Index No. 104933/09

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

In the Matter of the Application of

LISA HARBATKIN

Petitioner,

For Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

- against -

NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES; BRIAN G. ANDERSON, 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' MEMORANDUM OF LAW IN SUPPORT OF THEIR VERIFIED ANSWER TO THE VERIFIED PETITION

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NYCLIS No. 2009-012400

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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR VERIFIED ANSWER TO THE VERIFIED PETITION

PRELIMINARY STATEMENT

Petitioner brings this Article 78 proceeding to challenge the determination of the FOIL Appeal Officer of the Department of Records and Information Services ("Department of Records") of the City of New York. The instant case involves a request made pursuant to FOIL for the "anti-Communist" Case Files maintained by the Department of Records, which pertain to the "anti-Communist" activities of the New York City Board of Education from the 1930s through the 1960s. (Ver. Ans. ¶¶ 64, 77; Ver. Pet. ¶¶ 9, 12; Ex. 11.)

Petitioners' initial request, dated October 17, 2008, for the records pursuant to FOIL was reviewed by the Department of Records. (Ver. Ans. ¶ 64; Ver. Pet. Ex. 16.) By letter dated November 6, 2008, the FOIL Officer, Assistant Commissioner of the Department of Records, Kenneth R. Cobb, granted Petitioner access to the requested records subject to certain restrictions in place to protect the privacy of the individuals named in certain files. (Ver. Ans. ¶ 66; Ver. Pet. Ex. 1.) Petitioner appealed that determination to the FOIL Appeal Officer at the Department of Records by letter dated November 26, 2008. (Ver. Ans. ¶ 67; Ver. Pet. Ex. 17.)

By letter dated December 9, 2008, the FOIL Appeal Officer, Eileen M. Flannelly, Deputy Commissioner of the Department of Records, affirmed the determination of Kenneth R. Cobb, granting access to the requested records subject to certain restrictions to avoid the unwarranted invasion of the privacy of the teachers who are the subject of certain of the files. (Ver. Ans. ¶ 68; Ver. Pet. Ex. 2.) Specifically, the Department of Records offered to provide unredacted access to the requested files, including the "restricted files," provided that Petitioner agree to the privacy procedures set forth at the time, namely, (1) a written agreement not to disseminate or publish in any form any names or identifying personal information obtained from the restricted materials, (2) an agreement to request permission from the Department of Records for any direct quotation from the restricted materials to be used in any publication and not to use any such quotation without permission, and (3) an agreement to indemnify the Department of Records and the City of New York with respect to any claim, liability, or expense arising from the researcher's unauthorized publication of the restricted material. (Ver. Ans. ¶¶ 68, 106; Ver. Pet. Ex. 12.)

Petitioner brought this Article 78 proceeding to challenge the determination of the Department of Records and seeks an order: (1) overruling the determinations made on November

6, 2008 and December 9, 2008 by the Department of Records in response to Petitioner's FOIL request; (2) declaring Section 3-02, Title 49 of the Rules of the City of New York and the accompanying form MA-101D unconstitutional and unenforceable; (3) directing and ordering the City to furnish Petitioner with immediate access to unredacted copies of the information and records specified in Petitioner's FOIL requests; and (4) awarding Petitioner costs, disbursements, and attorneys' fees. (Ver. Ans. ¶ 71.)

Respondents thereafter offered in letter form, on June 15, 2009, to allow Petitioner access to the unredacted records subject only to her agreement not to publish the names or identifying details of the individuals mentioned in the records, and eliminating the requirements concerning quotation and indemnification. (Ver. Ans. ¶ 107; Ex. A.) Respondents now answer the petition and state that the FOIL Appeals Officer's determination was in all respects legal, proper, reasonable, and in conformity with all applicable laws and regulations, and was neither arbitrary nor capricious, and further, that Petitioner's other claims are moot and/or fail to state a cause of action in light of Respondents' June 15, 2009 letter.

STATEMENT OF FACTS

The FOIL Request, Decision and Appeal

By letter dated October 17, 2008, Petitioner requested from the New York City Department of Records and Information Services, pursuant to the New York Freedom of Information Law, access to:

1. All boxes and folders in Records Series Nos. 572, 593, and 595;
2. All boxes and folders in Records Series Nos. 590: List of names, Index of Publications, and Filing Records, *circa* 1940-1962;
3. All boxes and folders in Records Series No. 591: Subject Files, *circa* 1936-1961;

4. All boxes and folders in Records Series No. 594: Individual Case Files, *circa* 1952-1962;
5. All boxes and folders in Records Series No. 596: General Index File of Suspected Communists, *circa* 1955;
6. All boxes and folders in Records Series No. 597: Feinberg Law Loyalty Forms, *circa* 1955; and
7. Any and all other individual records and/or Records Series which pertain to the New York City Board of Education's Anti-Communist investigations and/or activities as generally described in the section titled, "Guidelines for Archival Use of Board of Education 'Anti-Communist Case Files" contained within the *Guide to Records of the New York City Board of Education*.

