

STATE OF NEW YORK  
COURT OF APPEALS

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NEW YORK STATE  
COURT OF APPEALS

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In the Matter of the Application of:

LISA HARBATKIN,

*Petitioner-Appellant,*

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

- against -

New York County  
Index No. 104933/09

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

*Respondents-Respondents.*

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**NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

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

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NEW YORK CITY DEPARTMENT OF  
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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  
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*Respondents-Respondents.*

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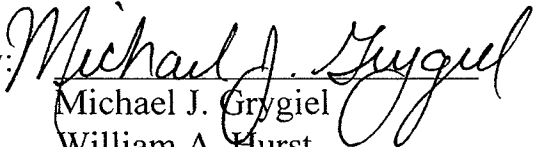
**NOTICE OF MOTION FOR LEAVE TO  
APPEAL TO THE COURT OF APPEALS**

PLEASE TAKE NOTICE that, upon the annexed papers, and the record and  
briefs, the undersigned will move this Court at a Motion Term to be held July 25,  
2011, for an order granting Petitioner-Appellant, Lisa Harbatkin, leave to appeal to  
the Court of Appeals. Leave to appeal is sought from a decision and order of the

Appellate Division, First Department, entered on May 31, 2011, that affirmed a judgment of Supreme Court, New York County (Marylin G. Diamond, J.), dated March 11, 2010, and duly filed and entered on March 18, 2010, denying Petitioner-Appellant's application, in a proceeding pursuant to N.Y. *Civ. Practice L. & R.* Article 78, to annul a determination of Respondents which denied Petitioner-Appellant's Freedom of Information Law request for unrestricted public disclosure of the historic "anti-Communist" case files maintained by the City of New York's Department of Records and Information Services, and ordering that the materials may not be disclosed to Petitioner-Appellant in unredacted form.

DATED: July 14, 2011  
Albany, New York

**GREENBERG TRAURIG, LLP**

By: 

Michael J. Grygiel

William A. Hurst

Cynthia E. Neidl

54 State Street, 6th Floor

Albany, New York 12207

(518) 689-1400

[grygielm@gtlaw.com](mailto:grygielm@gtlaw.com)

[hurstw@gtlaw.com](mailto:hurstw@gtlaw.com)

[neidlc@gtlaw.com](mailto:neidlc@gtlaw.com)

*Attorneys Pro Bono for  
Petitioner Appellant Lisa  
Harbatkin*

TO: The Honorable Andrew W. Klein, Clerk  
Court of Appeals of the State of New York  
20 Eagle Street  
Albany, New York 12207

Michael A. Cardozo, Esq.  
Corporation Counsel  
Elizabeth I. Freedman, Esq.  
Assistant Corporation Counsel  
The City of New York Law Department  
Appeals Division  
100 Church Street  
New York, New York 10007  
(212) 788-1026  
efreedma@law.nyc.gov

*Attorneys for Respondents-Respondents*

Itai Maytal, Esq.  
Miller Korzenik Sommers LLP  
488 Madison Avenue  
New York, New York 10022  
(212) 752-9200  
imaytal@mkslex.com

*Attorneys for Proposed Amici Curiae*

**PROCEDURAL HISTORY:  
TIMELINESS, JURISDICTION AND PRESERVATION**

A copy of the Appellate Division, First Department's May 31, 2011, decision and order was served on Petitioner-Appellant's counsel with notice of entry by United States first class mail on June 10, 2011. A true and correct copy of the Appellate Division Order and Notice of Entry is annexed hereto as Exhibit 1. This motion, which is being served and filed within thirty-five (35) days of June 10, 2011, is therefore timely. *CPLR* 5513(a)-(b) and 2103(b)(2).

This Court has jurisdiction over this motion and the appeal pursuant to *CPLR* 5601(b)(1) because Petitioner-Appellant is seeking leave to appeal as a matter of right from an order of the Appellate Division which finally determined the proceeding and directly involved the construction of the Constitution of the United States. In the alternative, this Court has jurisdiction over the instant motion and proposed appeal pursuant to 5602(a)(1)(i) because this is a proceeding originating in the Supreme Court and Petitioner-Appellant is seeking leave to appeal from an order of the Appellate Division, not appealable as of right, that finally determined the proceeding. The First Department's May 31, 2011, decision and order finally disposes of Petitioner-Appellant's application to annul Respondents' determination denying her FOIL request, by affirming Supreme Court's upholding of that determination and its order denying disclosure of the

records at issue to Petitioner-Appellant. A true and correct copy of Supreme Court, New York County's judgment dated March 11, 2010, and entered on March 18, 2010, is annexed hereto as Exhibit 2.

The issues on which leave to appeal is sought were raised by Petitioner-Appellant both in Supreme Court (R. 24-31) and on her appeal to the First Department (Harbatkin Br., 18-46; Harbatkin Rep. Br., 3-18), and thus are preserved for this Court's review.<sup>1</sup>

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR LEAVE TO APPEAL  
QUESTIONS PRESENTED**

1. The City of New York is the custodian of records concerning widely condemned investigations conducted during the mid-twentieth century into the alleged Communist Party affiliations of New York City public school teachers and others by the New York City Department of Law under the auspices of the New York City Board of Education. As a precondition to the exercise of the right to review these historic public records concerning its anti-Communist investigations

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<sup>1</sup> References denoted with the letter "R" refer to the corresponding page(s) of the Record on Appeal in the Appellate Division, First Department, submitted herewith. The Brief on Appeal for Petitioner-Appellant Lisa Harbatkin In Support of Public Access to Agency Records Under FOIL dated December 29, 2010, and the Reply Brief on Appeal for Petitioner-Appellant Lisa Harbatkin In Further Support of Public Access to Agency Records Under FOIL dated April 1, 2011, and submitted to the appellate court below are referred to herein, respectively, by page number as "(Harbatkin Br., \_\_\_)" and "(Harbatkin Rep. Br., \_\_\_)." The Brief for Respondents dated March 22, 2011, and submitted to the First Department is cited herein by page as "(City Br., \_\_\_)."

