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*.

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

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## PRELIMINARY STATEMENT

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

In its opposing papers, the City asserts two reasons for denying unredacted access to its historically significant anti-Communist case files: (1) a right of privacy on the part of the teachers who were investigated (and their family members) owing to the "sensitive nature" (City Br., 4) of the information at issue; and (2) the promises of confidentiality made to those who were interrogated by their interrogators. As discussed more fully below, neither reason is sufficient to support the continuing nondisclosure of the complete historical record from this debilitating period in our nation's history — when tyranny masqueraded as patriotism — as requested by Ms. Harbatkin.

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

## ARGUMENT

## POINT I

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

In resisting unredacted disclosure of the "anti-Communist" case files, the City relies on section 89(2)(b)(v) of FOIL (City Br., 26), which provides that an unwarranted invasion of personal privacy includes the "disclosure of information of a personal nature reported in confidence to an agency and *not relevant to the ordinary work of such agency."* N.Y. *Pub. Off. Law §* 89(2)(b)(v) (McKinney 2001) (emphasis supplied). By its express terms, therefore, this exemption does not apply in this instance because the interrogations conducted by the Board of Education's counsel, Saul Moskoff, and memorialized in the records at issue were directly relevant to its mission at the time — determining whether past or present membership in the Communist Party disqualified a teacher from continued employment in the New York City public school system[1] — as the City's opposing papers confirm. *(See* R. 23)[2]

[1] In December of 1951 the Board of Education adopted a resolution formalizing its previous policy and practice that a public school teacher's "present membership in the Communist Party" was, in and of it itself, a sufficient basis for termination of employment. (*See* R. 23)

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

Perhaps to distract from the fact that it does not qualify for the specific FOIL exemption it asserts as the basis for withholding what it acknowledges (as it must) are "records of historical significance" (R. 195), the City chastises Ms. Harbatkin for minimally citing *Cirino v. Board of Education of the City of New York,* N.Y.L.J., July 10, 1980, No. 0011117/1980 (N.Y.Co. Sup. Ct., 1980), an unreported decision nearly thirty (31) years old which, previously to the lower court's decision, had never been cited by any court, in New York State or any other jurisdiction.[3] The City characterizes *Cirino* as "exactly the same as" the instant case. (City Br., 28) It plainly is not.

In *Cirino,* petitioner was researching the "impact and sequelae of the Feinberg Act[4] on the lives of those who were adversely affected by that Act," which was "spawned in a dark time in our history in the 1950's known as the McCarthy Era" when "the lives of many people were ruined as a result of 'witch hunts' for Communists and other alleged 'subversives' . . . ." The Supreme Court, New York County, held that FOIL required redaction of "identifying details" from the Board of Education's files of *living* subjects of the investigations — the only records addressed in the *Cirino* decision. Equally as important, *Cirino* was decided

[3] As of March 29, 2011, a computerized case name search of all WESTLAW state and federal court databases using the term "Cirino" yielded no results concerning the decision referred to by the City.

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

in a framework and with the understanding that even the records "of individuals who were still alive" (City Br., 28 n.6) would remain sealed only "until the year 2000 on the grounds that they were [act]ive in nature." In other words, those records would be made available in the public domain in their entirety at the beginning of the second millennium because of the withering of any privacy interest that occurs commensurately with the passage of time and actuarially with the death of the subjects. It can no longer realistically be maintained that disclosure would result in economic or personal hardship to the teachers — whether living or deceased — who were targeted because of their political beliefs and associations. This is reinforced by the Court's forceful recognition in *Cirino* that "any such hardship resulted from the McCarthy era witch hunt conducted under the aegis of the Feinberg Act, and not from disclosure of the abuses conducted in the name of patriotism."

If, as the City contends, the "same result" was reached in *Cirino* and that it "should be no different here" (City Br., 13), then disclosure of the investigative files of teachers who are now deceased — a number which no doubt has increased considerably since 1980 — should occur forthwith, as those records were not at issue in *Cirino*, where the judgment was limited to redaction of the files of living individuals. (R. 199) A careful reading of *Cirino* therefore reveals that it actually undermines, rather than supports, the nondisclosure position asserted by the City.

