

STATE OF NEW YORK
SUPREME COURT

COUNTY OF NEW YORK

In the Matter of the Application of:

LISA HARBATKIN,

Petitioner-Plaintiff,

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

-against-

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

Respondents-Defendants.

**VERIFIED PETITION/
VERIFIED COMPLAINT
FOR DECLARATORY
JUDGMENT**

Index No.

09104933
April 8, 2009

Lisa Harbatkin ("Petitioner"), by her undersigned attorneys, Hiscock & Barclay, LLP, alleges and states as follows as and for her (1) Verified Petition seeking a judgment pursuant to Article 78 of the N.Y. *Civil Practice Law & Rules* ("CPLR"), and New York's Freedom of Information Law ("FOIL"), Article 6 of the N.Y. *Public Officers Law*, §§ 84-90 *et seq.*, compelling Respondent-Defendant New York City Department of Records and Information Services and its agents (the "City") to grant public access to agency records, and, (2) Verified Complaint seeking a Judgment pursuant to CPLR 3001 *et seq.*, declaring and adjudging that the City's imposition of unlawful conditions and/or restrictions on Petitioner's use of agency records obtained pursuant to FOIL constitutes the impermissible denial of Petitioner's rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution:

INTRODUCTION

1. The instant combined proceeding concerns Petitioner's FOIL request for public access to agency records that the New York City Department of Records and Information Services is compelled to maintain pursuant to Chapter 72 of the Charter of the City of New York. Specifically, Petitioner seeks to annul and vacate administrative determinations rendered on November 6, 2008, by Respondent-Defendant Cobb, the agency's designated Records Access Officer, and on December 9, 2008, by Respondent-Defendant Flannelly, the agency's Deputy Commissioner and FOIL Appeal Officer, which unreasonably, arbitrarily and unlawfully conditioned Petitioner's ability to gain access to unredacted versions of the New York City Board of Education's "Anti-Communist" Case Files containing records generated from the 1930's through the 1960's – unquestionably agency records subject to FOIL – on Petitioner's agreement, *inter alia*, (i) not to publish the names and/or identifying information regarding individuals identified in those records unless the named individuals, many of whom are presumably deceased and/or no longer in the workforce, are family members of Petitioner or are individuals from whom or on whose behalf Petitioner has received specific, written authorization allowing such publication; (ii) not to publish any direct quotes unless they are previously approved by the City; and (iii) remarkably, to indemnify the City and all of its employees against claims arising from the publication of any such unapproved or identifying information. True and correct copies of the City's November 6, 2008, and December 9, 2008, determinations denying Petitioner's FOIL request are annexed hereto as Exhibits 1 and 2, respectively.

PARTIES

2. Lisa Harbatkin is an individual who resides at 301 E. 22nd Street, New York, New York 10010. Petitioner Harbatkin 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 McCarthy Era, including, without limitation, research and writing pertinent to how the Board of Education's anti-Communist campaign affected New York City public schoolteachers who

were made the subject of various anti-Communist investigations, and the lingering effect of those investigations on public and educational policy.

3. Upon information and belief, Respondent New York City Department of Records and Information Services, which maintains its principal offices and performs its functions from 31 Chambers Street, Suite 305, New York, New York 10007, was established as a duly constituted agency of New York City Government pursuant to Chapter 72 of the Charter of the City of New York. A true and correct copy of Chapter 72 of the Charter is annexed hereto as Exhibit 3.

4. Pursuant to Chapter 72 of the Charter, “the Commissioner of Records is the chief public records officer for the mayor, borough presidents and counsel and shall . . . establish standards for proper records management in an agency or government institution funded in whole or in part by local tax levy monies.” *Id.*

5. Upon information and belief, nothing in Chapter 72 of the Charter or elsewhere “shall be construed to limit access by the public to city records,” and the Department of City Records and Information Services is “responsible for granting access to [public] records in accordance with applicable provisions of law,” including FOIL. *Id.*

6. Respondent-Defendant Kenneth R. Cobb is the agency’s Assistant Commissioner and Records Access Officer, and in that capacity issued the November 6, 2008, denial of Petitioner’s initial FOIL request for public access to agency records, and/or imposed unreasonable and unlawful conditions on Petitioner’s ability to use those records in furtherance of her free speech rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution.