(but not records on any other subject matter), the City of New York's Department of Records and Information Services requires any party seeking access to certify that he/she will not "record, copy, disseminate or publish in any form any names or other identifying personal information" obtained from the restricted materials. (R. 317) Petitioner-Appellant refused to sign the form containing this certification requirement because she would not agree to relinquish her First Amendment rights as a condition of access. (R. 21-22) Has the City of New York placed unconstitutional conditions on the exercise of free speech and research activities, and do those conditions also violate the First Amendment's content-neutrality requirement and lack the necessary procedural safeguards?

*The Appellate Division, First Department did not determine this question, stating that a ruling on Petitioner-Appellant's constitutional challenge would be "merely advisory" because Supreme Court had not decided the issue.*

2. In response to Petitioner-Appellant's Freedom of Information Law ("FOIL") request for access to its historic "anti-Communist" series of investigative files, the City of New York's Department of Records and Information Services partially disclosed some records, but withheld others and redacted the names of so-called confidential informants who reported on public school teachers during the anti-Communist investigations, the names of the targets of those investigations, the names of the public schools where the investigations were conducted nearly a half-

century ago, and even the names of the neighborhoods in which those schools were located, all on the ostensible grounds of protecting the identity of informants and others swept up in the investigations. Did the City's denials of public access to the records in unredacted format adequately establish that disclosure would cause an unwarranted invasion of personal privacy under FOIL?

*The Appellate Division, First Department answered this question in the affirmative.*

3. At the time teachers and informants were interrogated, the City promised them confidentiality — thereby establishing a cloak of secrecy intended more to leverage compliance and shield the Board of Education's own conduct from public scrutiny than to protect those who were targeted by its ideological cleansing activities. Does the City's agreement not to reveal in perpetuity the names or other identifying information relative to "teachers and other school personnel investigated and/or questioned by the Board and its lawyers" (R. 196) because they were suspected of political disloyalty contravene FOIL's presumption of open access to official government records by subordinating the City's disclosure obligations to the terms of a private confidentiality agreement?

*The Appellate Division, First Department did not determine this question.*

## INTRODUCTION AND BACKGROUND

Petitioner-Appellant Lisa Harbatkin (“Ms. Harbatkin”) respectfully submits this motion and accompanying memorandum of law in support of her appeal from the decision and order of the Appellate Division, First Department, dated and entered on May 31, 2011 (the “Decision,” attached as Exhibit 1). The Decision affirmed Supreme Court’s denial of Ms. Harbatkin’s Petition, brought pursuant to New York’s Freedom of Information Law (“FOIL”), Article 6 of the N.Y. *Public Officers Law*, §§ 84-90 *et seq.*, for unrestricted public disclosure of the historic “anti-Communist” case files maintained by Respondent the City of New York’s Department of Records and Information Services (the “City”). The Decision refused to rule on Ms. Harbatkin’s constitutional challenge to the City’s imposition — without any procedural safeguards — of content-based restrictions on her use of the anti-Communist case files in her research and writing, in violation of her rights of free speech protected under the First Amendment to the United States Constitution. As discussed more fully herein, this Court should grant this motion in order to review these novel issues of significant public importance.

Ms. Harbatkin is a native New Yorker who has been actively engaged in scholarly research and writing related to the New York City Board of Education’s notorious anti-Communist investigations which peaked in their intensity during the 1950’s, known as the McCarthy Era and so-named for the anti-Communist

practices of Sen. Joseph McCarthy. Her work includes, *inter alia*, research and writing pertinent to how the Board of Education's anti-Communist campaign affected New York City public school teachers who were subjected to — and, in many instances, victimized by — these political loyalty investigations, and the lingering effect of the investigations on public and educational policy. (R. 14-15, 281-284)

In response to Ms. Harbatkin's FOIL requests, the City refused to disclose the names of individuals contained in the anti-Communist case files — compiled from the 1930s through the 1960s, when the Board of Education was conducting investigations into the political beliefs and associations of “approximately 1,100” (R. 16, 198) public school teachers — purportedly to protect their privacy. The First Department's cursory upholding of the City's denials of access to these records should be reversed by this Court, and the City should be directed to disclose the requested information. Disclosure will provide the general public with an opportunity to assess the circumstances culminating in the Board of Education's anti-Communist investigations of the mid-twentieth century, including the City's use of informants (both voluntary and involuntary) within the public school system to identify potential targets of those investigations. The public has the right to know this information consistent with FOIL's commitment to open government and public accountability on a matter that directly implicates an issue of significant

historic concern to New York's citizens. Putting aside that these materials are historically dated, the transparently pretextual nature of the City's privacy claim, which the Appellate Division rubber-stamped, is revealed by its willingness to supply the names of any and all teachers who were investigated to Ms. Harbatkin — *provided*, however, that she agrees not to publish them "in any form." (R. 317) The Appellate Division erred because its conclusory pronouncement — the Decision is devoid of analysis or explanation — that disclosure of the requested records would result in an unwarranted invasion of personal privacy failed to justify nondisclosure under FOIL in this instance.