Almost three decades have passed since the case was decided, in which time the Berlin Wall has been dismantled, the former Soviet empire has collapsed, and Marxism has been pervasively discredited as a theory of political and economic organization. Whatever privacy interest might be said to have existed during an earlier, and regrettable, chapter in our nation's history has long since faded away and can no longer prevent full disclosure of the historical record "pertain[ing] to the `anti-Communist' activities of the Board from the 1930s through the 1960s." (R. 195)

## POINT II

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

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

The City essentially contends that § 89(2)(b)(v) of FOIL is not relevant to this case and that the facts at bar are necessarily remitted to the general balancing-of-interests analysis adopted by the New York Court of Appeals in *New York Times Co. v. City of New York Fire Dept.*, which involved a request for FOIL disclosure of calls made on the tragic morning of the September 11, 2001, to the City Fire Department's 911 emergency system. 4 N.Y.3d 477, 485 (2005) (stating that because none of the six privacy exemptions to FOIL were applicable, the court

had to decide "whether any invasion of privacy here is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information."). Based on the "extraordinary facts in th[at] case," *id* at 484, a privacy interest was recognized on behalf of the surviving relatives of those who, confronted with their imminent demise, placed emergency 911 calls:

> The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller — or the caller, if he or she survived — might reasonably be deeply offended at the idea that these words could be heard on television or read in the *New York Times.*

*Id.* at 485.

Ms. Harbatkin does not take issue with the proposition that a privacy interest may continue beyond death. (Pet. Br., 12-13) However, as the Court of Appeals emphasized in *New York Times v. City of New York Fire Dept.*, that is "only the beginning of the inquiry." 4 N.Y.3d at 485. A reviewing court is obligated to balance the relevant interests in a given case in determining whether disclosure would injure the asserted privacy interest and, further, whether the "injury to privacy would be 'unwarranted' within the meaning of FOIL's privacy exception." *Id.* The City's argument proceeds as if the recognition that "a privacy interest remains even after death" (City Br., 14), conjoined with the limited

privacy interest of those teachers who may still be alive, as upheld in *Cirino* — a decision which, as discussed above in the text, presupposed complete (i.e., unredacted) disclosure of the entire series of anti-Communist case files after the year 2000 — is a talisman that somehow displaces or truncates the requisite balancing analysis and mandates nondisclosure. It is not, and it does not. The City goes so far as to claim that there is "a privacy right regarding the fact that the subject case file exists." (R. 195) The City has provided no authority in support of this breathtaking — indeed, Orwellian — assertion. To the contrary, the *New York Times* decision's default balancing analysis is contextual and fact-specific, and depends principally on an evaluation of the *content* of the records at issue to determine whether a privacy interest on the part of a surviving family member is sufficient to overcome the public's presumptive right of access under FOIL.

Unlike the compelling and particularized privacy interest that informed the *sui generis* holding in *New York Times*,[5] the core of the City's privacy argument — adumbrated on page 33 of its brief — is that the teachers who were interrogated ("the persons interviewed," in the City's trivializing parlance) and their surviving relatives would be "distressed" by belated public disclosure of their association with the Communist Party, particularly if they may not have been truthful with

[5] The Court of Appeals noted that a diminished privacy claim would arise from transcripts of other, more conventional calls made to 911, clearly suggesting that the specific and exceptional nature of the calls in that case — which it viewed as tantamount to dying declarations — warranted enhanced privacy protection. 4 N.Y.3d at 485-86.

family members about their involvement. (City Br., 33) Simply put, the City is ostensibly concerned at this late stage about protecting the subjects of the anti-Communist files and their relatives from the embarrassment that it perceives would follow from disclosure of their names.[6] Further, the City's assertion that "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" is nothing short of patronizing and insulting to those men and women who were the subjects of those interviews. This claim is wholly speculative and conclusory. It stands in stark contrast to the demonstrable personal anguish and trauma "those who suffered the loss of loved ones" on September 11, 2001, would experience from public disclosure and likely repetition in the media of the "dramatic, highly personal utterances" of those who perished. 4 N.Y.3d at 492 (Rosenblatt, J., dissenting in part). Tellingly, the City's conjectural privacy claim is not in any way supported by the interrogation transcripts it has submitted in the record — every

