter of black letter law, the motives or purpose of someone requesting agency records are irrelevant under FOIL. *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 156 (1999) (“Our prior FOIL decisions have consistently rejected the purpose or status of the person making the FOIL request as a factor of critical significance in applying FOIL exemptions.”); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-67 (1986) (stating that “because FOIL has made full disclosure by public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions”); *Scott, Sardano & Pomeranz v. Records Access Officer*, 65 N.Y.2d 294, 297-98 (1985) (“The Freedom of Information Law, as originally enacted . . . and later amended . . . liberalized public access to government records by obviating the application's showing of an ‘interest therein’ as otherwise might be required by section 66-a. Consequently, an evaluation of petitioner's purposes for seeking disclosure is irrelevant in deciding whether it is entitled thereto”); *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80 (1984) (“FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.”) (citation omitted). *See generally United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (held, motive of requester is “irrelevant to defining the weight accorded the presumption of access” to court

records because an assessment of motives “risks self-serving judicial decisions tipping in favor of secrecy”).

While Ms. Harbatkin has set forth in painstaking detail the legitimate reasons – which, to borrow a phrase, are “completely scholarly and respectful” (City Br., 22) – she is requesting the historical information that has been withheld from her (*see* Harbatkin Aff., ¶¶ “8-14”), she has no obligation to do so in order to obtain disclosure of these non-exempt records under FOIL. To hold otherwise would effectively reverse the City’s burden of proof, which requires that it articulate a particularized and specific justification for nondisclosure of subject names and other identifying information contained in the anti-Communist case files. *Public Officers Law* § 89(4)(b)(McKinney 2001); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697-98 (1993).

C. The Interrogation Transcripts Contain Information Provided Under Oath.

Finally, privacy interests conceivably carry more weight when there is a concern with the reliability and truthfulness of the information at issue.

The court should consider the reliability of the information. Raw, unverified information should not be as readily disclosed as matters that are verified. Similarly, a court may consider whether the nature of the materials is such that there is a fair opportunity for the subject to respond to any accusations contained therein.

United States v. Amodeo, 71 F.3d at 1051 (discussing strength of public’s presumptive common law right of access to judicial documents).

With respect to the anti-Communist files, however, this concern is implausible because, as the Moskoff transcripts clearly and repeatedly state, each subject was under an oath of truthfulness. (Ver. Ans., Ex. C, p. 3; Ex. D, p. 3; Ex. E, p. 3; Ex. F, p. 2)

D. The Privacy Cases Cited by Respondents Are Inapposite.

The few additional privacy exemption cases cited by the City are readily distinguishable and fail to support its argument. (See City Br., 16-17) *Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse*, 65 N.Y.2d 294 (1985), centered on the application of an entirely different FOIL exemption, where petitioner law firm sought access to motor vehicle accident reports maintained by respondent in order to solicit potential clients for its personal injury practice. *Id.* at 296. The Court of Appeals held that disclosure of names and addresses of automobile accident victims under those circumstances would constitute an “unwarranted invasion of personal privacy” pursuant to FOIL § 89(2)(b)(iii)’s exemption for the “sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes.” *Id.* at 298.

Johnson v. New York City Police Dept., 257 A.D.2d 343 (1st Dep’t 1999), and *De Oliveira v. Wagner*, 274 A.D.2d 904 (3d Dep’t 2000), each involved the narrow question of “whether disclosure of documents generated by the police during the investigation of a crime is warranted under FOIL, when disclosure is sought by an individual who has been convicted of the very crime in question.” *Johnson*, 257 A.D.2d at 346; *De Oliveira*, 274 A.D.2d at 904. Unsurprisingly, the decisions held that disclosure of documents which could reveal the identity of murder investigation witnesses to a convicted defendant was an unwarranted invasion of privacy with respect to those witnesses. *See Johnson*, 257 A.D.2d at 347–48; *De Oliveira*, 274

A.D.2d at 905. Needless to say, no such obvious privacy interest arising from concern over the personal safety of individuals based on fear of reprisals is implicated here. *See Johnson*, 257 A.D.2d at 347; *see generally De Oliveira*, 274 A.D.2d at 904.

Buffalo Broadcasting Co. v. New York State Dept. of Correctional Services, 174 A.D.2d 212 (3d Dep't 1992), upheld the redaction of scenes of "strip frisks or other possible display of nudity of inmates" from video footage of prison riots disclosed in response to a FOIL request. *Id.* at 214–15. The City's decades-old archival materials sought by Ms. Harbatkin in unredacted form do not contain any information which even remotely approximates such a direct affront to personal privacy as would be caused by the release of nude video footage without the individual's consent.