The City's legal obstructionism did not stop with the mere denial of public access. Pursuant to a regulation<sup>2</sup> it enacted for the sole purpose of controlling public access to the anti-Communist case files, the City required Ms. Harbatkin — and all other citizens seeking access to the withheld records — to agree, in advance and as a condition of obtaining full disclosure, not to "record, copy, disseminate or publish in any form any names or other identifying information" concerning the school teachers who were interrogated by the Board of Education. (R. 317) There is no greater offense to the First Amendment and no greater harm to our

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<sup>2</sup> Section 3-02 ("Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files"), Chapter 2, Title 49 of the Rules of the City of New York ("Rule 3-02") and implementing Form MA-101D ("Form D"). (R. 68-69, 70) Subsequent to Ms. Harbatkin's initiation of the Article 78 proceeding in Supreme Court, the City apparently modified Form D by withdrawing its pre-publication approval and indemnification requirements. (R. 317)

constitutional order than a government that can prevent the publication of information with which it disagrees or of which it disapproves, which is exactly what the Decision has allowed here. By effectively affirming the validity and enforceability of Rule 3-02 and its implementing Form D, the First Department has allowed the City to require all individuals, as a condition of unrestricted access to the Board of Education's historic anti-Communist files, to certify that they will not disseminate or publish any names or personally identifiable material contained in those files. (R. 70, 317) This sweeping regulation, which holds those who would have unredacted access to the archives hostage to the conditions on publication imposed by the City, is not only a substantial and continuing impediment to Ms. Harbatkin's ongoing research (R. 281-285), but a form of censorship that is anathema to the marketplace of ideas. It strikes at the very core of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In the end, there is surely something disturbing, and more than a little ironic, about the events that have brought Ms. Harbatkin to this Court: the City 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 this 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 tragic, but important, chapter in not just the City's but the nation's history. Moreover, the City of New York is hardly the first governmental entity to seek to suppress embarrassing information about historic practices that were coercive or threatening to the citizens it was entrusted with governing. Yet if the lower courts are correct, Ms. Harbatkin and other researchers may be deprived of complete access to and prohibited from publishing information contained in what are unquestionably historically valuable and authentic documents. The chilling effect on Ms. Harbatkin's First Amendment activities could hardly be more severe. It is not too much to say that, ostensibly to protect the privacy of those citizens subjected to the ideological purges undertaken by its Board of Education several decades ago, the City has replicated the system of censorship characteristic of the repressive Communist regimes that it was seeking to combat during the McCarthy

period. If the lessons of the law and history have taught us anything, it is that the First Amendment does not tolerate such conduct.

### **REASONS FOR GRANTING LEAVE**

Leave to appeal is warranted as a matter of right pursuant to *CPLR* 5601(b)(1) to permit this Court to decide whether the City's express conditioning of unredacted access to the "anti-Communist" series of case files on a relinquishment of the right to publish "any names" they contain violates the First Amendment. (R. 317) This purely constitutional issue has not previously been considered by this Court — or any court in New York State, to our knowledge. Contrary to the First Department's statement, consideration of this issue would not entail an "advisory" opinion because the City's regulation remains in full force and effect and continues to infringe Ms. Harbatkin's (and other citizens') First Amendment rights. A justiciable controversy is therefore present for adjudication by this Court.

In the alternative, the Court should grant leave pursuant to *CPLR* 5602(a)(1)(i) to decide whether the names of teachers and informants may be withheld from the "anti-Communist" case files because disclosure would constitute an unwarranted invasion of personal privacy under FOIL. In *Matter of New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 484 (2005), this Court recognized, for the first time, that a privacy interest may exist "in the feelings and

experiences of people no longer living.” Ms. Harbatkin acknowledges, in accordance with that decision, that a descendible right of privacy may, in exceptional circumstances, exist under FOIL. However, this Court’s solicitude for that interest in that case was attributable to the deeply personal nature of the 911 calls of those trapped in the inferno that was the World Trade Center towers on September 11, 2001. The historical records here are intrinsically different from those at issue in *Matter of New York Times*, and any privacy interest is no longer of comparable strength. The First Department’s holding significantly expands the descendible right of privacy recently established in *Matter of New York Times*, and is not supported by the interests implicated on the instant appeal. We respectfully submit that the Appellate Division’s misapplication of FOIL’s personal privacy exemption in this context presents an issue of public importance not only to citizens of New York State but throughout the nation.

Finally, this Court should not allow promises of confidentiality made by the Board of Education to those it was interrogating to prohibit disclosure under FOIL. Although the First Department did not address this issue, if a government agency were permitted to bargain away the public’s rights of access to its records by the simple expedient of promising confidentiality, FOIL would be rendered a dead letter. This, too, is an issue of surpassing public importance that goes directly to

FOIL's objective of promoting governmental accountability through transparency.

N.Y. *Pub. Off. Law* § 84 (McKinney 2008).

## POINT I

### **THE FIRST DEPARTMENT'S DECISION AND ORDER IS APPEALABLE AS OF RIGHT BECAUSE IT EFFECTIVELY UPHELD A VIOLATION OF PETITIONER-APPELLANT'S FIRST AMENDMENT RIGHTS**

#### **A. Ms. Harbatkin's Constitutional Claim Presents a Justiciable Controversy.**

The City's Rule 3-02 (R. 68-69) and its accompanying Form D (R. 317) impose direct publication restrictions on anyone accessing the City's "anti-Communist" files. While members of the public may view the records in unredacted form, they are prohibited from recording, copying, disseminating or publishing in any form any names or identifying personal information contained in the records. (R. 317) The publication restrictions imposed by Rule 3-02 and Form D are unconstitutional because they are clearly a content-based governmental restriction *on publication*. (See Harbatkin Br., 42-46)

Both courts below utterly failed to address Ms. Harbatkin's constitutional challenge to the City's Rule and practices. The Appellate Division deemed her constitutional claim "merely advisory" solely because Supreme Court did not rule on it (citing *New York Pub. Int. Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 529-30 (1977)). With all due respect, this is clearly erroneous: *because* the First