[6] Notably, the generalized privacy interest the City is urging on this Court does not exist in the common law of New York State. The Court of Appeals has made this abundantly clear: "in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; ***we have no common law of privacy***." *Howell v. New York Post*, 81 N.Y.2d 115, 123 (1993) (*emphasis supplied*) (*citing Stephano v. News Group Pubis*., 64 N.Y.2d 174, 185 (1984); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440 (1982); *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 497 n. 2 (1978); *Flores v. Mosier Safe Co.*, 7 N.Y.2d 276, 280 (1959)). Further, it is well established that an aversion to mere embarrassment of the type posited by the City is insufficient as a matter of law to sustain a privacy claim. "There is, of course, no cause of action in this State for publication of truthful but embarrassing facts." Howell, 81 N.Y.2d at 124. The argument advanced by the City that allowing unredacted access to the Moskoff transcripts will embarrass the subjects and their survivors is therefore a tenuous basis for a privacy claim. We respectfully submit that, in balancing the competing interests in this proceeding, the Court should be mindful of the lack of solicitude in the law for privacy claims in this State.

one of which confirms that the teachers in question had affiliated with the Communist Party for, at worst, understandable personal and, at best, admirable — even laudatory — reasons: as a matter of intellectual attraction because it was "humanitarian" to do so; to assist in fighting poverty in California; to rescue a failing marriage; to oppose Hitler and the rise of Fascism in the world; and to improve learning conditions in New York City's public schools. (R. 264-67) In short, it is just as likely that unredacted disclosure of the records will allow relatives, researchers, historians and citizens alike to "admire their courage, and to be justly enraged" by the Board of Education's ideological inquisition that purged many experienced, dedicated and competent teachers from employment in the City's public school system. *Id.* at 486. "Precisely because of the importance" of the abusive practices that took place under the banner of patriotism during the McCarthy period — leading, in effect, to the loss of a generation of public school teachers — "Americans deserve to have as full an account of that event as can be responsibly furnished. *Id* at 492 (Rosenblatt, J., dissenting in part).

As the record demonstrates, no such unique privacy interest comparable to that in *New York Times* can be found in the instant case. Even assuming, as the City contends, that Communist Party membership more than half a century ago "showed a lack of judgment and/or naivete" (City Br., 33) — a claim which is much easier to make with the benefit of several decades of hindsight, the end of the

Cold War and the disintegration of the former Eastern bloc — it does not rise to the level sufficient to block unredacted disclosure of these historically valuable records. In the final analysis, disclosure without redactions would not be "objectionable to a reasonable person of ordinary sensibilities." (R. 260)

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

Finally, the City questions whether Ms. Harbatkin intends to use the information at issue "in support of some identifiable public objective." (City Br., 43) It not only has no right to make this inquiry but completely misses the mark in doing so because, as a matter of black letter law, the motives or purpose of someone requesting agency records are irrelevant under FOIL. *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 156 (1999) ("Our prior FOIL decisions have consistently rejected the purpose or status of the person making the FOIL request as a factor of critical significance in applying FOIL exemptions."); *Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 566-67 (1986) (stating that "because FOIL has made full disclosure by public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions"); *Scott, Sardano & Pomeranz v. Records Access Officer,* 65 N.Y.2d 294, 297-98 (1985) ("The Freedom of Information Law, as originally enacted . . . and later amended . . . liberalized public access to government records by obviating the application's showing of an 'interest

therein' as otherwise might be required by section 66-a. Consequently, an evaluation of petitioner's purposes for seeking disclosure is irrelevant in deciding whether it is entitled thereto"); *M Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80 (1984) ("FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose .... Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.") (citation omitted). *See generally United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (held, motive of requester is "irrelevant to defining the weight accorded the presumption of access" to court records because an assessment of motives "risks self-serving judicial decisions tipping in favor of secrecy").

While Ms. Harbatkin has set forth in painstaking detail the legitimate reasons — which, to borrow a phrase, are "completely scholarly and respectful" (City Br., 43) — she is requesting the historical information that has been withheld from her *(see* R. 279-81), she has no obligation to do so in order to obtain disclosure of these non-exempt records under FOIL. To hold otherwise would effectively reverse the City's burden of proof, which requires that it articulate a particularized and specific justification for nondisclosure of subject names and other identifying information contained in the anti-Communist case files. *Public Officers Law §* 89(4)(b)(McKinney 2001); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d

567, 571 (1979); *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987); *Russo v. Nassau Community College*, 81 N.Y.2d 690, 697-98 (1993).

