To Be Argued By:
Michael J. Grygiel

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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 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.

BRIEF ON APPEAL FOR PETITIONER-APPELLANT LISA HARBATKIN IN SUPPORT OF PUBLIC ACCESS TO AGENCY RECORDS UNDER FOIL

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INTRODUCTION

Petitioner-Appellant Lisa Harbatkin ("Ms. Harbatkin" or "Petitioner") respectfully submits the following brief in support of her appeal from the Judgment of Supreme Court, New York County (Hon. Marylin G. Diamond, J.S.C.) entered on March 18, 2010 (the "Judgment"). (R. 5)[1] In the Judgment, the lower court denied 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"). (R. 6) The Judgment also granted, *sub silentio*, the City's motion to dismiss the declaratory judgment aspect of this combined proceeding in which Ms. Harbatkin sought a determination that the City's imposition of various restrictions on her use of the anti-Communist case files in her research and writing violated her rights of free speech protected under the federal and New York State Constitutions. (R. 7) For the reasons presented in the record, and as discussed more fully herein, this Court should reverse the Judgment, and further order the immediate disclosure of the records at issue in unredacted form while striking down the conditions the City has imposed on their use as flagrantly unconstitutional.

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[1] References denoted with the letter "R" refer to the corresponding page(s) of the Record on Appeal submitted herewith.

PRELIMINARY STATEMENT

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)

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 -- ostensibly to protect their privacy. The lower court's cursory affirmation of the City's denials of access to these records should be reversed, and the City should be directed to disclose the requested information. Disclosure will provide the general public with an opportunity to assess the circumstances culminating in the Board of Education's anti-Communist investigations of the mid-twentieth century, including the City's use of informants

(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 lower court accepted, 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." The lower court erred because the City's conclusory assertion that disclosure of the requested records would result in an unwarranted invasion of personal privacy was insufficient 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[2] 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, to obtain permission from its Department of Records/Municipal Archives before using "any direct quotation"

[2] 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, R. 70) Subsequent to Ms. Harbatkin's initiation of the Article 78 proceeding in the lower court, the City apparently modified Section 3.02 by withdrawing its pre-publication approval requirement.

from the restricted materials in any publication. This was not only a direct and substantial impediment to Ms. Harbatkin's ongoing research, but a frontal assault on the First Amendment. Our constitutional system does not allow the government to impose prior restraints on speech, a form of censorship that is anathema to the marketplace of ideas.

There is no greater offense to the First Amendment and no greater harm to our constitutional order than a government that can prevent the publication of information with which it disagrees or of which it disapproves, which is exactly what the lower court has allowed here. By effectively affirming the validity and enforceability of Rule 3-02 and its implementing Form D, the lower court 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 "record, copy, disseminate or publish" any names or personally identifiable material contained in those files. (R. 70) This sweeping regulation, which holds those who would have unredacted access to the archives hostage to the conditions on publication imposed by the City, 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). This guiding principle constrains the

government in all of its varied activities, ranging from the direct (*e.g.*, by requiring official approval before information can be published) to the indirect (*e.g.*, through the imposition of an indemnification requirement as a precondition of protected expressive activity) regulation of speech.

It is not as if the law in this area is uncertain. In its misguided efforts at restricting access to the materials, the City has ignored (or disregarded) a long-established constitutional principle: the government may not withhold access to information as a vehicle to impose content-based restrictions on private speakers or to block the publication of disfavored subject matter. That is precisely what the lower court's Judgment allows to occur here.

In the end, there is surely something disturbing, and more than a little ironic, about the events that brought Ms. Harbatkin to court: the City now seeks, several decades after the fact, to prohibit Ms. Harbatkin from "naming names" in writing about this period in history. In a certain sense, this is the opposite of the practices reflected in the case files, when the Board of Education wielded its power and authority to compel the systematic identification of public school teachers suspected of ideological infidelity. In this day and age, there is no reason for continuing to keep that information behind the government's closed doors, where the political interrogations memorialized in the records at issue were first conducted more than a 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 court is right, Ms. Harbatkin may be deprived of complete access to that information 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.

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 affiliations of New York City school teachers and others by the New York City Department of Law under the auspices of the New York City

Board of Education. In response to a FOIL request, the City 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. The City also cited decades-old promises of confidentiality to the voluntary and involuntary participants in those 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 N.Y. *Public Officers Law* § 87(2)(b)?

Supreme Court, New York County answered this question in the affirmative.