Department held that disclosure of names could be withheld under FOIL, it was then *required* to determine whether, consistent with the First Amendment, the City could condition disclosure on an agreement not to publish those names.<sup>3</sup> Here, unlike the legislation at issue in *Carey*, which had not gone into effect and may never have gone into effect unless approved by voters in a referendum, 42 N.Y.2d at 528, Rule 3-02 was officially adopted by the City in February of 2008 and took effect on March 26, 2008. (R. 20, 68-69) Further, Ms. Harbatkin refused to sign Form D in capitulation to the City's demand that she forfeit the right to publish any names contained in the "anti-Communist" case files. (R. 295-296) A justiciable controversy is therefore present, the resolution of which will have an "immediate practical effect" on her constitutional rights. *Carey*, 42 N.Y.2d at 530. "The need for judicial intervention is obvious when, because of the actions of one of the parties, a dispute arises as to whether there has been a breach of duty or violation of the law." *Id.* This is not a situation where the enforcement of Rule 3-02 and Form D "is beyond the control of the parties and may never occur." *Id.* at 531 (citation omitted). To the contrary, Rule 3-02's requirements are within the City's control and have in fact been imposed on Ms. Harbatkin. A "genuine legal

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<sup>3</sup> The converse is also true: if the Appellate Division had determined (as it should have) that a descensible privacy interest did *not* outweigh the public's disclosure rights under FOIL, it would have had no need to reach the constitutional question raised by Ms. Harbatkin. *Fossella v. Dinkins*, 66 N.Y.2d 162, 167 (1985) ("In our view the statutes and policies of this State are alone sufficient to sustain the decisions reached below. There is no need to reach the Federal constitutional questions or the other issues raised in this proceeding.").

dispute” therefore exists requiring a judicial determination of “the legal rights and obligations of the parties” relative to the “coercive measures” adopted by the City. *Carey*, 42 N.Y.2d at 530. The First Department impermissibly ducked Ms. Harbatkin’s First Amendment claim.

**B. By Requiring That Ms. Harbatkin Not Publish “Any Names or Other Identifying Personal Information,” the City Imposed Unconstitutional Conditions on Her First Amendment Rights.**

The U.S. 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* Kathleen M. 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 *Perry* 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).

Here, the City could hardly be clearer that in order for Ms. Harbatkin to be granted unrestricted access to a uniquely valuable repository of historical information, she cannot publish the names of the individuals targeted in the Board of Education’s attempts at ideological cleansing, or of those who informed on them. The City has therefore placed an unconstitutional condition 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. This is constitutionally impermissible, even assuming *arguendo* — contrary to Ms. Harbatkin’s position and the requirements of FOIL — that the City properly withheld the names of teachers and informants in the first instance. “[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 Inst. of*

*Art and Serv. v. City of New York*, 64 F.Supp.2d 184, 199 (E.D.N.Y. 1999) (citations omitted) (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[ion]” of Petitioner’s freedom of speech rejected as inimical to the First Amendment in *Perry*, 408 U.S. at 597.

If the City is not enjoined 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 continue to be directly and inalterably impaired.<sup>4</sup> (R. 281-285) “Such interference with constitutional rights is impermissible.” *Perry*, 408 U.S. at 597. The result – not only unfortunate but unconstitutional – will adversely impact public discourse because of the City’s

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<sup>4</sup> Because they are based on the content of speech, the publication restrictions imposed by Rule 3-02 and Form D are presumptively invalid and can be upheld only if (1) necessary to advance a compelling governmental interest, (2) precisely tailored to serve that interest, and (3) 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). 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 Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 95-6 (1972) (“government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”). 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) (delay of 50 to 57 days violated constitutional due process); *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).

permanent embargo on information from the historical record, to the detriment of an informed public.

## POINT II

### IN THE ALTERNATIVE, THIS MOTION SHOULD BE GRANTED BECAUSE THE FOIL ISSUES PRESENTED ARE NOVEL AND OF SIGNIFICANT PUBLIC IMPORTANCE

A. **The First Department's Decision That Unredacted Public Disclosure of the Anti-Communist Case Files Would Cause an Unwarranted Invasion of Personal Privacy Under FOIL Impermissibly Extended This Court's Holding In *Matter of New York Times*.**

In *Matter of New York Times Co. v. City of New York Fire Dep't*, *supra*, 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, as well as oral histories, which consisted of interviews with firefighters in the days following the attacks. The Fire Department denied public access to the records citing, *inter alia*, FOIL's personal privacy exemption. 4 N.Y.3d at 484. The privacy interest at issue in *Matter of New York Times* belonged to the "surviving relatives:"

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 484-5.

Although it correctly determined that the privacy claim asserted by the City did not fall within an enumerated FOIL exemption, the First Department, relying on *Matter of New York Times*, nevertheless concluded that “the privacy interests of the surviving subjects and their relatives . . . outweigh petitioner’s interest in being able to publish the names of teachers contained in the records at issue” — without providing any explanation for *why* those privacy interests retain viability more than half a century after-the-fact or *how* they would be compromised by present day disclosure. By simply announcing the above conclusion, the First Department ignored this Court’s admonition that “[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’ within the meaning of FOIL’s privacy exception.”<sup>5</sup> *Matter of New York Times*, 4 N.Y.3d at 485. For example, this Court determined that the privacy interests in the

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<sup>5</sup> The balancing analysis required by the *Matter of New York Times* decision is contextual and fact-specific, and depends principally on an evaluation of the *content* of the records at issue to determine whether a privacy interest on the part of a surviving family member is sufficient to overcome the public’s presumptive right of access under FOIL.

911 calls made on September 11, 2001, were particularly compelling because of the uniquely tragic circumstances in which the calls were made:

The privacy interests in this case are compelling. The 911 calls 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.* There is no support for the First Department’s bald conclusion that unredacted disclosure of the anti-Communist case files sought by Ms. Harbatkin here would impinge upon any similarly “compelling” privacy interests of the deceased,<sup>6</sup> or of their surviving relatives.