### C. The Interrogation Transcripts Contain Information Provided Under Oath.

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

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

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

With respect to the anti-Communist files, however, this concern is implausible because, as the Moskoff transcripts clearly and repeatedly state, each subject was under an oath of truthfulness. (R. 212, R. 220, R. 225, R. 230)

### D. The Privacy Cases Cited by Respondents Are Inapposite.

The few additional privacy exemption cases cited by the City are readily distinguishable and fail to support its argument. *(See* City Br., 34) *Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse*, 65 N.Y.2d 294 (1985), centered on the application of an entirely different FOIL exemption, where

petitioner law firm sought access to motor vehicle accident reports maintained by respondent in order to solicit potential clients for its personal injury practice. *Id.* at 296. The Court of Appeals held that disclosure of names and addresses of automobile accident victims under those circumstances would constitute an "unwarranted invasion of personal privacy" pursuant to FOIL § 89(2)(b)(iii)'s exemption for the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising

purposes." *Id.* at 298.

*Johnson v. New York City Police Dept.*, 257 A.D.2d 343 (1st Dep't 1999), and *De Oliveira v. Wagner*, 274 A.D.2d 904 (3d Dep't 2000), each involved the narrow question of "whether disclosure of documents generated by the police during the investigation of a crime is warranted under FOIL, when disclosure is sought by an individual who has been convicted of the very crime in question." *Johnson*, 257 A.D.2d at 346; *De Oliveira*, 274 A.D.2d at 904. Unsurprisingly, the decisions held that disclosure of documents which could reveal the identity of murder investigation witnesses to a convicted defendant was an unwarranted invasion of privacy with respect to those witnesses. *See Johnson*, 257 A.D.2d at 347-48; *De Oliveira*, 274 A.D.2d at 905. Needless to say, no such obvious privacy interest arising from concern over the personal safety of individuals based on fear

of reprisals is implicated here. *See Johnson,* 257 A.D.2d at 347; *see generally De Oliveira,* 274 A.D.2d at 904.

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

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

## POINT III

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

Although the City makes much of the promises of confidentiality that were made to those at the time they were interrogated (City Br., 9-13), it ignores that, as the record in this case establishes, the cloak of secrecy thereby imposed was intended to shield the Board of Education's own conduct from public scrutiny as

much as to protect those who were targeted by its ideological cleansing activities. (R. 289-90)

While a factor to be considered in the *New York Times* balancing analysis, the fact that confidentiality was promised — which the City recounts mantra-like throughout its opposing papers, as if mere repetition will somehow bolster its argument — because of what Mr. Moskoff euphemistically referred to as the "tenor of the times" (R. 290) is certainly not dispositive. The tenor of the times is now completely different, and those anachronistic promises should be discredited in weighing the competing interests. Moreover, that promise of confidentiality was given under the coercive circumstances of what amounted to a government inquisition. The New York City Department of Education summoned individuals to these interviews under threats, whether implicit or explicit, that they were to produce the names of any possible members of the Communist Party or surrender their teaching license and livelihood -- as Petitioner's father did. It is clear that the City intended to use any means necessary to obtain the information they sought. Therefore, there is no reason to believe any of the city's promises of confidentiality were offered in good faith or under any traditional circumstances.

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

As a basis for nondisclosure, the notion that the City could agree in perpetuity not to reveal the names of or other identifying information relative to "teachers and other school personnel who were investigated and/or questioned by the Board" (City Br., 9) because they were suspected of political disloyalty exists in considerable tension with FOIL's presumption of open access to official government records to the extent it would subordinate the City's disclosure obligations to the terms of a private confidentiality agreement.[7]

The Legislature established FOIL as dispositive on questions of public access to government records, and the City's disclosure obligations under the statute cannot be overridden by outdated confidentiality agreements the purpose of which is to keep private that which should now be public. *See Geneva Printing Co. v. Village of Lyons*, slip op. at 9-10, (Wayne Co. Sup. Ct., March 25, 1981) ("[T]he agreement to conceal the terms of their settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."). *See also LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 427 (2d Dep't

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

1995) (held, settlement agreement denying public access to its terms "is unenforceable as against the public interest" since "as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records"); *S-P Drug Co. v. Smith*, 96 Misc.2d 305, 311 (N.Y. Co. Sup. Ct., 1978) (held, state agency's disclosure obligations under FOIL cannot be preempted by the terms of a contract with a private party, an arrangement which would negate the public access and accountability contemplated by the statute).