7. Respondent-Defendant Eileen M. Flannelly is the agency’s Deputy Commissioner and FOIL Appeal Officer, and in that capacity issued the December 9, 2009, denial of Petitioner’s

administrative appeal from her initial FOIL request for public access to agency records, and/or upheld the imposition of unreasonable and unlawful conditions on Petitioner's ability to use those records in furtherance of her free speech rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution.

8. The City is subject to New York State's FOIL, N.Y. *Public Officers Law*, Article 6, §§ 84-90.

**BACKGROUND: THE NEW YORK CITY BOARD OF EDUCATION'S
ANTI-COMMUNIST INVESTIGATIONS**

9. Upon information and belief, the 1940's and 1950's were a politically charged and highly controversial era in the history of the New York City Board of Education. By that time, the New York City public school system had become an epicenter of local McCarthyism, and certain of its administrators and agents vigorously embraced the prevailing anti-Communist sentiments of the day.

10. Upon information and belief, Saul Moskoff, an Assistant Corporation Counsel for the City of New York, was assigned full-time for nearly a decade to ferret out alleged Communists and unrepentant former Communists in the New York City public school and university system out of an overall, albeit irrational, concern that the City's youth were being indoctrinated into allegedly subversive Communist beliefs. The hysteria surrounding the City's ant-Communist investigations influenced education policy for decades.

11. Upon information and belief, the Board of Education's anti-Communist campaign resulted in the widely publicized departmental trials of approximately 50 New York City schoolteachers based on nothing more than their alleged political beliefs, and resulted in a total of 400 schoolteachers – including Petitioner Harbatkin's father – eventually surrendering their invaluable teaching licenses in lieu of subjecting their constitutionally protected rights of political association to scrutiny in the Board of Education's investigation led by Saul Moskoff.

12. New York City archivists and others have scrupulously preserved and stored various records documenting the Board of Education's controversial and disturbing anti-Communist activities during the McCarthy Era, which records are currently possessed and controlled by the Department of Records and Information Services, including, without limitation, the following:

- (a) Series 590. Anticommunist Investigations: List of Names, Index of Publications, and Filing Records. Files maintained by the Special Investigative Office of the Board of Education. Included are listings of the case files maintained on individual teachers; a separate list of teachers' names (ca. 1940) and an index to the office's file publications.
- (b) Series 591. Anticommunist Investigations: Subject Files. 1936-1961. Subject files created by the Special Investigative Office of the Board of Education. The files contain correspondence, reports, memoranda, transcripts and other materials on topics associated with the investigations. Many files relate to organizations and individuals who played significant roles, either public or private, as targets of investigation or as sources of information. Other groups of files relate to the systematic development of the legal basis of administrative procedures for the investigations . . . An additional group of files contains source material for legal cases, in a numbered sequence assigned by the Investigative Office.
- (c) Series 596. Anticommunist Investigations: General index file of suspected Communists: The series consists of a file of index cards (approximately 30,000 cards), each listing name, address, and other information for one individual. Typical information includes the source from which the name was obtained, such as Communist Party voter registration lists, federal and state investigating committees, police spies, and informers.
- (d) Series 594. Anti-Communist Investigations. Individual Case Files. Ca. 1952-1962: Case files investigated by the Special Investigative Office of the Board of Education. Individual case files include correspondence, reports from investigative agencies and informers, "interview" transcripts, and internal memoranda relating to individual teachers investigated for possible communist connections.

**PETITIONER'S REPEATED ATTEMPTS TO OBTAIN
ACCESS TO AGENCY RECORDS**

13. During the course of Petitioner's scholarly research, she discovered that the New York City Municipal Archives, a sub-agency within the Department of Records and Information Services, had become the official repository of the Board of Education's anti-Communist records series.

14. On or about June 7, 2007, Petitioner contacted David M. Ment, a City Archivist, requesting guidance on how to gain access to the City's anti-Communist case files.

15. In a response of the same date, Archivist Ment stated that he would "be able to consult with the Archives Director and other authority to determine the procedures governing access, permissions, etc., here." A true and correct copy of the June 7, 2007, e-mail correspondence between Petitioner and David M. Ment is annexed hereto as Exhibit 4.