(Ver. Ans. ¶ 64; Ver. Pet. Ex. 16.) This request amounts to access to approximately 140,000 pages of records. (Ver. Ans. ¶ 64.)

By letter dated November 6, 2008, the Assistant Commissioner of the Department of Records, Kenneth R. Cobb, granted Petitioner access to the requested records subject to certain restrictions in place to protect the privacy of the individuals named in certain files. (Ver. Ans. ¶ 66; Ver. Pet. Ex. 1.) Specifically, pursuant to Section 3-02 of the Rules & Regulations of the City of New York, researchers may access the files in the "restricted" series upon certifying that they will neither record nor use any names or personally identifiable material obtained from such files. (Ver. Ans. ¶ 66; see Ver. Pet. Ex. 11.)

By letter dated November 26, 2008, petitioner, by counsel, appealed the Department of Records' decision. (Ver. Ans. ¶ 67; Ver. Pet. Ex. 17.) Thereafter, by letter dated December 9, 2008, the Department of Records FOIL Appeal Officer affirmed the decision of Kenneth Cobb, and granted unredacted access to Petitioner to the restricted files, provided that Petitioner agree not to publish the names of individuals identified in those files, and agree to the other requirements concerning quotation and indemnification listed in form MA-101D. (Ver.

Ans. ¶ 68; Ver. Pet. Ex. 2.) By letter dated June 15, 2009, Respondents again offered Petitioner unredacted access to the requested files, and eliminated the requirements concerning quotation and indemnification, leaving as the only requirement for access Petitioner's agreement not to record, copy, disseminate or publish in any form any names or other identifying personal information obtained from the restricted materials. As an alternative, Respondents also offered Petitioner the standard option utilized pursuant to FOIL for records containing some information that is protected by the personal privacy exemption. Petitioner may obtain copies of the records, 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. Respondents also indicated that the standard copying fee of $0.25 per page would apply to this option. (There is no set of redacted records available. If Petitioner were to choose this option, the unredacted records would have to be copied and then redacted.) (Ver. Ans. ¶¶ 107, 108; Ex. A.)

The "anti-Communist" Records Series

The Department of Records, through its Municipal Archives, preserves and makes available for research historical records of the New York City Board of Education ("the Board").[1] (Ver. Ans. ¶ 76.) 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, only some of which are restricted. (Ver. Ans. ¶ 77.) The restricted records contain personal and confidential information relating to teachers and other school

[1] The agency is now known at the New York City Department of Education. However, the agency was called the New York City Board of Education at the time of the creation of the records at issue and will therefore be referred to as "the Board" in this memorandum.

personnel investigated and/or questioned by the Board and its lawyers for alleged support of, or association with, the Communist Party. (Ver. Ans. ¶ 78.) 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. (Ver. Ans. ¶ 79.) This is so not only because of the sensitive nature of the information contained within the files, but also because apparently all of the information in the restricted series was provided under promise of strict confidentiality. (Ver. Ans. ¶ 80.)

Indeed, the records themselves indicate that the individuals providing the information contained within the records were given a promise of confidentiality that their words would be kept secret. (Ver. Ans. ¶ 81.) This promise of strict confidentiality was part of the procedure utilized in these interviews, as demonstrated by this February 17, 1955 interview:

> *[Mr. Moskoff:] I will make the same preliminary statement that I do in every case. . . […] Needless to say, there has been and will be absolutely no publicity of any nature given to the fact that you and I had this talk, this is a matter of strict confidence between yourself and [Superintendent of Schools] Dr. Jansen.*

(Ver. Ans. ¶ 87; Ex. E at 1-2.)

That this promise of strict confidentiality was uniformly provided to persons being interviewed is further demonstrated by the January 13, 1956 interview of Petitioner's mother, Margaret Harbatkin, attached as Exhibit 13 to the Verified Petition. At page two, the interviewer, Saul Moskoff, makes clear the confidential nature of the information sought:

> *[Mr. Moskoff:] [T]his is merely an inquiry to ascertain information and needless to say, there has been given and will be given no publicity to the fact that you and I are having this discussion. It is regarded as a matter of strict confidence between yourself and [Superintendent of Schools] Dr. Jansen, acting through me.*

(Ver. Ans. ¶ 82; Ver. Pet. Ex. 13 at 10.)[2]

Further, in an interview randomly selected from "Series 591: Anti-Communist Investigations. Subject Files," the interviewee was given a similar promise, reflected on page two of the interview transcript:

> *[Mr. Moskoff:] The fact that you are here today, needless to say, has been given and will be given no publicity. This interview is regarded as a confidential matter between Dr. Jansen, myself, yourself, and of course, [teacher's adviser – name redacted] . And I shall expect, [adviser's name redacted], that you will keep confidential the fact that you were here and that we had a discussion at all.*

(Ver. Ans. ¶ 84; Ex. C at 2.)