Contrary to the City's claim, the privacy interests recognized in the above cases are substantially more compelling than the tenuous and conjectural privacy claim it is asserting here.

POINT III

THE PROMISES OF CONFIDENTIALITY MADE BY THE BOARD OF EDUCATION BEHIND CLOSED DOORS IN PART TO SHIELD ITS OWN CONDUCT FROM PUBLIC SCRUTINY DESERVE LITTLE WEIGHT IN THE BALANCING PROCESS

Although the City makes much of the promises of confidentiality that were made to those at the time they were interrogated (City Br., 6-9), it ignores that, as the record in this case establishes, the cloak of secrecy thereby imposed was intended to shield the Board of Education's own conduct from public scrutiny as much as to protect those who were targeted by its ideological cleansing activities. (Harbatkin Aff., ¶ "24")

While a factor to be considered in the *New York Times* balancing analysis, the fact that confidentiality was promised – which the City recounts mantra-like throughout its opposing papers, as if mere repetition will somehow bolster its argument – because of what Mr. Moskoff euphemistically referred to as the “tenor of the times” (Ver. Ans., Ex. E, p. 2) is certainly not dispositive. The tenor of the times is now completely different, and those anachronistic promises should be discredited in weighing the competing interests.

A. The City’s Disclosure Obligations Under FOIL Cannot Be Abrogated By or Subordinated to the Terms of a Private Confidentiality Agreement.

As a basis for nondisclosure, the notion that the City could agree in perpetuity not to reveal the names of or other identifying information relative to “teachers and other school personnel investigated and/or questioned by the Board and its lawyers” (City Br., 5-6) because they were suspected of political disloyalty exists in considerable tension with FOIL’s presumption of open access to official government records to the extent it would subordinate the City’s disclosure obligations to the terms of a private confidentiality agreement.⁷

The Legislature established FOIL as dispositive on questions of public access to government records, and the City’s disclosure obligations under the statute cannot be overridden by outdated confidentiality agreements the purpose of which is to keep private that which should now be public. *See Geneva Printing Co. v. Village of Lyons*, slip op. at 9-10, (Wayne Co. Sup. Ct., March 25, 1981) (“[T]he agreement to conceal the terms of their settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid

⁷ While it is perhaps understandable in some sense that the City seeks to uphold the promise of secrecy it made to public school teachers several decades ago, the law is clear, as elaborated below in the text, that a confidentiality agreement between a government agency and its employees is insufficient as a matter of law to justify the withholding of non-exempt records from the public under FOIL.

insofar as restricting the right of the public to access.”). *See also LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 427 (2d Dep’t 1995) (held, settlement agreement denying public access to its terms “is unenforceable as against the public interest” since “as a matter of public policy, the Board of Education cannot bargain away the public’s right to access to public records”); *S-P Drug Co. v. Smith*, 96 Misc.2d 305, 311 (N.Y. Co. Sup. Ct., 1978) (held, state agency’s disclosure obligations under FOIL cannot be preempted by the terms of a contract with a private party, an arrangement which would negate the public access and accountability contemplated by the statute).

Similarly, to sustain a claim that the City’s promises of confidentiality – made behind closed doors, under clearly coercive circumstances, several decades ago – trump disclosure in the present context would defeat FOIL’s purpose of maximizing access to government records to promote “public accountability.” *Public Officers Law* §84. That purpose would amount to nothing more than empty rhetoric if the City remains the arbiter of whether the names of the public school teachers it investigated are subject to disclosure.

POINT IV

THE CITY’S MOOTNESS CLAIM IS MERITLESS

Incredibly, the City relies on a June 15, 2009, settlement offer (Ver. Ans., Ex. A) – which Ms. Harbatkin rejected in writing the next day, as her counsel previously had over the telephone (Grygiel Rep. Aff., ¶¶ “2-4” and Exs. 18-19) – as purported grounds for dismissing as moot the second cause of action asserted in the Verified Petition, which claims that Rule 3-02 of Title 49, Rules of the City of New York (eff. March 26, 2008), in particular Form MA-101D required

thereby as a precondition to full public access (“Form D”), qualifies as a standardless, content-based prior restraint on publication that is prohibited by the First Amendment.