16. On or about June 28, 2007, Petitioner inquired again as to the status of the various permissions she was informed were required to access the City's anti-Communist case files. In reply, Archivist Ment stated, "we are working on the access procedures and hope to get them formalized as soon as possible. Our goal is to make access possible without unnecessary hurdles." A true and correct copy of the June 28, 2007, email correspondence between Petitioner and David M. Ment is annexed hereto as Exhibit 5.

17. On or about June 29, 2007, Petitioner provided Archivist Ment with a list of certain documents from the archives that she wished to review in the course of her ongoing research.

18. On or about July 9, 2007, Petitioner again inquired of Archivist Ment as to the status of the City's access procedures. A true and correct copy of Petitioner's July 9, 2007, email inquiry to David M. Ment is annexed hereto as Exhibit 6.

19. Again on August 6, 2007, Petitioner inquired as to the status of the City's access procedures.

20. On August 28, 2007, Respondent Cobb replied to Petitioner's inquiry on behalf of Archivist Ment, stating "we have drafted an access policy and as soon as we obtain the necessary approval from our counsel at the Law Department . . . we will let you know." Upon information and belief, the referenced access policy would allow access to certain records that had been unilaterally withheld and/or redacted by the agency for the ostensible purpose of shielding the names of various subjects and participants in the Board of Education's anti-Communist investigations, including so-called "informants," *i.e.*, subjects of the investigation and/or others who "named names," often in exchange for the reinstatement of their teaching privileges. A true and correct copy of an August 28, 2007, email message from Respondent Cobb to Petitioner Harbatkin is annexed hereto as Exhibit 7.

21. On or about September 11, 2007, Petitioner inquired of Archivist Ment via e-mail as to the status of the access policy. On or about September 19, 2007, Archivist Ment replied to Petitioner, stating "our access procedure has been adopted and approved and we are ready to go forward." Archivist Ment also included with his e-mail message a copy of Form MA-101C, discussed *infra*, which he characterized as "the form that is appropriate for the situation of your access to the files of your parents." True and correct copies of Petitioner's September 11, 2007, e-mail inquiry, and Archivist Ment's September 19, 2007, reply e-mail message are annexed hereto as Exhibit 8.

22. On or about January 31, 2008, Archivist Ment restricted Petitioner's access to certain materials kept and maintained in the City Archives, stating "they are basically copies of portions of the case files of teachers who named others, and are filled with material affecting the privacy of teachers." A true and correct copy of David M. Ment's January 31, 2008, email correspondence is annexed hereto as Exhibit 9.

23. On or about February 6, 2008, in email correspondence also copied to Respondent Cobb, Archivist Ment confirmed that the files Petitioner had requested addressed "topics related to the

investigations, legal issues, etc.,” and that the requested files “showed the inner workings of Moskoff’s operation,” but stated that certain of the files “fall under the policies for the protection of individual teachers’ privacy rights.” True and correct copies of David M. Ment’s February 6, 2008, email correspondence with his accompanying memorandum of the same date are annexed hereto as Exhibit 10.

THE CITY’S ADOPTION OF RULE 3-02

24. On or about February of 2008, Respondent adopted as a Rule, *inter alia*, section 3-02 of Title 49, Rules of the City of New York titled, “Municipal Archives Guidelines for Archival Use of Board of Education ‘Anti-Communist’ Case Files,” with an effective date of March 26, 2008 (“Rule 3-02”). Subparagraph “A” of Rule 3-02 states, in pertinent part:

The Municipal Archives preserves and makes available for research historical records of the New York City Board of Education (“the Board”). This collection includes several records series (nos. 590, 591, 593, 594, 595, 596 and 597) that pertain to the “anti-Communist” activities of the Board from the 1930s through the 1960s. They contain personal and confidential information relating to teachers and other school personnel investigated and/or questioned by the Board for alleged support of or association with the Communist Party. The individuals who are the subject of these files have a privacy right regarding information of a personal nature contained in them; this includes a privacy right regarding the fact that the subject case file exists.

A true and correct copy of Rule 3-02 is annexed hereto as Exhibit 11. (Emphasis supplied)

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

- (1) Researchers who request access to a specific file for the purpose of researching the views or activities of the individual who is the subject of that file or of another individual named in that file must obtain permission for such access from the subject individual and from the named individual, as applicable. If the subject or named individual is deceased or unable to give or deny permission, such permission must be obtained from the individual's legal heirs or custodians, as specified in forms MA-101A, MA-101B, and MA-101C.