In this particular interview, there was additional discussion concerning the confidential nature of the discussions:

> *[Interviewee:] Well, as I said, I don't know, I have every reason to believe what you said at the beginning, that this is a confidential matter, and I believe [the stenographer] Mr. Dunne is included?*
>
> *[Mr. Moskoff:] Yes. You may rest assured that whatever I say binds the members of this unit.*

(Ver. Ans. ¶ 85; Ex. C at 5.)

Likewise, in another transcript from a randomly selected file from "Series 594," the main series of individual case files, the interviewee was given the same promise of confidentiality during a March 8, 1955 interview:

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[2] Notably, according to an article published on June 16, 2009 in the *New York Times*, Petitioner's mother confided to Petitioner that after she told Mr. Moskoff she would never sleep again if she provided or verified the names of fellow teachers, he turned off his tape recorder "and told her to

Continued…

> *[Mr. Moskoff:] I want to make it clear that there has been and will be no publicity given to the fact that you and I are having this discussion this afternoon. This is regarded as a matter of strict confidence between the Superintendent of Schools, acting through me, and yourself, and of course, there are no charges whatever of any kind against you.*

(Ver. Ans. ¶ 86; Ex. D at 2.)

In fact, in a review of 23 interviews selected at random from the requested restricted records, such a promise of confidentiality was present in all of them. (Ver. Ans. ¶ 88.)

Moreover, contrary to Petitioner's view, individuals asked about Communist Party membership, among other things, were not only concerned about their own privacy, but also that of their family members. They were likewise promised total confidentiality, as in this October 21, 1954 interview:

> *[Mr. Moskoff asks teacher if she is willing to…*
>
> *[Interviewee:] Yes. I wouldn't want to do this publicly because I wouldn't want anything to reflect on my son. […] And another thing that's very important to me—I know that the sins of the parents are visited upon their children, and it's quite a thing for my son—*
>
> *[Mr. Moskoff:] Well, nobody would know. This is strictly confidential.*
>
> *[Interviewee:] I wouldn't want him, under any circumstance, to find out.*
>
> *[Mr. Moskoff:] No, he won't, don't you worry about that.*

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keep saying she didn't remember the names." Ralph Blumenthal, When Suspicion of Teachers Ran Unchecked in New York, *N.Y. Times*, June 16, 2009, at A15.

> *[Interviewee:] . . . but rather than have any repercussion on my son, I would—*
>
> *[Mr. Moskoff:] Please accept my word for it—so just don't talk about it any more, there will be none, because, believe me, you are not the first teacher we have spoken to under these circumstances—there have been a substantial number,* ***believe me—nobody knows they have been here, not even their principals; in some cases, like in your case, the members of their family don't know; they will never know, it's a closed door, so don't be concerned about it.***
>
> *[Interviewee:]* ***My family thinks I am at a Guidance meeting.***

(Ver. Ans. ¶ 89; Ex. F at 28-30 (emphasis added).)

The information supplied by these individuals forms the content of much of the material in the "restricted files." (Ver. Ans. ¶ 90.)

The "anti-Communist" Records Privacy Procedures

Access to and use of the Board's "anti-Communist" Case Files was governed by Title 49, Section 3-02 of the Rules & Regulations of the City of New York. (Ver. Ans. ¶ 100.) Pursuant to these procedures, researchers who request access to a specific file for the purpose of researching the views or activities of a person named in that file must obtain permission for such access from the subject individual and from the named individual, as applicable. (Ver. Ans. ¶ 101.) 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. (Ver. Ans. ¶ 102.)

Where a researcher, such as Petitioner, is engaged in general research not limited to a particular individual or individuals, the researcher may access files in the restricted series either by obtaining copies of the records that have personally identifying details redacted or upon certifying that the researcher will neither record nor use any names or personally identifying

material obtained from such files. (Ver. Ans. ¶ 103.) The regulations exempt published materials and materials created for general distribution from these restrictions. (Ver. Ans. ¶ 104.) Initially, researchers interested in accessing the restricted series for general research were asked to sign Form MA-101D. (Ver. Ans. ¶ 105.) This form required the researcher to agree to a series of conditions, including: (1) an agreement not to disseminate or publish in any form any names or identifying personal information obtained from the restricted materials; (2) an agreement to request permission from the Department of Records for any direct quotation from the restricted materials to be used in any publication and not to use any such quotation without permission; and (3) an agreement to indemnify the Department of Records and the City of New York with respect to any claim, liability, or expense arising from the researcher's unauthorized publication of the restricted material. (Ver. Ans. ¶ 106; Ver. Pet. Ex. 12.)