Given that a specific FOIL exemption does not provide a basis for nondisclosure in this case, the general default balancing-of-interests analysis adopted by this Court in *Matter of New York Times* governs the issue. See 4 N.Y.3d at 485 (stating that because none of the six privacy exemptions in

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<sup>6</sup> The City acknowledges that the individuals are named in files that pertain to the Board of Education’s anti-Communist investigations “from the 1930s through the 1960s.” (R. 68) This information is therefore unquestionably historical in nature and, presumably, virtually all of the teachers who are the subject of the files are now deceased, as is the case with Ms. Harbatkin’s own parents. (R. 40, 280) While not dispositive, the “age of information sought to be redacted” is unquestionably relevant to the propriety of the privacy exemption asserted by the City. *Matter of Bellamy v. New York City Police Dep’t*, 59 A.D.3d 353, 355 (1st Dep’t 2009).

§ 89(2)(b) of FOIL were applicable, the court had to decide “whether any invasion of privacy here is ‘unwarranted’ by balancing the privacy interests at stake against the public interest in disclosure of the information.”). Based on the “extraordinary facts in th[at] case,” *id.* at 484, a privacy interest was recognized on behalf of the surviving relatives of those who, confronted with their imminent demise, placed emergency 911 calls.

Unlike the compelling and particularized privacy interest that informed the *sui generis* holding in *Matter of New York Times*, the core of the City’s privacy argument below was that the teachers who were interrogated 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., 33-34) Simply put, the City purports to be concerned at this late stage about protecting the subjects of the anti-Communist files and their relatives from the embarrassment that it perceives would follow from disclosure of their names. This claim is wholly speculative. It stands in stark contrast to the 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. *New York Times*, 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 submitted in the record below – every one of which confirms that the teachers in question had affiliated with the Communist Party for, at worst, understandable personal and, at best, admirable – even laudatory – reasons: as a matter of intellectual attraction because it was “humanitarian” to do so; to assist in fighting poverty in California; to rescue a failing marriage; to oppose Hitler and the rise of Fascism in the world; and to improve learning conditions in New York City’s public schools. (R. 264-267) In short, it is just as likely that unredacted disclosure of the records will allow relatives, researchers, historians and citizens alike to “admire their courage, and to be justly enraged” by the Board of Education’s ideological inquisition that purged many experienced, dedicated and competent teachers from employment in the City’s public school system. *New York Times*, N.Y.3d 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). Public access to the complete historical record will help to “expose government abuses [and] evaluate governmental activities.” *Matter of New York State United Teachers v. Brighter Choice Charter School*, 15 N.Y.3d 560, 565 (2010).

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 contended below, that Communist Party membership more than half a century ago showed a lack of judgment and/or naïveté – a claim which is much easier to make with the benefit of several decades of hindsight, the end of the Cold War and the disintegration of the former Eastern Bloc – it does not rise to a level sufficient to block unredacted disclosure of these historically valuable records<sup>7</sup>. In the final analysis, disclosure without redactions would not be objectionable to a reasonable person of ordinary sensibilities in the manner contemplated by this Court in *Matter of New York Times*. (R. 260)

Ms. Harbatkin's motion for leave should be granted to permit review and clarification of the First Department's unwarranted expansion of the descensible privacy interest recognized in *New York Times*, a novel and important issue requiring guidance from this Court.

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<sup>7</sup> The public interest in full disclosure of the historically valuable information at issue in the instant case is considerable, whereas any privacy interest is severely attenuated by the age of the information (which the City compiled from the 1930s through the 1960s) and, more importantly, by the fact that there is nothing inherently stigmatizing about being identified as the victim of a government investigation which the judgment of history has condemned as an ideological witch hunt entailing the systematic abuse of civil rights and liberties. To the contrary, the stigma falls on the government which conducted the unlawful investigations into the political beliefs of its citizens. (Harbatkin Br., 27-32; Harbatkin Rep. Br., 7-9)

**B. The City's Disclosure Obligations Under FOIL Cannot Be Abrogated By or Subordinated To the Terms of a Private Confidentiality Agreement.**

We have been unable to find a single case in which a New York State court has held that a government agency's obligations to disclose otherwise non-exempt records under FOIL may be subordinated to the terms of a private confidentiality agreement, an issue of clear public importance. The reason for this complete absence of authority is clear: the Legislature established FOIL as controlling on questions of public access to government records, and the City's disclosure obligations under the statute cannot be overridden by on-the-spot confidentiality agreements the purpose of which was to keep private that which should now be public.

This fundamental point was reaffirmed earlier this year in *Mulgrew v. Board of Education of the City of New York*, 31 Misc.3d 296 (Sup. Ct., N.Y. Cnty. 2011) (Kern, J.). In *Mulgrew*, various news organizations submitted FOIL requests to the New York State Department of Education ("DOE") for disclosure of Teacher Data Reports ("TDRs"), including teachers' names, compiled in connection with a DOE pilot program "in which a student's predicted improvement on state tests is compared with the student's actual improvement." *Id.* at 298. Through that process of comparison, an individual teacher's "value added" was determined by "attribut[ing] the gain or loss in test scores to the child's teacher while controlling

for other factors that influence student achievement . . . .” *Id.* The *Mulgrew* court summarily rejected the argument by the United Federation of Teachers that DOE’s “assuring teachers of their confidentiality and directing principals not to share the results with anyone other than the subject teacher” prohibited the disclosure of individual teachers’ names contained in the TDRs: “ ‘as a matter of public policy, the Board of Education cannot bargain away the public’s right to access to public records.’ ” *Id.* at 303 (citing *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 427 (2d Dep’t 1995)).