- (2) Researchers engaged in more general research not limited to a particular individual or individuals may access files in the restricted series upon certifying that they will neither record nor use any names or personally identifiable material obtained from such files, form (MA-101D).
- (3) When a researcher accesses a file with permission from the individual who is the subject of that file, the Archives will redact the names of other individuals in the file whose permission has not been obtained.
- (4) Self-service photocopying is not available for anti-Communist case file documents. All photocopies will be redacted to remove information identifying any individual whose permission has not been obtained.
- (5) Published materials and materials created for general distribution, such as newspaper clippings and press releases, are not subject to the restrictions set forth in this section.”

Id.

26. In accordance with the above, the City sought to compel Petitioner to complete Form MA-101D as a pre-condition to gaining access to certain anti-Communist case files. Form MA-101D requires a certification confirming the requesting party’s “agree[ment] to the following conditions:

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

A true and correct copy of Form MA-101D, which Ms. Harbatkin refused to and did not sign, is annexed hereto as Exhibit 12.

**THE REQUESTED HISTORICAL RECORDS ARE OF SIGNIFICANT
PUBLIC INTEREST AND EDUCATIONAL VALUE**

27. During the course of her research, Petitioner was allowed to access redacted versions of certain agency records, including those pertaining to Assistant Corporation Counsel Moskoff's investigation and examination of her parents, Sidney Harbatkin and Margaret Horvath Harbatkin. Those records establish that, rather than submit to Moskoff's interrogation, Sidney Harbatkin tendered his formal resignation from the New York City school system on or about October of 1955. In accordance with standard investigative procedures, Moskoff caused a memorandum to be included in Mr. Harbatkin's permanent employment file, stating as follows:

Evidence has been brought to my attention tending to indicate that SIDNEY HARBATKIN, the holder of a substitute teacher's license in 1953, was a member of or affiliated with the Communist Party.

If SIDNEY HARBATKIN should apply for a renewal or reinstatement of his substitute teacher's license or for any other license, this statement should be brought directly to the attention of the Superintendent of Schools. I have arranged that it remain in a sealed envelope in his file unless he attempts to regain a position with the Board of Education.

True and correct copies of the case files obtained by Petitioner relating to the Board's investigation of her mother and father (numbers 897 and 894, respectively) are annexed hereto as Exhibits 13 and 14, respectively.

28. File number 897 contains a verbatim and at times chilling transcript of a sworn interview with Moskoff given by Petitioner's mother Margaret Horvath Harbatkin on or about January 13, 1956. In that transcript, Moskoff identifies his charge as follows:

Before I put any questions to you so that you may guide yourself accordingly, I want to refresh your recollection as to what the policy of the Board of Education is and has been with respect to this subject matter. The Board in December of 1951 adopted a Declaration of Policy which reiterated a then existing policy which in

substance was that present membership in the Communist Party is a sufficient basis for disqualification from continued employment in the school system. The Board said that past membership in the Communist Party standing alone, did not necessarily require disqualification but that each case of past membership would be considered in the light of the particular facts and circumstances involved, including the nature of the membership, its extent, its duration and most important of all the severance, as to whether or not there was a final, complete and honest severance from the Party.

Exhibit 12, p. 2.

29. Moskoff's interrogation also sought to compel Mrs. Harbatkin to "name names":

[Mr. Moskoff]

Q. All right. Now the Board of Education in March of 1955 adopted a resolution which required teachers who were once Party members and who have knowledge of facts concerning their membership, particularly with regard to other teachers who were members, to divulge such information to the Superintendent of Schools so that he might make a discreet inquiry to find out whether those people left the Communist Party. The resolution provided that if a teacher failed or refused to divulge this information to the Superintendent he would have to report that fact to the Board of Education together with any circumstances that might be deemed extenuating. Now pursuant to that resolution, I am required therefore to ask you, to direct you rather, to identify those people who were members of this group of which you were a member between 1940 and 1942 who were known to you then to be teachers in the New York City school system. Now what is your answer please?

[Mrs. Harbatkin]

A. I don't remember any. I've known teachers at so many different schools. As a substitute I went from - I don't even remember all the different schools I worked at Mr. Moskoff, and that's the truth. I've been in so many schools, I've known teachers in so many different schools - I don't remember people.

Id., p. 21.