By letter dated June 15, 2009, Marilyn Richter, Assistant Corporation Counsel, informed Petitioner that the Department of Records would provide access to the restricted files pursuant to either of two offered alternatives. (Ver. Ans. ¶ 107; Ex. A.) First, Petitioner could request redacted copies of the requested files, and pay reasonable copying charges for their production. (Id.) Second, the Department of Records provided Petitioner with a modified agreement, allowing her to inspect the files in unredacted form, but omitting the requirements that Petitioner request and receive permission prior to using any direct quotation and that Petitioner agree to indemnify the City of New York for any claims arising from the Petitioner's unauthorized publication of any of the restricted material. (Id.) The only remaining requirement in the modified agreement is that Petitioner agree not to record, copy, disseminate or publish in any form any names or other identifying personal information obtained from such restricted materials. (Ver. Ans. ¶ 108; Ex. A.)

As discussed more fully below, disclosure of the names of individuals, or personally identifying material obtained from these files, without restriction as to the publication of this information, would constitute an unwarranted invasion of the personal privacy of such individuals. (Ver. Ans. ¶ 109.) Accordingly, such disclosure is not required under FOIL.

ARGUMENT

POINT I

DISCLOSURE OF THE IDENTIFYING INFORMATION CONCERNING THE INDIVIDUALS NAMED IN THE RESTRICTED SERIES FILES WOULD CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY

Pursuant to Public Officers Law § 87(2)(b), an agency may properly deny access to records or portions thereof if their disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [§ 89(2)]." Of relevance here is the fifth enumerated category in Public Officers Law § 89(2):

> An unwarranted invasion of personal privacy includes, but shall not be limited to: […] v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

PUB. OFF. LAW § 89(2)(b). Moreover, although Section 89(2)(b) describes a number of categories that fall within its scope, by its own terms this list is not exhaustive. Id.; see also N.Y. Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 485 (2005) (recognizing that the list of categories in section 89(2)(b) is not exhaustive). In this case, disclosure of the names and other identifying information[3] of individuals contained within the restricted series of the Board's "anti-

[3] Typically, the other identifying information contained in these records are the person's home address and worksite (i.e., school).

Communist" case files, or personally identifiable material obtained from these files, without redaction, would constitute an unwarranted invasion of the personal privacy of such individuals.[4]

In fact, although Petitioner's voluminous memorandum of law fails to even cite the case, this Court has already decided this very question, concerning these very files. In Cirino v. Board of Education of the City of New York, Ms. Cirino, a researcher and historian, made a FOIL request for the Board's "anti-Communist" files. N.Y.L.J., July 10, 1980, No. 001117/1980 (N.Y. Co. Sup. Ct. 1980), attached to the Verified Answer as Ex. B. The Board denied the Ms. Cirino any access, for several reasons. Specifically, the Board argued that disclosure would be an unwarranted invasion of personal privacy of the persons investigated, and that disclosure would reveal law enforcement investigatory techniques (invoking the FOIL the law enforcement exemption), and would violate the attorney-client, attorney work product and/or material prepared in anticipation of litigation privileges. Id. This Court (Fingerhood, J.) accepted the personal privacy argument and rejected all the other arguments. Accordingly, this Court found that FOIL required the Board to release the requested records to Ms. Cirino, but directed the Board to redact names and personally identifying details from the records to protect those individuals who had not provided Ms. Cirino with consent.[5] Id. The Cirino case is not just

[4] Public Officers Law §89(2)(a)(c)(i) specifically provides that "disclosure shall not constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted."

[5] To the extent that individuals identified in the case files "have contributed to Petitioner's research" (Pet.'s Memo of Law at 11), they are free to supply the Petitioner with the requisite permissions to have their own case files made available to Petitioner with their own names and identifying information left unredacted.

Petitioner cites the Department of Records' own failure to consult with the individuals mentioned in the files as grounds for disclosure, citing Bahnken v. New York City Fire Dep't in support of this remarkable proposition. 17 A.D.3d 228 (1st Dept. 2005). Unlike the small group of hospitals in Bahnken, however, disclosure of the records at issue here affect thousands of

Continued…

directly analogous to, but exactly the same as, the case at bar—the same records are being requested and under the same statute—and the result should be no different here.[6]

In addition to the clear precedent in Cirino, which holds that release of these records with redactions is all that is required under FOIL, more recent FOIL jurisprudence points to the same result. In determining whether a specific disclosure is warranted under FOIL, courts must balance the privacy interests at stake against the public interest in disclosure of the information. N.Y. Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 485 (2005). With respect to the privacy interests in these "anti-Communist" case files, Petitioner's citation of N.Y. Times Co. is apt. In that case, the Fire Department denied public access to unredacted recordings of 911 emergency service calls made by individuals, inter alia, who were killed in the terrorist attacks occurring on September 11, 2001. The Court of Appeals explicitly found that a privacy right existed, as Petitioner here admits, "in the feelings and experiences of people no longer living." Id. at 484.