Reduced to its essentials, the City’s mootness objection rests on the slender reed of its apparent decision to ignore the requirements of Rule 3-02 – a duly promulgated Rule of the City of New York – *but only as to Ms. Harbatkin*. Thus, rather than expose the draconian requirements of Rule 3-02 to judicial scrutiny, the City has resorted to the expedient of withdrawing the Rule, in large part, for purposes of avoiding a constitutional challenge on the merits in this case. In this regard, Ms. Harbatkin has been singled out for differential treatment by the government that is not available to other, similarly situated persons, for no other reason than her commencement of a lawsuit. The City’s approach here should be construed as a clear, even if tacit, acknowledgment that the withdrawn Form D requirements violated Ms. Harbatkin’s constitutional free speech rights, and respondents’ mootness claim should be rejected.

A. The City’s Adoption of Rule 3-02.

On or about February of 2008, respondent adopted as a Rule, *inter alia*, 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,” with an effective date of March 26, 2008 (“Rule 3-02”). Subparagraph “A” of Rule 3-02 states, in pertinent part:

The Municipal Archives preserves and makes available for research historical records of the New York City Board of Education (“the Board”). This collection includes several records series (nos. 590, 591, 593, 594, 595, 596 and 597) that pertain to the “anti-Communist” activities of the Board from the 1930s through the 1960s. *They contain personal and confidential information relating to teachers and other school personnel investigated and/or questioned by the Board for alleged support of or association with the Communist Party. The individuals*

who are the subject of these 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.

(Verified Petition, Ex. 11) (emphasis supplied)

Subsection B of Rule 3-02 states that “in addition to” the general regulations governing public access to archival material contained in section 3-01, “public access to the ‘anti-Communist’ case file series is governed by the following additional regulations and/or procedures:

- (1) Researchers who request access to a specific file for the purpose of researching the views or activities of the individual who is the subject of that file or of another individual named in that file must obtain permission for such access from the subject individual and from the named individual, as applicable. If the subject or named individual is deceased or unable to give or deny permission, such permission must be obtained from the individual's legal heirs or custodians, as specified in forms MA-101A, MA-101B, and MA-101C.
- (2) Researchers engaged in more general research not limited to a particular individual or individuals may access files in the restricted series upon certifying that they will neither record nor use any names or personally identifiable material obtained from such files, form (MA-101D).
- (3) When a researcher accesses a file with permission from the individual who is the subject of that file, the Archives will redact the names of other individuals in the file whose permission has not been obtained.
- (4) Self-service photocopying is not available for anti-Communist case file documents. All photocopies will be redacted to remove information identifying any individual whose permission has not been obtained.
- (5) Published materials and materials created for general distribution, such as newspaper clippings and press releases, are not subject to the restrictions set forth in this section.”

(Id.)

In accordance with the above, the City sought to compel petitioner to complete Form D as a precondition to gaining access to certain anti-Communist case files. Form D requires a certification confirming the requesting party's "agree[ment] to the following conditions:

1. I will not disseminate or publish in any form any names or other identifying personal information obtained from the restricted materials, except in situations where such names and information were obtained solely from existing public sources, such as newspaper clippings.
2. I agree to request permission from the Department of Records/Municipal Archives for any direct quotation from the restricted materials to be used in any public presentation, thesis, dissertation, web site, or any other publication, and agree not to use any such quotation without such permission.
3. In order to induce the Department of Records/Municipal Archives to grant public access to the restricted materials, I agree to be responsible for, and to indemnify the Department of Records/Municipal Archives, the City of New York, and its employees, with respect to any claim, liability, and expense which may be charged against them arising from my unauthorized publication or other use of the restricted material in contravention of any right, of privacy or otherwise, of any individual or entity identified in the material."

(Verified Petition, Ex. 12) Ms. Harbatkin refused to sign Form D as a precondition to her ability to conduct "general research" into the City's anti-Communist case files.

The Verified Petition's second cause of action alleges that the requirements in Form D of total confidentiality (subsection 1), of obtaining the agency's prior approval before using "any direct quotation" in any "public presentation, thesis, dissertation, web site, or any other publication" (subsection 2), and of indemnification (subsection 3) – compliance with which the City mandates as preconditions to granting public access to the so-called "Restricted Materials"

– on their face and as applied constitute unconstitutional burdens on and a prior restraint of speech in violation of rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution.

B. The City’s June 15, 2009, Offer of Settlement.

In a letter dated June 15, 2009 – one (1) day before the City’s responding papers were due – 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.” (Ver. Ans., Ex. “A”) 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. (*Id.*)

Accordingly, the City summarily jettisoned Rule 3-02’s duly promulgated (but clearly unconstitutional) requirements, 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. 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. For example, the revised form actually *eliminated* the previously existing exception to the blanket prohibition against disseminating or publishing identifying personal information “in situations where such names and information were obtained solely from existing public sources, such as newspaper clippings.” So under the new regime, Ms. Harbatkin would not even be allowed to publish a name included in the anti-Communist case files which she obtained from a newspaper clipping or elsewhere in the public domain, as she would have been permitted to do before the City altered Form D under the guise of settlement.