The same principle is dispositive here — *i.e.*, a government agency’s promise of confidentiality is unenforceable as a matter of law to block disclosure of non-exempt records under FOIL.<sup>8</sup> See *Matter of LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, *supra* (held, settlement agreement denying public access to its terms “is unenforceable as against the public interest”); *S-P Drug Co. v. Smith*, 96 Misc.2d 305, 311 (Sup. Ct., N.Y. Cnty. 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); *Geneva Printing Co. v. Vill. of Lyons*,

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<sup>8</sup> In *Mulgrew*, the DOE decided “to release the TDRs in a form that discloses teachers’ names” notwithstanding its “assurances that the TDRs would remain confidential . . . .” 31 Misc.3d at 298, 303. DOE’s willingness to abandon its promise of confidentiality there stands in striking contrast to its argument in both courts below in this case that the Board of Education’s inherently coercive promises of confidentiality are sufficient to prohibit disclosure of the names of teachers who were interrogated because of their suspected political beliefs. The City cannot have it both ways.

slip op. at 9-10, (Sup. Ct., Wayne Cnty., Mar. 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 insofar as restricting the right of the public to access.”).

Similarly, to sustain a claim that the City’s self-serving 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.” *See* N.Y. *Pub. Off. Law* § 84 (McKinney 2008). 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.

Leave should be granted so this Court may confirm that an agency’s disclosure obligations under FOIL may not be displaced or preempted by a private confidentiality agreement. This is an issue of significant public interest because, if permitted, it would negate the very purpose of FOIL.

### **CONCLUSION**

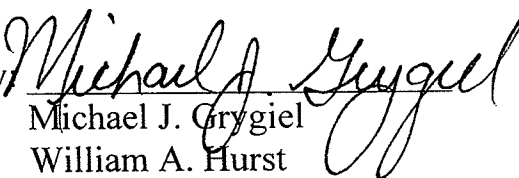
Based on the foregoing reasons, Petitioner-Appellant Lisa Harbatkin’s motion for leave to appeal to the Court of Appeals should be granted as a matter of right pursuant to *CPLR* 5601(b)(1) because of the constitutional issues involved or,

in the alternative, in the exercise of this Court's discretion pursuant to *CPLR* 5602(a)(1)(i) because of the novel and public importance of the issues presented under this State's Freedom of Information Law.

DATED: July 14, 2011  
New York, New York

Respectfully Submitted,

**GREENBERG TRAURIG, LLP**

By: 

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

**EXHIBIT 1**

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

*Justice*

Matter of the Application of LISA HARBATKIN,

Petitioner,

For a Judgment Pursuant to Article 78 of the New York  
Civil Practice Law & Rules,

- against -

NEW YORK CITY DEPARTMENT OF RECORDS AND  
INFORMATION SERVICES et al.,

Respondents.

INDEX NO. 104933/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

**FILED**

MAR 18 2010

NEW YORK  
COUNTY CLERK'S OFFICECross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that: The petitioner Lisa Harbatkin brings this proceeding for a judgment pursuant to CPLR article 78 and Public Officers Law §§ 84-90 (FOIL) (1) compelling the respondent defendant New York City Department of Records and Information Services and its agents (collectively, the City) to grant public access to the New York City Department of Education's anti-Communist records, and (2) declaring that the City's imposition of unlawful conditions on Harbatkin's use of those records constitutes a denial of her constitutional rights.

Harbatkin, a scholar, is seeking unfettered access to historical materials maintained by the City of New York's Department of Records consisting of internal memoranda, witness statements, and transcripts of approximately 1,100 interviews concerning an investigation of Communist infiltration of the New York City Schools from the 1930's through the 1960's. Harbatkin's parents were among the targets of the investigation. Initially, in a letter dated December 9, 2008, the FOIL Appeal Officer granted unredacted access, provided that Harbatkin agreed not to publish names, obtain the City's permission to use direct quotes, and indemnify the City with respect to any claim arising from unauthorized publication. Harbatkin then commenced this proceeding. Subsequently, in a letter dated June 15, 2008, the City, eliminating the requirements concerning quotation and indemnification, offered to allow access to the unredacted files subject only to an agreement not to publish the names of individuals identified in the records.

In opposition to the petition, the City argues that under Public Officers Law §§ 87 (2)(b) and 89(2), disclosure of the names of the Communists identified in the files would constitute an unwarranted invasion of the personal privacy of such individuals. It claims that when asked at their interviews about Party membership, the individuals expressed concern about both their own privacy and that of their family members and that, as a result, in every case, the individuals providing the information were promised confidentiality. The City suggests that to the extent the individuals identified in the case files have contributed to Harbatkin's research, they are free to supply Harbatkin with the requisite permission to have their own case files made available to Harbatkin.

**Discussion**

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Thus, a court may not substitute its judgment for that of an

administrative agency when there is a rational basis for the agency's determination (*Matter of Nehorayoff v Mills*, 95 NY2d 671 [2001]). Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98 [1997]; *Matter of Fineway Supermarkets, Inc. v State Liquor Authority*, 48 NY2d 464 [1979]).

The policy underlying FOIL is "to insure the maximum public access to government records" (*Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 296-297 [1985]). The burden of proof rests on the agency that claims exemption from disclosure (*Matter of Westchester Rockland Newspapers, Inc. v Kimball*, 50 NY2d 575 [1980]). In order to ensure that the public has maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 [1992]). That the documents may have been furnished in confidentiality does not necessarily render them beyond the scope of FOIL disclosure (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557 [1984]; *Matter of City of Newark v Law Department of City of New York*, 305 AD2d 28 [1<sup>st</sup> Dept 2003]; *Matter of New York 1 News v Office of President of Borough of Staten Island*, 231 AD2d 524 [2d Dept 1996]; *Matter of Bello State of New York Dept. of Law*, 208 AD2d 832 [2d Dept 1994]). However, the privacy exemption authorizes each agency to deny access to records or portions of such records that, if disclosed, would constitute an "unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). The statute defines an "unwarranted invasion of personal privacy" as, *inter alia*, the disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency (Public Officers Law § 89 [2] [b] [v]).