30. During the interview of Mrs. Harbatkin, a list of names of the members of a particular group of the Communist Party was read to her and she was asked if this was the group of which she was a member. At page 7 of the interview, Moskoff identified five (5) names of alleged members of that group. Those names and that list were produced in response to Petitioner's research request, but with each and every name redacted. Accordingly, Petitioner is unable to identify those who were allegedly in the same

group as her parents and other suspected Communists, and/or those who may have been informants against them.

31. Also included in the records associated with Petitioner's parents was a transcript from Records Series 591, Box 10, Folder 3 of an interview with an informant identified only as "Sprint" dated October 25, 1955. Upon information and belief, "Sprint" was an informant who gave Moskoff the name of Petitioner's mother as a possible member of or sympathizer with the Communist Party. Each and every name contained in "Sprint's" interview, except for Petitioner's parents, was redacted in the version produced to Petitioner, thus prejudicing Petitioner's ability to research and report on newsworthy historical events. A true and accurate copy of the redacted records contained in Box 10, Folder 3, is annexed hereto as Exhibit 15.

32. Further, Petitioner gained access to a portion of the materials from Records Series 591, Box 10, Folder 3, titled "Sprint." The interview transcript contained in Box 10, Folder 3, contained pervasive redactions of nearly every name, including place names and school names, whether partial or full and without any apparent regard as to whether disclosure of that information qualified as an unwarranted invasion of personal privacy. There was no indication in the file or elsewhere that any of the named individuals had requested that their names be redacted. *Id.*

**RESPONDENTS' DENIAL OF PETITIONER HARBATKIN'S FOIL
REQUESTS FOR ACCESS TO THE NEW YORK CITY BOARD
OF EDUCATION'S "ANTI-COMMUNIST" RECORDS SERIES**

33. On or about October 17, 2008, Petitioner filed a FOIL request seeking unrestricted access to certain records contained in the Board of Education's "anti-Communist" Series. A true and correct copy of Petitioner's October 17, 2008, FOIL request is annexed hereto as Exhibit 16.

34. On or about November 6, 2008, Respondent Cobb denied Petitioner's request for access to agency records under FOIL. A true and correct copy of Respondent Cobb's November 6, 2008, letter denying public access to the requested records is annexed hereto as Exhibit 1, *supra*.

35. Petitioner filed a timely administrative appeal from Respondent Cobb's November 6, 2008, denial by letter dated November 26, 2008. A true and correct copy of Petitioner's November 26, 2008, administrative appeal is annexed hereto as Exhibit 17.

36. On or about December 9, 2008, Respondent Flannelly effectively denied Petitioner's administrative appeal by conditioning the right of public access to agency records under FOIL on Petitioner's agreement to and certification of compliance with the conditions set forth in Form MA-101D – a certification which, upon information and belief, is not materially different in its purpose or effect than the anti-Communist certifications obtained by Saul Moskoff as a pre-condition to continued employment as a teacher in the New York City school system. A true and correct copy of Respondent Flannelly's December 9, 2008, denial letter is annexed hereto as Exhibit 2, *supra*.

37. As purported justification for the denial and/or impermissible conditioning of public access, Ms. Flannelly stated, *inter alia*:

We would be pleased to grant Ms. Harbatkin un-redacted access to all the material she has requested except those files that we are obliged to restrict in order to avoid unwarranted invasion of the privacy of the teachers who are the subject of the files (in accordance with the provisions of subdivision 2 of section eighty-nine of the Freedom of Information Law). ***However, given our desire to provide the fullest possible access to these historically important materials, we have adopted procedures by which Ms. Harbatkin can gain un-redacted access to even the restricted files, provided that she agree not to publish names.***

Please note that the Municipal Archives is not "acting as a surrogate . . . on behalf of third parties." When the Municipal Archives accessions records from the creating office or agency, it assumes ownership of the records and all responsibility for future disposition of the material.

See Exhibit 2, *supra*. (Emphasis supplied)

38. Upon information and belief, Respondent's denial of public access erroneously relies upon Section 89(2) of FOIL, which authorizes the withholding of public access to agency records or the deletion of identifying details only when necessary to prevent an "unwarranted invasion of personal privacy." Under the statute, an unwarranted invasion of personal privacy can include:

- (i) disclosure of employment, medical or credit histories or personal references of applicants for employment;
- (ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- (iii) sale or release of lists of names and addresses as such lists would be used for solicitation or fundraising purposes;
- (iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- (v) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
- (vi) information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the Workers Compensation Law.