Second, 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. Consequently, Ms. Harbatkin *would be prohibited from even writing the names down on a piece of paper for the purpose of conducting further research.* (Harbatkin Aff., ¶ “41”) 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.*)

Third, 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. (Harbatkin Aff., ¶ "40")

On June 16, 2009, petitioner's counsel transmitted a letter to Assistant Corporation Counsel Richter, in which he rejected the City's June 15, 2009, offer and sought confirmation that "the City has abandoned and will not seek to enforce these two [advance approval and indemnification] requirements against Ms. Harbatkin." (Ex. 18 to Grygiel Aff.) Assistant Corporation Counsel Richter 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." (Ex. 19 to Grygiel Aff.) Thus, the City's response appeared to confirm that that it had merely ginned up a revised form to govern *only* Ms. Harbatkin's request for unredacted disclosure of agency records, and had no intention of waiving or modifying the same requirements with respect to any other person(s) requesting access to the Board of Education's anti-Communist case files.

C. The Constitutional Claims At Issue Are Not Moot Because They Are Capable of Repetition Yet Evading Review.

A court must decide a case before it, even in the absence of a live controversy, where there exists:

- (1) a likelihood that the controversy will recur, either between the parties or between other members of the public;

- (2) the controversy is one that typically evades review; and
- (3) the controversy presents a significant or important question involving substantial or novel questions.

Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-15 (1980); *see also Clear Channel Communications, Inc. v. Rosen*, 263 A.D.2d 663 (3d Dep't 1999). The Verified Petition/Complaint for Declaratory Judgment fully satisfies these criteria.

Stated simply, if Form D's unconstitutional conditions of pre-publication approval and indemnification have not been permanently eliminated as requirements of general applicability (which, notwithstanding the City's settlement offer of June 15, 2009, would appear to be possible only by compliance with the City's rulemaking procedures, which have not been followed here), then the original Form D (and not the newly minted version annexed to the City's offer) still applies to the rest of the public – including petitioner's colleague Lori Styler, producer of the documentary film titled “Dreamers and Fighters: The NYC Teacher's Purge” (Styler Aff., ¶¶ “2,” “5”), as well as other interested individuals who may seek access to their files or those of family members. (Brickman Aff., ¶ “9”) Presumably, the City will attempt to enforce the Form D requirements against those individuals unless they bring a lawsuit (as Ms. Harbatkin did here), at which time the City appears to be prepared to enter into *seriatim* settlement agreements – or, as here, simply to ignore the Rule on a case-by-case basis – the effect of which would be to shield Form D from judicial scrutiny.

Accordingly, the question of Form D's constitutionality is likely to recur, but through the City's apparent willingness to ignore Rule 3-02 if and when a lawsuit is filed, will evade judicial review. That is exactly the scenario intended to be addressed by the exception to the mootness doctrine for claims that are capable of repetition yet evading review. *Westchester Rockland*

Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 436-37 (1979) (“[W]e have traditionally retained jurisdiction . . . [b]ecause of the importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review.”). *See also Capital Newspapers Div. of the Hearst Corp. v. Lee*, 139 A.D.2d 31, 34 (3d Dep’t 1988) (Levine, J.) (constitutional questions not moot because issues involved are “of public importance and the controversy is capable of repetition yet evading review”); *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d 708, 709 (4th Dep’t 1984) (Article 78 Petition seeking unredacted transcript and access to exhibits from criminal hearing not moot).

(1) The Controversy Here Presents Significant and Novel Questions.

Ms. Harbatkin’s second cause of action satisfies the third factor of the mootness exception because it involves a plainly incorrect interpretation of the right of access to agency records under FOIL, as well as unconstitutional restrictions on her First Amendment rights based on such access. First, the constitutionality of Form D has never before been addressed by any court or tribunal, so the issues raised by the Verified Petition’s second cause of action are unquestionably novel and of first impression in this Court.