> 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

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individuals whose whereabouts are unknown to the City. Nothing in Bahnken implies that an agency subject to FOIL has a duty to track down and notify individuals potentially affected by an unwarranted invasion of personal privacy and no such duty exists.

[6] Although not mentioned in the decision in Cirino, the judgment in that case (as settled by the Court based on the submission of petitioner) specified that redaction would be available for the names and indentifying information of individuals who were still alive. (Ver. Ans. ¶ 94.) This was consistent with the privacy interest that existed prior to the Court of Appeals decision in N.Y. Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477 (2005), discussed infra. In that case, the court held that a privacy interest remains even after death. Id. at 484. Thus, this qualification in the judgment is no longer applicable, under current law.

> 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 484-85.

The Court of Appeals therefore decided that the callers' words in those records could be redacted to protect their privacy interest. Id. at 486-87. Subsequently, the First Department further clarified this ruling to include redaction of not only the words of the callers themselves, but also redaction of the words of the 911 operators which repeated the callers' words or which stated personally identifying information concerning the callers. New York Times Co. v. City of New York Fire Department, 39 A.D.3d 414, 415, (1st Dep't 2007). (See Affirmation of Marilyn Richter, sworn to on June 16, 2009 ("Richter Affirmation"), annexed to Respondents' Answer.)

Petitioner attempts to distinguish the holding in New York Times Co. by erroneously asserting that in New York Times Co., the record contained privacy claims by individuals whose privacy rights were affected (the callers or surviving relatives.) (Petitioner's Memorandum of Law, pp. 8-12.) This is simply wrong; there were no statements by individuals in the record before the Court of appeals in New York Times Co. (See Richter Affirmation).

The absence of such evidence was noted in the dissenting (in part) opinion in New York Times Co., although the dissenters also concluded, as had the majority, that this absence was not dispositive.

> Notably, the city has not provided any affidavits from survivors or victim's [sic] family members suggesting that disclosure of 911 tapes, or any other material sought, would violate their privacy. The record contains only the opposite: affidavits from

> nine intervenors, family members who want full disclosure. Nevertheless, I do not challenge the majority's assumption that full disclosure would cause considerable anguish to many victims' families.

Id. at 493.

Indeed, courts have held that "[w]hat constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities…." Dobranski v. Houper, 154 A.D.2d 736, 737 (3d Dept. 1989). The courts are also mindful that among reasonable individuals, concerns about personal privacy vary significantly. In New York Times Co., the Court of Appeals stated:

> We acknowledge that not everyone will have the same reaction to disclosure of the 911 tapes. The intervenors in this case, whose husbands and sons died at the World Trade Center, favor disclosure. They may feel, as other survivors may also, that to make their loved ones' last words public is a fitting way to allow the world to share the callers' sufferings, to admire their courage, and to be justly enraged by the crime that killed them. This normal human emotion is not less entitled to respect than a desire for privacy. …But the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful.

New York Times Co., 4 N.Y.3d at 486.

Petitioner here, a surviving relative, favors full disclosure, as did the intervenors in New York Times Co. She believes that there is value in making her mother's interview public, and has placed it in the public record. That is Petitioner's choice. However, as in New York Times Co., Petitioner's view does not and should not control the privacy rights of others, here the thousands of other subjects who were interviewed or named in the documents, and the thousands of surviving relatives of those subjects who are deceased. The interviews attached to the Verified Answer and quoted above, show that there were persons who were extremely

concerned that their participation in the interview remain confidential. Indeed, some persons lied to their families about their participation in the investigation (and presumably, about their prior affiliation with the Communist Party.)

It is quite understandable that some of the persons interviewed, or their surviving relatives, would be distressed by public disclosure that they were members of the Communist Party, at a time when Joseph Stalin led the Soviet Union. In hindsight, some persons might believe that such membership showed a lack of judgment and/or naïveté. Even more readily apparent is the great concern that many subjects or their surviving relatives would have if the subject "named names" during the course of the interview, as many did. One has only to note the controversy that followed such well-known figures as Elias Kazan and Jerome Robbins until their deaths, for their similar actions, to understand the agony that the public release of such information could cause the subjects or their surviving relatives. Finally, for the subjects who lied to their families about their involvement, it is readily apparent that it would be extremely painful for many of these subjects and their families, or their surviving relatives if the subject is deceased, if their lies were publicly exposed, or if family members or surviving relatives first learned of the subject's involvement through publication of that involvement. In summary, it would be an unwarranted invasion of the personal privacy of the subjects named in these records, and if deceased their surviving relatives, to publicly disclose their names and identifying information.