New York *Public Officers Law* § 89(2)(a) & (b) (McKinney 2008).

39. Upon information and belief, the Department of Records and Information Services relied on the exemptions from public disclosure set forth in FOIL sections 89(2)(b)(iv) and/or 89(2)(b)(v) as purported justification for its denial and/or unlawful conditioning of Petitioner's right of public access on her agreement, *inter alia*, "to indemnify the Department of Records/Municipal Archives, the City of New York, and its employees" for any claim which might arise from publication.

40. Upon information and belief, many, if not most, of the targets of the Board of Education's "anti-Communist" activities identified in the requested agency records are either deceased or retired from their professional lives and therefore unlikely to suffer any economic or personal hardship caused by the disclosure of the agency records sought by Petitioner. For example, Sidney Harbatkin was deceased as of April 2, 1960, while Margaret Horvath Harbatkin was deceased as of August 15, 2003.

41. Upon information and belief, the Board of Education deemed its anti-Communist crusade as being of critical importance to the ongoing functions of the New York City public school system, and

the City's receipt and maintenance of those records for research and educational purposes is consistent with and compelled by Chapter 72 of the Charter of the City of New York.

42. Upon information and belief, the plain terms of FOIL sections 89(2)(b)(iv) & (v) are inapplicable to the records sought here.

BASIS FOR RELIEF

AS AND FOR A FIRST CAUSE OF ACTION

43. Petitioner repeats and realleges all of the allegations set forth above as if more fully set forth herein.

44. Petitioner commences the instant special proceeding seeking a writ of prohibition and mandamus, pursuant to Article 78 of the CPLR and Section 89(4)(b) of the *Public Officers Law*.

45. Petitioner brings the instant proceeding in New York County pursuant to CPLR 7804(b) and CPLR 506(b) because it is a County within the judicial district wherein Respondents made the determinations complained of and refused to perform the duties specifically enjoined upon them by law, and is the County where their principal office is located.

46. Petitioner seeks to prohibit enforcement of, and to vacate, the City's determinations dated November 6, 2008, and December 9, 2008, denying public access to agency records under FOIL, on the grounds that such denials result from the City's failure to perform a mandatory duty enjoined upon it by law, were made in excess of the City's jurisdiction, were affected by errors of law in that the decisions were contrary to the provisions of FOIL, constitute an abuse of discretion, and were arbitrary and capricious.

47. The City's determinations dated November 6, 2008, and December 9, 2008, either implicitly or explicitly acknowledge that no individual named in the Board of Education's "anti-Communist" series of records has requested anonymity or the redaction of her/his name from public records.

48. Upon information and belief, the City's erroneous determinations above have the practical effect of unreasonably and unlawfully precluding public access to agency records containing information of abiding public interest relative to a historically significant era in the United States in general and in the New York City public school system in particular.

49. The City's decisions apply specifically and directly to Petitioner and, unless vacated, will immediately and irreparably abrogate the public access rights FOIL guarantees to Petitioner and to the public at large, without any rational or lawful basis.

50. Petitioner cannot seek of review of the City's administrative determinations by way of further administrative appeal or by appeal to another court or tribunal and have exhausted all administrative remedies before Respondent agency.

51. The instant proceeding is ripe for judicial review.

52. The instant proceeding is timely brought within four months of the determinations complained of, Petitioner has no adequate remedy at law, and has made no prior application for the relief sought herein to any court or judicial tribunal.

AS AND FOR A SECOND CAUSE OF ACTION

53. Petitioner repeats and realleges all of the allegations set forth above as if more fully set forth herein.

54. Upon information and belief, the City has conditioned Petitioner's right of public access to agency records on her agreement to execute and comply with the restrictions contained in Rule 3-02 and Form MA-101D.

55. By requiring Petitioner to affirm her agreement and compliance with the restrictions contained in Rule 3-02 and Form MA-101D as a pre-condition of gaining public access, Respondent seeks to compel the relinquishment of Petitioner's constitutionally-protected free speech right to publish truthful, historically accurate information obtained from agency records on a newsworthy and historically significant matter of legitimate public interest and concern – *i.e.*, the Board of Education's pervasive anti-Communist activities of the mid-Twentieth Century, which impacted hundreds of City schoolteachers and their families, including Petitioner's own family– and, further, seeks to coerce Petitioner's consent to an unprecedented and impermissible form of modern censorship.