2). As a precondition to the exercise of the right to review public records concerning its anti-Communist investigations (but not records on any other subject matter) for the purpose of scholarly research connected therewith, the City 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.[3] Has the City placed unconstitutional

[3] In enacting a revised post-litigation version of Section 3-02, the City has apparently abandoned the requirements

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?

Supreme Court, New York County did not determine this question, yet nevertheless dismissed the declaratory judgment portion of this combined proceeding.

STATEMENT OF THE CASE

A. Ms. Harbatkin's Historical Research Activities.

Petitioner-Appellant Lisa Harbatkin ("Ms. Harbatkin") is a scholar actively involved in research and writing regarding the New York City Board of Education's notorious anti-Communist investigations into public school teachers' political beliefs between the 1930's and 1960's. During these investigations Saul Moskoff, Assistant Corporation Counsel assigned to the Board of Education and an individual well-known for his McCarthyism and anti-Communist sentiments, conducted extensive interrogations with numerous teachers suspected of espousing Communist beliefs. (R. 16) Each interrogation was transcribed and preserved by the City, along with additional records about the informants who identified individual teachers as suspected Communist sympathizers. (R. 17) Ms. Harbatkin

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that a party requesting access (1) obtain permission from the Department of Records/Municipal Archives for any direct quotation from the restricted materials to be used in any public presentation, and (2) indemnify the City against any claims or liability arising from unauthorized publication of the material. While the trial court did not address these flagrantly unconstitutional conditions on free speech challenged by Ms. Harbatkin below, they are no longer at issue in the case in view of their withdrawal by the City.

has a personal connection to the City's anti-Communist campaign: her parents, both public school teachers, were among those interrogated by the City when McCarthyism reached a fever pitch during the 1950's. Ms. Harbatkin's father was one of the 400 teachers forced to surrender his teaching license, and livelihood, in the wake of the City's interrogations. (R. 16)

B. The City's Denial of Ms. Harbatkin's FOIL Request and Administrative Appeal.

Through the course of her research, Ms. Harbatkin discovered that the New York City Municipal Archives, a sub-agency within the Department of Records and Information Services, housed records of the anti-Communist interviews and related materials. (R. 18) In June of 2007, Harbatkin contacted a City archivist and requested access to those files. (R. 18) The archivist informed her that the City was developing procedures to govern public access. (R. 18) After repeated assurances that such procedures were forthcoming, but faced with a continuing denial of access (R. 53-61), Ms. Harbatkin filed, as required by law, a FOIL request on October 17, 2008, seeking disclosure of the City's anti-Communist records. (R. 24) New York City Assistant Commissioner and Records Access Officer Kenneth R. Cobb denied Ms. Harbatkin's FOIL request in a letter dated November 6, 2008. (R. 24) Ms. Harbatkin filed an administrative appeal on November 26, 2008, which was denied in a letter dated December 9, 2008, from New York City Department of Records Deputy Commissioner and FOIL Officer Eileen M.

Flannelly. (R. 25, 34-35, 182-183) The appeal denial letter, which marked the City's final and binding decision regarding Ms. Harbatkin's FOIL request, informed Ms. Harbatkin that complete access to the anti-Communist records would be contingent upon her compliance with the City's newly created 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" ("Rule 3-02"), enacted as a direct response to her efforts to gain access to these historic materials. (R. 24, 34-35)

C. The Unconstitutional Conditions Imposed by Rule 3-02/Form D.

Rule 3-02 was officially adopted by the City in February of 2008 and took effect on March 26, 2008. (R. 20, 68-69) It states that "the individuals who are the subject of these [anti-Communist] 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." (*Id.*) Additionally, Rule 3-02 outlined further regulations and/or procedures governing the public's access to the anti-Communist files. These include requirements that: (1) individuals requesting a specific file must obtain permission to access it from the subject of that file, or if deceased, from the subject's heirs; (2) individuals conducting general research must certify that they will not record or use any names or personally identifiable material from the file: (3) when a researcher accesses a file with the permission of the subject of

that file, the Archives will redact the names of individuals whose permission has not been obtained; and (4) all photocopies will be redacted to remove information identifying individuals whose permission has not been obtained.[4] (R. 21-22, 70)

Pursuant to these requirements, the City sought to compel Ms. Harbatkin to complete Form MA-101D ("Form D") as a precondition of granting access to certain anti-Communist files. (R. 70) In its present iteration, Form D requires a party seeking access to the anti-Communist files to certify that he/she will (1) not disseminate or publish "in any form any names or other identifying personal information" obtained from the restricted materials.

D. Ms. Harbatkin's Commencement of the Underlying Article 78 Proceeding to Obtain Public Access to Historically Valuable Information.