The courts have found an unwarranted invasion of personal privacy pursuant to section 89(2)(b), and protected personally identifying information from disclosure, in other circumstances that are less or no more compelling than those here. See Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse, 65 N.Y.2d 294 (1985) (identifying

information regarding victims of motor vehicle accidents); Johnson v. New York City Police Department, 257 A.D.2d 343 (1st Dept. 1999), appeal dismissed, 94 N.Y.2d 791 (1999) (witness statements in police reports); De Oliveira v. Wagner, 274 A.D.2d 904 (3d Dept. 2000) (police communications with victim's relatives); Buffalo Broadcasting Co. v. New York State Department of Correctional Services, 174 A.D.2d 212, 215 (3d Dept. 1992), leave to appeal denied, 79 N.Y.2d 759 (1992) (videotapes of strip searches of inmates).

In addition, it is extremely significant that the persons interviewed were given explicit promises of confidentiality. As quoted above, Public Officers Law § 89(2)(b)(v) provides that "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency" is an unwarranted invasion of personal privacy. The Appellate Division, First Department has held that an express promise of confidentiality for information of a personal nature "serve[s] as a compelling reason to decline to disclose the information." Johnson, 257 A.D.2d at 348.

Similarly, in N.Y. Times Co., in addition to the 911 calls, the Court of Appeals also considered whether "oral histories," consisting of subsequent interviews with Fire Department personnel who were present at Ground Zero on September 11, were exempt from disclosure under the personal privacy exemption of § 89(2). 4 N.Y.3d at 488-90. Ultimately, the court found that the oral histories were disclosable under FOIL, relying heavily on the fact that "the record did not reflect that any interviewee was given a promise of confidentiality or led to believe that his or her words would be kept secret." Id. at 489. Initially, the Fire Department had submitted an affidavit stating that all interviewees had been assured that the interviews would be held in complete confidence. Id. In fact, this statement had been made in error, as the Fire Department later withdrew that claim and did not rely on the existence of any such promise

of confidentiality. The Court of Appeals considered this fact of great significance in its decision: "This statement, if true, would be highly relevant to this case…" Id.

Here, the record establishes that the individuals who were interviewed in the Board's "anti-Communist" activities were promised confidentiality as a matter of course, not only regarding the fact that they had been interviewed but as to the information, including the names of other individuals, that they were providing. As set forth above, the individuals interviewed were provided many specific assurances of confidentiality:

> *[T]here has been given and will be given no publicity to the fact that you and I are having this discussion. It is regarded as a matter of strict confidence. . .*

(Ver. Pet. Ex. 13 at 10.)

> *The fact that you are here today, needless to say, has been given and will be given no publicity. This interview is regarded as a confidential matter. . .*

(Ver. Ans. Ex. C at 2.)

> *I have every reason to believe what you said at the beginning, that this is a confidential matter. . .*

(Ver. Ans. Ex. C at 5.)

> *[T]here has been and will be no publicity given to the fact that you and I are having this discussion this afternoon. This is regarded as a matter of strict confidence. . .*

(Ver. Ans. Ex. D at 2.)

There can be no question that the individuals called to participate in these activities were "led to believe that his or her words would be kept secret." Id. at 489. This promise of confidentiality, missing in N.Y. Times Co., is another reason this Court must once

again find that the redaction of personally identifying information is justified and proper under FOIL, as it did in Cirino.

As stated supra, the judgment in Cirino specified that redaction would be available for the names and indentifying information for individuals who were still alive. (Ver. Ans. ¶ 94.) This was consistent with the lack of a recognized privacy interest that survived death, that was the state of New York law prior to the Court of Appeals decision in N.Y. Times Co., in which the Court of Appeals held that a privacy interest remains even after death. Id. at 484. Moreover, as set forth above, there is evidence in the record to suggest that this was exactly the result anticipated by those who participated in the interviews:

> *[Interviewee:] Yes. I wouldn't want to do this publicly because I wouldn't want anything to reflect on my son. […] And another thing that's very important to me—I know that the sins of the parents are visited upon their children, and it's quite a thing for my son—*
>
> *[Mr. Moskoff:] Well, nobody would know. This is strictly confidential.*
>
> *[Interviewee:] I wouldn't want him, under any circumstance, to find out.*
>
> *[Mr. Moskoff:] No, he won't, don't you worry about that.*
>
> *[Interviewee:] . . . but rather than have any repercussion on my son, I would—*
>
> *[Mr. Moskoff:] Please accept my word for it—so just don't talk about it any more, there will be none, because, believe me, you are not the first teacher we have spoken to under these circumstances—there have been a substantial number, believe me—nobody knows they have been here, not even their principals; in some cases, like in your case, the members of their family don't know; they will never know, it's a closed door, so don't be concerned about it.*

(Ver. Ans. Ex. F at 28-30.)(emphasis added). Thus, this qualification in the judgment in Cirino is no longer applicable, under current law.[7]

Conversely, there is little, if any, public interest in the disclosure of the individuals' names who identified or were identified as Communist Party members or sympathizers as part of the Board of Education's "anti-Communist" activities. According to Petitioner, complete disclosure of the archived case files would "further illuminate the widespread political suppression that occurred during this period." Petitioner fails to explain, however, why this interest would not be served (and is not currently being served) through Petitioner's ability to review the unredacted files or through the release of records with personally identifying information redacted, as required under FOIL.