Initially, the court notes that a FOIL request by another historian seeking essentially the same information from the Board of Education as sought herein was denied by the Supreme Court, New York County in 1980, which found, *inter alia*, that the unwarranted invasion of personal privacy exemption was applicable. See *Cirino v. Bd. of Educ. of the City of New York*, NYLJ, July 10, 1980, (Shirley Fingerhood, J.). In this respect, the petitioner herein does not seriously dispute that the information at issue herein was of a personal nature given with an understanding of confidentiality. Nor has the petitioner shown that the information was relevant to the Department of Education's ordinary work of teaching students.

In *Matter of Bellamy v New York City Police Department* (59 AD3d 353, 354-355 [1<sup>st</sup> Dept 2009]), the First Department held that where privacy interests are implicated by the type of information sought to be redacted, the court must determine whether release of such information falls within one of the specific categories listed in Public Officers Law § 89 (2)(b) and, if not, whether there is nevertheless any unwarranted invasion of privacy "by balancing the privacy interests at stake against the public interest in disclosure of the information" (quoting from *Matter of New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 485 [2005]). In the *New York Times* case, the Court of Appeals held that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead and that, pursuant to Public Officers Law § 87(2)(b), the Fire Department was not required to release tapes and transcripts of the 911 calls made on September 11, 2001 without redacting certain identifying information of the callers that was repeated by the 911 operators.

Thus, Public Officers Law § 89(2)(b) plainly permits an agency to delete identifying details from records made available by it to the public in order to prevent an unwarranted invasion of personal privacy. In this respect, the City interviewed the Communists at issue with the express commitment that each examination would remain confidential. Contrary to Harbatkin's assertion, there is nothing in the record before the court which even suggests that it was only to further parochial concerns or frustrate subsequent attempts to learn about the process that the City promised these individuals that their names would remain confidential. Notably, the petitioner has not claimed that the respondents' promise of confidentiality was in itself violative of the terms of any statute. Moreover, as already

discussed, the City has shown that disclosure of their individual names was of grave concern to the these individuals. In *Matter of Scarola v Morgenthau* (246 AD2d 417 [1st Dept 1998]), the First Department held that statements made by individuals alleged by petitioner to be "known informants" were exempt from disclosure under Public Officers Law § 87(2)(b) since disclosure of such documents would, *inter alia*, be an unwarranted invasion of their personal privacy.

Although Harbatkin insists that her reasons for requesting the identities is "completely scholarly and respectful," revealing the identity of confidential informants would nevertheless constitute an unwarranted invasion of privacy with respect to these confidential informants (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343 [1<sup>st</sup> Dept 1999]; *Matter of Scarola v Morgenthau*, 246 AD2d 417 [*supra*]). In any event, whatever limited scholarship interest the petitioner may have in exposing the identities of those who named names is clearly outweighed by the City's promise of confidentiality made to its employees and the potential embarrassment to, and harassment of, at least some of these individuals and their families.

In light of the sensitive nature of the information, the minimal burden that compliance with the respondents' offer places on the petitioner and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents' have properly refused petitioner access to the unredacted files unless she agrees not to publish the names of individuals identified in the records.

Finally, contrary to the petitioner's suggestion, the age of the records involved does not mandate disclosure. In *Matter of Bellamy v New York City Police Dept* (59 AD3d at 353), the First Department held that although the age of the information sought could be relevant to the inquiry as to whether the exemptions under Public Officers Law § 87(2) were applicable, age alone was insufficient to hold the exemptions inapplicable.

Accordingly, the petition is hereby denied and the proceeding dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 3/11/10 \_\_\_\_\_

*MGD*

\_\_\_\_\_  
MARYLIN G. DIAMOND, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION


**FILED**

MAR 18 2010

NEW YORK  
COUNTY CLERK'S OFFICE

PLEASE TAKE NOTICE that a Judgment of which the within is a copy, was duly entered in the office of the Clerk of New York Supreme Court on the 18<sup>th</sup> day of March 2010.

**MICHAEL A. CARDOZO**  
*Corporation Counsel*  
*Attorney for Defendants*  
100 Church Street Room 2-165  
New York, New York 10007  
Tel: (212) 788-1165

By:   
Thaddus Hackworth  
Assistant Corporation Counsel

To: Michael J. Grygiel  
*Hiscock & Barclay*  
30 Beaver Street  
New York, New York 12207

County Clerk's Index No#104933/2009

<b>New York Supreme Court County of New York</b>
Matter of the Application of LISA HARBATKIN,  Petitioner  -against-  NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES, et al.  Respondents.
<b>JUDGMENT AND NOTICE OF ENTRY</b>
<b>MICHAEL A. CARDOZO</b> <i>Corporation Counsel</i> <i>Attorney for Respondents</i> 100 Church Street New York, N.Y. 10007

**EXHIBIT 2**

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, JJ.

5220 In re Lisa Harbatkin,  
Petitioner-Appellant,

Index 104933/09

-against-

New York City Department of Records  
and Information Services, et al.,  
Respondents-Respondents.

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Advance Publications, Inc., ALM Media, L.L.C.,  
Associated Press, Bloomberg News, Gatehouse  
Media, Inc., The Hearst Corporation,  
The New York News Publishers Association,  
The New York Times Company and Pen American  
Center,  
Amici Curiae.

-----  
Greenberg Traurig, LLP, Albany (Michael J. Grygiel of counsel), for  
appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I.  
Freedman of counsel), for respondents.

Miller Korzenik Sommers LLP, New York (Itai Maytal of counsel), for  
amici curiae.

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Order and judgment (one paper), Supreme Court, New York County  
(Marylin G. Diamond, J.), entered March 18, 2010, which denied a  
petition pursuant to the Freedom of Information Law (Public  
Officers Law §§ 84-90) for a judgment compelling respondent New  
York City Department of Records and Information to grant  
unrestricted access to records related to the Board of Education's  
"anti-Communist investigation," unanimously affirmed, without

costs.

Respondents granted petitioner access to all of the records in its possession regarding the Board of Education's multi-decade "anti-Communist" investigation, subject only to the condition that she not publish the names appearing in the "restricted files." Petitioner filed the instant petition, seeking unrestricted access pursuant to the Freedom of Information Law.