Second, as set forth in POINT I, *infra*, the City cannot justify nondisclosure here by relying on *Public Officers Law* 89(2)(b)(v), which creates an exemption for the “disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency,” because the anti-Communist case files are unquestionably “relevant” to the work of the Board of Education.⁸

⁸ Indeed, on December 6, 1951, the New York City Board of Education adopted “Findings of Fact and Declaration of Policy Concerning Communist Party” (“Policy”). In pertinent part, the Policy states:

The City's privacy claim largely retreats from the statute and is derived instead from the decision in *Matter of New York Times Co. v. City of New York Fire Dept.*, *supra*, 4 N.Y.3d 477, which authorized the withholding of transcripts of telephone calls to New York City's 911 service from victims of the World Trade Center bombing on September 11, 2001, to protect the "compelling" privacy interests of the victims' surviving relatives. That case was the first time that the Court of Appeals held that "surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead." *Id.* at 485. The question raised here – *i.e.*, whether the City's speculative claim, wholly unsupported by any evidence in the record, that the surviving relatives of some teachers or informants who (voluntarily or involuntarily) were involved in the anti-Communist investigations conducted at least a half-century ago might suffer some unspecified shame or embarrassment from full and unrestricted public disclosure which qualifies as "the sort of invasion that the privacy exception exists to prevent," *New York Times*, 4 N.Y.3d at 486 – has never been addressed.⁹ Consequently, the issues are both "novel and significant," and the third factor in the mootness analysis is therefore satisfied.

(..continued)

The conclusion is now inescapable that the Communist Party in the United States is and has been dedicated to the advocacy of the overthrow of our government by force and violence. Based upon such conclusion, ***it is the announced policy of the Board of Education that a teacher or other employee who is a member of the Communist Party . . . is not qualified to continue in the school system.*** Past membership in the Communist Party . . . may establish present membership in the absence of a showing that such membership has been terminated in good faith. Even if it does not so establish present membership, past membership may be taken into account with other circumstances of the individual case in considering whether a teacher or other employee is disqualified.

Entirely relevant to a teacher's fitness for continued employment is the question of whether or not that teacher is now or has ever engaged in an illegal act or conspiracy.

See Adler v. Wilson, 282 A.D. 418, 420 (3d Dep't 1953) (emphasis supplied).

⁹ Indeed, *Cirino v. Board of Education*, on which the City heavily relies, was concerned only with the privacy interests of *living* subjects of the anti-Communist investigations at a time when the wounds inflicted by the Board of Education's witch hunt were less than 30 years old. The City's attempt to extend *Cirino's* holding by

D. The City’s June 15, 2009, Offer of Settlement is Dehors the Record and Should Not be Considered for Any Purpose.

The law has long been settled that “[j]udicial review of administrative determinations is confined to the ‘facts and record adduced before the agency.’” *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000) (citing *Matter of Fanelli v. New York City Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1982), *aff’d*, 58 N.Y.2d 952 (1983)). Equally well established is the foundational administrative law principle that “[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.” *Aronsky v. Bd. of Educ.*, 75 N.Y.2d 997, 1000 (1990) (citation omitted).

Ignoring these longstanding principles, which limit judicial review to the administrative record before the agency at the time it issued a final determination, the City not only impermissibly annexed its June 15, 2009, settlement offer, clearly inadmissible under CPLR 4547, to its opposing papers, but then had the temerity to try and manufacture a mootness claim from it.¹⁰ The City’s belated offer is not part of the administrative record, which closed with the agency’s final determination rendered on December 9, 2008. This is fatal to its attempt to manufacture a mootness argument.

It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency. We

(..continued)

bootstrapping it with the decision in *New York Times* so as to assert a protected privacy interest on the part of both the deceased and their surviving relatives more than half a century after-the-fact strains credulity and should be rejected.

¹⁰ CPLR 4547 states, in pertinent part:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim . . . Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible.”

N.Y. *Civ. Prac. L. & R.* 4547 (McKinney 2007).

have said that [a] reviewing court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 (1991)
(citations and internal quotations omitted).

The holding by the Court of Appeals in *Scherbyn* should compel this Court to reject the City's impermissible attempt to expand the record of its decision challenged by Ms. Harbatkin. The City's mootness claim is clearly pretextual and nothing more than an eleventh-hour and ill-advised attempt to salvage Rule 3-02 from its inevitable annulment on constitutional grounds.

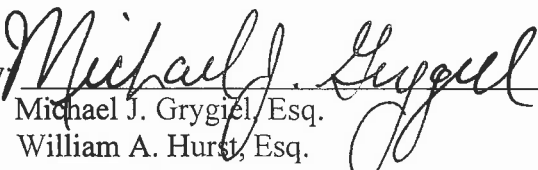
CONCLUSION

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: July 3, 2009
New York, New York

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