All that FOIL requires is access to these records with the individuals' identifying details redacted to preserve personal privacy. However, the Department of Records has been willing to go above and beyond what FOIL requires, and has offered Petitioner an alternative form of access, outside the auspices of the FOIL, that is less restrictive than access under FOIL, and is consistent with the Department of Records' efforts to provide unusually open access to historical government records. The Department of Records has offered Petitioner unfettered access to the complete, unredacted set of records, subject to her agreement not to publish the identities of the private individuals contained within them.

Under both the access required by FOIL or the enhanced access alternative, Petitioner does not, and cannot, offer a single reason why the public's interest would be served

[7] Moreover, given that approximately 1,100 interviews were conducted (Ver. Ans. ¶ 88), and an unknown number of other individuals who were identified in these records, identifying those individuals who are living or deceased would be a practical impossibility.

only through the *publication* of the identities of the specific teachers who were suspected or admitted Communists party members or sympathizers and those who acted as informants (i.e., "named names") during a time of national crisis. This is especially true when considering the context of these investigations—names were likely often provided based on surmise, rumor, speculation and conjecture—it can be assumed that the names provided in the context of such allegations were sometimes, if not often, untrue, and that the person identified was never a member of the Communist Party. In this sense, it is continued confidentiality, and not disclosure of the names, that serves the public's interest. Nonetheless, Petitioner's ability to answer her questions:

- [H]ow did the Board of Education decide which teachers (including her own parents) to investigate? (Pet.'s Memo. of Law at 15)
- Where did the investigators get their information, and how did they get it? (Id.)
- How did the Board's investigators work with a network of informants and undercover agents both inside and outside of the public school system? (Id.)
- What kinds of 'deals' were made in specific situations? (Id.)
- Why did some teachers wind up in the headlines, while others who refused to inform were permitted to continue with their careers? (Id.)

would not be inhibited by the provision of full, unrestricted access to the requested files contingent upon Petitioner's agreement not to publish these names.

Even, arguendo, if Petitioner were able to articulate some public interest that would be served basis for the release of these names, this balancing test would still apply—and it will remain heavily skewed toward protecting the privacy interest of these countless individuals. Petitioner's failure to articulate any cognizable reason for her need to publish the names of these individuals only adds to the likelihood that such information is intended to be used as "an object of idle curiosity or a source of titillation," N.Y. Times Co., 4 N.Y.3d at 485, rather than in support of some identifiable public objective. And even if Petitioner's use of the information

were completely scholarly and respectful, in this age of the Internet, there is no control of the treatment of information once it is in the public domain.

In sum, the Respondents' requirements under FOIL with respect to these records has already been decided by this court in Cirino, which held that the records must be released with the redaction of identifying details to protect the personal privacy of the individuals named within them. The basic result should be no different here. The Department of Records has already offered Petitioner access to the records in redacted form, and has moreover remarkably offered Petitioner access to the case files above and beyond what is required by FOIL, in exchange for Petitioner's promise not to publish the identities of the individuals named within them. Petitioner's challenge to this determination is without basis.

POINT II

PETITIONER'S OTHER CLAIMS ARE MOOT AND/OR FAIL TO STATE A CAUSE OF ACTION

As set forth above, by letter dated June 15, 2009, confirming a prior telephone discussion, Marilyn Richter, Assistant Corporation Counsel, informed Petitioner, through her counsel, that the Department of Records had modified its proposed agreement for Petitioner, omitting the requirement that Petitioner request and receive permission prior to using any direct quotation from the material and omitting the requirement that Petitioner agree to indemnify the City of New York for any claims arising from the Petitioner's unauthorized publication of any of the restricted material. (Ver. Ans. ¶ 107; Ex. A.) The only remaining requirement is Petitioner's agreement not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from such restricted materials. (Ver. Ans. ¶ 108; Ex. A.)

Therefore, with respect to Petitioner's First Amendment claims concerning the potential enforcement of the two above-specified requirements, that have now been removed

from the agreement, there is no justiciable controversy for the court to determine pursuant to C.P.L.R. 3001. "[T]he courts are not empowered to render advisory opinions, or determine abstract, moot, hypothetical, remote or academic questions." In re Ideal Mut. Ins. Co., 174 A.D.2d 420 (1st Dept. 1991) (quoting 3 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 3001.03). A petitioner must have a "legally protectable interest, that is in direct issue or jeopardy, in order to invoke the remedy of declaratory judgment in the area of private litigation." Id. Because Respondents no longer seek Petitioner's agreement to request permission prior to using any direct quotation nor Petitioner's agreement to indemnify the City of New York for any claims relating to Petitioner's unauthorized publication of any of the restricted material, there is no longer any justiciable controversy relating to the potential enforcement of these provisions. Petitioner's claims with respect to these provisions are therefore moot.