The trial court erred with regard to the applicability of the exemption from disclosure for "information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency" (Public Officers Law § 89[2][b][v]). Construing the exemption narrowly (see *Matter of Johnson v New York Police Dept.*, 257 AD2d 343, 346 [1999], lv dismissed 94 NY2d 791 [1999]), we find that transcripts of interviews regarding Communist Party membership, which the lead interrogator explicitly reminded schoolteacher-interviewees was sufficient basis for termination of employment, cannot be fairly characterized as "not relevant" to the work of the Board of Education.

Nevertheless, we agree with the trial court's conclusion that the privacy interests of the surviving subjects of the investigation and their relatives (see *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477 [2005]) outweigh petitioner's

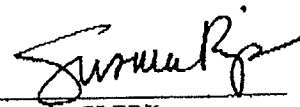
interest in being able to publish the names of teachers contained in the records at issue.

Petitioner also argues that the Rules of City of New York Department of Records and Information Services (49 RCNY) § 3-02, which is specifically addressed to standards for access to the "restricted files" in the anti-Communist records, violates her state and federal constitutional rights to free speech. We decline to rule on that claim. The court below decided the petition purely on FOIL grounds. Therefore, any ruling on petitioner's constitutional claim would be merely advisory (see *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-530 [1977]).

Accordingly, the petition was properly denied.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 31, 2011



CLERK

## AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL


STATE OF NEW YORK, COUNTY OF NEW YORK, SS:

The undersigned, being duly sworn, deposes and say :

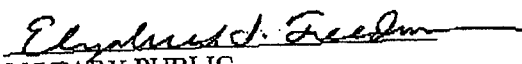
That on the 10<sup>th</sup> day of June, 2011 she served the annexed Order and Notice of Entry upon :

Michael J. Grygiel GREENBERG TRAUIG LLP Attorneys for Petitioner-Appellant 54 State Street, 6 <sup>th</sup> Floor Albany, New York 12207 (518) 689-1400 <a href="mailto:grygielm@gtlaw.com">grygielm@gtlaw.com</a>	ITAI MAYTAL MILLER KORZENIK SOMMERS LLP Attorneys for Amici Curiae 488 Madison Avenue, Suite 1120-5702 New York, New York 10022 (212) 752-9200 <a href="mailto:imaytal@mkslex.com">imaytal@mkslex.com</a>
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being the address within the State theretofore designated by him/her for that purpose, by causing to be deposited a copy of the same, enclosed in a prepaid wrapper in a post office box situated at 100 Church Street in the Borough of Manhattan, City of New York, regularly maintained by the Government of the United States in said City.

  
 NOLA FRANCIS

Sworn to before me this 10<sup>th</sup> day,  
 of June, 2011

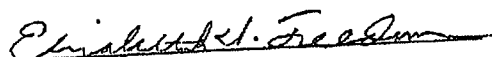
  
 NOTARY PUBLIC

ELIZABETH I. FREEDMAN  
 Notary Public, State of New York  
 No. 02FR4795476  
 Qualified in New York County  
 Commission Expires 6-30-2011

In re Lisa Harbatkin, LM #2009-012400,  
Elizabeth I. Freedman

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 31<sup>st</sup> day of May, 2011.

**MICHAEL A. CARDOZO**  
Corporation Counsel  
Attorney for Respondents-Respondents  
100 Church Street  
New York, New York 10007  
Tel: (212) 788-1026

By:   
Elizabeth I. Freedman  
Assistant Corporation Counsel  
[efreedma@law.nyc.gov](mailto:efreedma@law.nyc.gov)

To: Michael J. Grygiel  
**GREENBERG TRAUIG LLP**  
Attorneys for Petitioner-Appellant  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207  
(518) 689-1400  
[grvgielm@gitaw.com](mailto:grvgielm@gitaw.com)

**ITAI MAYTAL**  
**MILLER KORZENIK SOMMERS LLP**  
Attorneys for Amici Curiae  
488 Madison Avenue, Suite 1120-5702  
New York, New York 10022  
(212) 752-9200  
[imaytal@mkslex.com](mailto:imaytal@mkslex.com)

Dated: June 10, 2011

New York County Clerk's Index No. 104933/09

**New York Supreme Court**  
**APPELLATE DIVISION : FIRST DEPARTMENT**

In re Lisa Harbatkin, Petitioner-Appellant,  
-against-

New York City Department of Records and Information  
Services, et al., Respondents-Respondents.

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Advance Publications, inc., ALM Media, L.L.C.,  
Associated Press, Bloomberg News, Gatehouse Media,  
Inc., The Hearst Corporation, the New York News  
Publishers Association, The New York Times Company  
and Pen American Center, Amici Curiae.

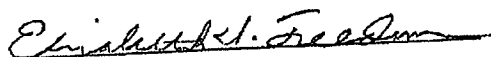
**Appellate Division Order  
and Notice of Entry**

**MICHAEL A. CARDOZO**  
Corporation Counsel  
Attorney for Respondents-Respondents  
100 Church Street  
New York, N.Y. 10007

Due and timely service of a copy of the within Order and  
Notice of Entry is hereby admitted.  
New York, N.Y. ...., 2011.  
..... Esq.  
Attorney for.....

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**MICHAEL A. CARDOZO**  
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Tel: (212) 788-1026

By:   
Elizabeth I. Freedman  
Assistant Corporation Counsel  
[efreedma@law.nyc.gov](mailto:efreedma@law.nyc.gov)

To: Michael J. Grygiel  
GREENBERG TRAUIG LLP  
Attorneys for Petitioner-Appellant  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207  
(518) 689-1400  
[grygielm@gilaw.com](mailto:grygielm@gilaw.com)

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Attorneys for Amici Curiae  
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