56. Upon information and belief, the City's erection and maintenance of unreasonable and unauthorized policies, customs and procedures establishing barriers and conditions to Petitioner's and the public's correlative rights of access and freedom of speech is unconstitutional and constitutes a breach of its statutory and regulatory mandate to act as custodian of historically significant public records and to preserve those records for posterity and public education.

57. The requirements in Form MA-101D of total confidentiality (subsection 1), of obtaining the agency's prior approval before using "any direct quotation" in any "public presentation, thesis, dissertation, web site, or any other publication" (subsection 2), and of indemnification (subsection 3) – compliance with which the City mandates as pre-conditions to granting public access to the so-called

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

AS AND FOR A THIRD CAUSE OF ACTION

58. Petitioner repeats and realleges each and every allegation above as if set forth in full herein.

59. Petitioner is likely to succeed on the merits of her claims that the City’s denial of access under FOIL was irrational, arbitrary and capricious, and contrary to law, and that Rule 3-02 and the requirement that she certify compliance with Form MA-101D constitute impermissible conditions placed on the exercise of Petitioners’ and the public’s constitutionally-protected rights of free speech.

60. The deprivation of Petitioner’s free speech rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution constitutes irreparable harm.

61. The balance of the equities lies with Petitioner.

62. Petitioner is entitled to a permanent injunction enjoining, prohibiting and restraining the City from using, relying on or otherwise enforcing Rule 3-02 and/or Form MA-101D as a basis for denying access to agency records and/or prohibiting or restricting publication of their contents.

WHEREFORE, Petitioner respectfully requests entry of a Judgment:

- (a) Vacating, annulling, overruling and prohibiting the further enforcement of the November 6, 2008, determination of Respondent-Defendant Kenneth R. Cobb, in his official capacity as Assistant Commissioner and Records Access Officer, New York City Department of Records and Information Services, denying Petitioner’s FOIL request made pursuant to Article 6 of the *Public Officers Law*;
- (b) Vacating, annulling, overruling and prohibiting the further enforcement of the December 9, 2008, determination of Respondent-Defendant Eileen M. Flannelly, in her official capacity as FOIL Appeals Officer, New York City

HISCOCK & BARCLAY, LLP

Department of Records and Information Services, denying Petitioner's appeal filed pursuant to Article 6 of the *Public Officers Law*;

- (c) Declaring and Adjudging that Section 3-02, Title 49, Rules of the City of New York, and accompanying Form MA-101D, on their face and as applied, impose unconstitutional conditions and/or an unconstitutional prior restraint on Petitioner's exercise of rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the New York State Constitution;
- (d) Permanently enjoining, prohibiting and restraining the City from in any way relying upon, referring to, or otherwise attempting to enforce Section 3-02, Title 49, Rules of the City of New York, or the refusal to complete Form MA-101D, as grounds for denying public access to or the right to publish the contents of agency records;
- (e) 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;
- (f) Awarding Petitioner her costs, disbursements, and attorneys' fees pursuant to Section 89(4)(c) of the *Public Officers Law*; and,
- (g) Awarding Petitioner such other and further relief as to the Court may seem just and proper.

DATED: April 6, 2009
New York, New York

HISCOCK & BARCLAY, LLP

By: _____

Michael J. Grygiel
William A. Hurst

Attorneys for Petitioner Pro Bono
Lisa Harbatkin
Office and Post Office Address
7 Times Square
New York, New York 10036
Telephone: (212) 509-5212

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

LISA HARBATKIN, being duly sworn, deposes and says that deponent is the Petitioner-Plaintiff named in the above-entitled combined proceeding; that deponent has read the foregoing Petition/Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes them to be true. The grounds of deponent's knowledge are her personal knowledge and knowledge obtained from scholarly research and review of agency records.



LISA HARBATKIN

Subscribed and sworn to before me this

31st day of ^{March} April, 2009.



Notary Public

STEVEN E. HILLER
Notary Public, State of New York
No. 01HI4507658
Qualified in New York County
Term Expires November 30, 2009

HISCOCK & BARCLAY, LLP