As to the third remaining requirement, that Petitioner agree not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from such restricted materials, Petitioner's Memorandum of Law contains little discussion of this requirement as an alleged violation of the First Amendment, but instead focuses on the two other requirements that have removed from the modified agreement. (Petitioner's Memorandum of Law, pp. 15-24.) However, insofar as Petitioner may be asserting that this remaining requirement is an alleged violation of her First Amendment rights, her assertion is without merit. Petitioner cites no cases that hold that it is unconstitutional for the government to provide access to confidential information on the condition that the person not disseminate or publish the confidential information.

If such condition were a violation of the First Amendment, then numerous common practices would be unconstitutional. For example, the Federal Privacy Act, 5 U.S.C. §

552a, strictly limits the disclosure and dissemination of records concerning individuals that are maintained by federal government agencies. Violations of this statute not only subject the violator to civil suits for damages, but if committed willfully, are crimes. 5 U.S.C. § 552a(g),(i). Indeed, under the Privacy Act it is a crime for any person to knowingly and willfully request or obtain any record concerning an individual from a federal agency under false pretenses. 5 U.S.C. § 552a(i)(3). The Privacy Act, which was enacted in 1974, contains far more comprehensive, punitive and detailed restrictions on dissemination of personal information contained in federal government records than does the requirement at issue here.

For another example, it is a common practice in litigation for one side to provide confidential documents to the other during discovery. Such confidential information is routinely provided pursuant to a protective order issued by the court. These protective orders restrict the use of the confidential documents to specified litigation purposes, and prohibit any other dissemination or disclosure of the confidential information. Violation of a protective order is subject to findings of contempt and sanctions, as is the violation of any court order. Surely Petitioner is not suggesting that the judiciary is routinely violating the First Amendment by issuing protective orders restricting the use of confidential documents and information. If these protective orders are constitutional, than surely, the requirement at issue here is constitutional as well.

POINT III

PETITIONER MAY NOT BE AWARDED ATTORNEYS' FEES

Pursuant to FOIL's fee-shifting provision, a court may only award reasonable counsel fees and litigation costs to a party if the court finds that the party "substantially prevailed" in the proceeding and that "the agency lacked a reasonable basis in law for

withholding the record." Public Officers Law § 89(4)(c). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees. Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 441 (2005). In the instant matter, petitioners may not be awarded attorneys' fees.

First, in determining whether the party "substantially prevailed" in an Article 78 challenging a FOIL determination, the question is "whether it was the initiation of their proceeding which brought about the release of the documents." Stop the Madrassa Cmty. Coal., et al. v. New York City Dep't of Educ., et al., Index No. 113973/2007 (Sup. Ct. N.Y. Co. June 30, 2008) (citing Powhida v. Albany, 147 A.D.2d 236, 239 (3rd Dept. 1989)). (A copy of the decision in Stop the Madrassa Cmty. Coal., is annexed hereto as Exhibit A.) In this case, the requested documents were made available to Petitioner prior to, and certainly no later than, the first written response from the Department of Records on November 6, 2008, well before the instant Article 78 proceeding was initiated. In fact, none of the requested records was withheld from the Petitioner. The Department of Records explicitly made available to Petitioner unrestricted access of the files that she requested, contingent only upon her agreement to follow the procedural safeguards to protect the privacy of the individuals whose identities are revealed within the records. Because no record was withheld by the Department of Records, Public Officers Law § 89(4)(c) has not been triggered and no fees may be awarded to Petitioner.

Second, assuming arguendo that the restriction that Petitioner may not publish the names or identifying details of the individuals identified in the full and complete set of records to which Petitioner was granted access is considered "withholding the record," the Department of Records has a reasonable basis in law for its restriction pursuant to FOIL's personal privacy exemption. Respondents have offered a good-faith basis for the redaction and/or restriction on

publication of the names and indentifying details of the individuals found in the records. As discussed in Point I, supra, publication of these names would amount to an unwarranted invasion of personal privacy, and therefore disclosure of the names is not required under FOIL. Public Officers Law §§ 87(2)(b); 89(2)(b). For these reasons, petitioner may not be awarded attorneys' fees pursuant to Public Officers Law § 89(4)(c).

CONCLUSION

For the reasons set forth herein and in the Verified Answer and the accompanying Affirmation of Marilyn Richter, respondents respectfully request that the Court dismiss the petition in its entirety, deny all the relief requested therein, and award respondents such other and further relief as the Court deems just and proper.

Dated: New York, New York
June 17, 2009

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