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

## POINT IV

## THE CITY'S CHANGES TO FORM D DO NOT AMEND RULE 3-02, WHICH REMAINS UNCONSTITUTIONAL

The City argues that since July 2009 -- approximately the time Ms. Harbatkin's original action was filed -- it has modified the form agreement, also known as "Form D," that an applicant must complete and sign before the City grants access to the restricted files. (City Br. 44) According to the City, the only

remaining requirement in the revised Form D is an agreement not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from the restricted materials. (City Br. 44-45) Although the City has changed the form attendant to Rule 3-02, it has not amended Rule 3-02 itself, or its unconstitutional nature. Rule 3-02 still exists as official law and contains the same language it did when the City adopted it in February 2008 as a direct response to Petitioner's requests to access the restricted files. Hence, regardless of any past or future changes made to Form D, the City allows the unconstitutional conditions outlined in Rule 3-02 to continue to exist on the books. Furthermore, the July 2009 revisions to Form D do nothing to ameliorate the constitutional offenses inherent in the Form itself or the Rule is was created under. In many respects, the revised version of Forms D is actually more stringent than the previous version. For example, the revised form actually *eliminated* the previously existing exception to the blanket prohibition against disseminating or publishing identifying personal information "in situations where such names and information were obtained solely from existing public sources, such as newspaper clippings." So under the new regime, Ms. Harbatkin, or any individual seeking to research the restricted files, would not even be allowed to publish a name included in the anti- Communist case files which she obtained from a newspaper clipping or elsewhere in the public

domain, as she would have been permitted to do-before the City altered Form D under the guise of settlement.

Additionally, the revised Form D expands the prohibition against "disseminat[ing] or publish[ing]" names or other identifying information obtained from the restricted records to include a previously nonexistent ban against any attempt to "record [or] copy" such names or other identifying information. Consequently, Ms. Harbatkin and others are *prohibited from even writing the names down on a piece of paper for the purpose of conducting further research.* (R. 295-96) And because the language used in the new form is overly broad, Harbatkin and others are prohibited from publishing "any names" — not just those names that the City had redacted in the purported interest of protecting personal privacy. *(Id.)*

Additionally, the newly revised Form D fails to fulfill the purpose for which the City is so ardently arguing in this case -- the supposed privacy rights of those individuals whose names are contained in the interview transcripts and their survivors. The fact that Form D now only prevents Harbatkin and others from recording or publishing the name contained in the restricted files certainly does not restrict them from simply remembering those names and seeking out further information about those individuals through other means. Therefore, the revised Form D's restriction against publication acts not as a shield for the claimed privacy

rights of the interviewees and their survivors, but as a sword for the government to specifically restrict the publication of certain information based solely on its content.

Finally, The City contends that Rule 3-02 and Form D's publication restrictions pass constitutional muster because "exemptions to disclosure of government documents, such as those at issue here, have consistently been upheld under the Constitution." (City Br., 45) However, the City's response completely misses, and fails to address, the core of Ms. Harbatkin's straightforward First Amendment claim. It is Ms. Harbatkin's contention that the publication restrictions imposed by Rule 3-02 and Form D are unconstitutional because they are clearly a content-based governmental restriction on *publication*. (*See* Pet. Br., 42) Such a publication restriction is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, is precisely tailored to serve that interest, and is the least restrictive means available for protecting that interest. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004)**Error! Bookmark not defined.**; s*ee also Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 n.15 (2d Cir. 2006)**Error! Bookmark not defined.**. Instead of offering a justification for their content-based restriction that would satisfy this strict scrutiny analysis, the City attempts to frame the issue as one about access to government documents, not governmental restriction of publication. In other words, while Ms.

Harbatkin has asserted a black letter First Amendment claim centered on what boils down to content-based government censorship, the City has responded to that claim by asserting an argument about an entirely different issue altogether, disclosure of government documents.

## CONCLUSION

Based on the foregoing reasons, and those in the Verified Petition/Verified Complaint for Declaratory Judgment dated April 6, 2009, Respondents-Defendants' determinations denying Petitioner's FOIL requests should be annulled and public disclosure of the City of New York's "Anti-Communist" Case Files ordered in unredacted form, and the City's Department of Records and Information Services should be permanently enjoined from enforcing Section 3-02, Chapter 2, Title 49 of the Rules of the City of New York and accompanying Form MA-101D which, on their face and as applied, should be declared and adjudged unconstitutional because in violation of Petitioner's exercise of her rights of freedom of speech protected by the First Amendment to the United States Constitution and Article 1, Section 8, of the New York State Constitution, along with an award of litigation costs, including attorneys' fees, to Petitioner, together with such other and further relief as the Court deems just and proper.

DATED: March_, 2011
New York, New York **Greenberg Traurig, LLP**

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