As a survivor of individuals who were interrogated, Ms. Harbatkin was granted full access to files containing information about her parents, Sidney and Margaret Harbatkin. (R. 22) Through her review of these and other materials, Ms. Harbatkin was able to ascertain that considerable historical information is contained in the City's catalog of anti-Communist files. She discovered significant facts about the nature of the interrogations, including the content of the questions asked of the subjects, and the implicit threats of job loss contained in those questions. (R. 22-23) Recognizing the historical importance of the information contained in the anti-Communist files, and because the conditions imposed by Rule

[4] These restrictions remain in full force and effect in the current version of Rule 3-02 enforced by the City. (R. 317)

3-02 and Form D violated her right to freedom of speech, Ms. Harbatkin refused to sign Form D. As a result of the City's denial of access, Ms. Harbatkin filed an Article 78 petition pursuant to *CPLR 7803* in the Supreme Court of the County of New York on April 6, 2009, challenging Rule 3-02 as arbitrary and capricious and an abuse of discretion in conjunction with a Complaint seeking a judgment declaring Rule 3-02 and its attendant forms and regulations violations of the First and Fourteenth Amendments. (R. 9-182)

E. <u>The City's Post-Litigation Offer of Settlement</u>.

In a letter dated June 15, 2009 – the day before the City's responding papers were due in the litigation below – Assistant Corporation Counsel Marilyn Richter transmitted a letter to Ms. Harbatkin's counsel following up on previous discussions in order to "memorialize in writing the respondents' current position ... concerning [Petitioner's] request to access voluminous records from the restricted records of the New York City Board of Education's anti-communist investigations." (R. 205-207) The City's June 15, 2009, offer of settlement stated that respondent would "provide either of the following forms of access to your client, Ms. Harbatkin:

> 1) Ms. Harbatkin may obtain copies of the documents, with the personally identifying information concerning individuals discussed in these documents redacted, to protect the personal privacy of those individuals and, if deceased, the personal privacy of their surviving relatives. Please note that there is a copying charge of $0.25

per page. (DORIS does not have a redacted set of the documents, and will have to copy the unredacted set and then make the redactions.)

2) Ms. Harbatkin may access unredacted copies of the documents, provided that she agrees, in writing, not to record, copy, disseminate or publish in any form any names or other identifying personal information obtained from the records. A copy of the written application that Ms. Harbatkin will be required to sign, containing the terms of the agreement, is enclosed.

(*Id.*) The June 15, 2009, correspondence included a new form, to be signed by Ms. Harbatkin, indicating her consent to the above conditions. (R. 317)

Accordingly, the City was prepared abruptly to jettison Rule 3-02's unconstitutional requirements, as listed in Form D, that Ms. Harbatkin obtain official government permission before publishing any direct quotations from the anti-Communist case files and provide indemnification to the City and its employees.[5] However, the "new" conditions contained in the City's June 15, 2009, offer and its accompanying revised form were in certain respects *more stringent* than those contained in Form D. First, the City's June 15, 2009, letter expanded the prohibition against "disseminat[ing] or publish[ing]" names or other identifying information obtained from the restricted records to include a previously nonexistent ban against any attempt to "record [or] copy" such names or other identifying information. (R. 317) Consequently, Ms. Harbatkin *would be prohibited from even writing the names down on a piece of paper for the purpose*

[5] As stated above, the City has abandoned these requirements in enacting a modified version of Rule 3-02.

of conducting further research. And because the language used in the new form is overly broad, she would be prohibited from publishing "any names" – not just those names that the City had redacted in the purported interest of protecting personal privacy. (*Id.*)

Second, the City attempted to impose on Ms. Harbatkin – a freelance writer and researcher – the cost of reproducing two (2) complete sets of responsive records due to the cumbersome and inefficient redaction protocols followed by the Municipal Archives, which entail making a complete copy set of the requested records; making redactions to those copies; then producing, in effect, a copy of the redacted copy, but billing the requesting party for both sets. The requirement of reimbursing the City for the cost of two (2) sets of records, when only one is actually produced, not only directly contravenes FOIL, but presents a financial impediment which further chills the exercise of Ms. Harbatkin's constitutional free speech rights. (R. 26-27)

On June 16, 2009, Petitioner's counsel transmitted a letter to Assistant Corporation Counsel Richter, rejecting the City's June 15, 2009, offer and seeking confirmation that "the City has abandoned and will not seek to enforce these two [advance approval and indemnification] requirements against Ms. Harbatkin." (R. 269-270) The City's counsel replied, in pertinent part, by stating "that respondents will not subsequently ask Ms. Harbatkin to sign an agreement containing the two