New York County Supreme Court
Index No. 104933/09

To be argued by:
ELIZABETH I. FREEDMAN
(15 minutes requested)

COURT OF APPEALS
STATE OF NEW YORK

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 FOR RESPONDENTS

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January 4, 2012

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BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

In this CPLR Article 78 proceeding, petitioner-appellant Lisa Harbatkin seeks to appeal as of right and by permission, from a decision and order of the Appellate Division, First Department entered May 31, 2011, which affirmed the New York County Supreme Court's denial of her CPLR Article 78 petition seeking unrestricted access to records related to the New York City Board of Education's "anti-Communist

investigation" under the Freedom of Information Law ("FOIL"). Petitioner commenced this Article 78 proceeding to challenge the determination of the FOIL Appeal Officer of the Department of Records and Information Services of the City of New York ("Department of Records") denying her FOIL request. Pursuant to FOIL, petitioner requested "anti-Communist" case files maintained by the Department of Records, which pertain to the "anti-Communist" activities of the Board of Education from the 1930s through the 1960s. Petitioner was granted access to the requested records subject to certain restrictions, in order to avoid the unwarranted invasion of the privacy of the teachers who are the subject of certain of the files. Petitioner on this appeal is challenging those restrictions under FOIL, and under the state and federal constitutions.

Respondents offered to allow petitioner access to the unredacted records subject only to her agreement not to publish the names or identifying details of the individuals mentioned in the records. The New York County Supreme Court (Diamond, J.) denied the petition and dismissed the proceeding, ruling that "revealing the identity of confidential informants would nevertheless constitute an unwarranted invasion of privacy with respect to these confidential informants" (citations omitted). The Court held that "[i]n light of the sensitive nature of the information, the minimal burden that compliance with the

respondents' offer places on the petitioner and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents have properly refused petitioner access to the unredacted files unless she agrees not to publish the names of individuals identified in the records." The Supreme Court further found that the age of the records does not mandate disclosure.

By decision and order entered May 31, 2011, the Appellate Division, First Department unanimously affirmed the Supreme Court order and judgment, agreeing with that Court's conclusion "that the privacy interests of the surviving subjects of the investigation and their relatives (see Matter of New York Times Co. v. City of N.Y. Fire Dept., 4 N.Y.3d 477 [2005]), outweigh petitioner's interest in being able to publish the names of teachers contained in the records at issue." The Appellate Division did not rule on petitioner's state and federal constitutional claims alleging the violation of her rights to free speech.

STATEMENT OF FACTS

The FOIL Request, Decision and Appeal

Prior to petitioner's written FOIL request, petitioner was given access to numerous records, comprising thousands of documents, regarding the New York City Board of Education's anti-Communist investigations. These records include: Series 315, Charles Bensley Papers; Series 354, James Marshall Papers; Series 386, Charles Silver Files; Series 471, Superintendent of Schools William Jansen, General Correspondence; Series 591, Anticommunist Investigations, Subject Files; Series 595, Anticommunist Investigations, Published Material; and Series 664, Division of Curriculum Development, "Strengthening Democracy" (R192).[1] Access to these Series was provided to petitioner on an unrestricted basis, with the exception of certain folders in Series 591. Altogether, petitioner was granted access to approximately 50,000 pages of materials related to the Board's anti-Communist investigations prior to making her FOIL request (R192).

By letter dated October 17, 2008, petitioner requested from the New York City Department of Records and Information Services, pursuant to FOIL, access to the following documents

[1] Numbers in parentheses preceded by the letter "R" refer to pages in the Record on Appeal.

maintained by the Department of Records, and referred to as the "anti-Communist" series (R180-81):

> 1. All boxes and folders in Records Series Nos. 572, 593, and 595;
>
> 2. All boxes and folders in Records Series Nos. 590: List of names, Index of Publications, and Filing Records, *circa* 1940-1962;
>
> 3. All boxes and folders in Records Series No. 591: Subject Files, *circa* 1936-1961;
>
> 4. All boxes and folders in Records Series No. 594: Individual Case Files, *circa* 1952-1962;
>
> 5. All boxes and folders in Records Series No. 596: General Index File of Suspected Communists, *circa* 1955;
>
> 6. All boxes and folders in Records Series No. 597: Feinberg Law Loyalty Forms, *circa* 1955; and
>
> 7. Any and all other individual records and/or Records Series which pertain to the New York City Board of Education's Anti-Communist investigations and/or activities as generally described in the section titled, "Guidelines for Archival Use of Board of Education "Anti-Communist Case Files" contained within the *Guide to Records of the New York City Board of Education*.

The request amounts to access to approximately 140,000 pages of documents (R193).

By letter dated November 6, 2008, Assistant Commissioner of the Department of Records, Kenneth R. Cobb, granted petitioner access to the requested records subject to certain restrictions, to protect the privacy of the individuals

named in certain files (R33, R193). Specifically, pursuant to Section 3-02 of Title 49 of the Rules of the City of New York ("RCNY"), researchers may access the files in the "restricted" series upon certifying that they will neither record nor use any teachers' names or personally identifying material obtained from such files (R68-69, R193).

By letter dated November 26, 2008, petitioner, by counsel, appealed the Department of Records' decision (R182-83, R193). Thereafter, by letter dated December 9, 2008, the Department of Records FOIL Appeal Officer Eileen M. Flannelly affirmed the decision of Kenneth Cobb, and granted unredacted access to petitioner to the restricted files, provided that petitioner agree not to publish the names of individuals identified in those files, and agree to the other requirements concerning quotation and indemnification listed in Form MA-101D (R34-35, R70, R194).

Specifically, the Department of Records offered to provide unredacted access to the restricted files, including the "restricted files," provided that petitioner agree to the privacy procedures set forth at the time, namely, (1) a written agreement not to disseminate or publish in any form any names or identifying personal information obtained from the restricted materials; (2) an agreement to request permission from the Department of Records for any direct quotation from the

restricted materials to be used in any publication, and not to use any such quotation without permission; and (3) an agreement to indemnify the Department of Records and the City of New York with respect to any claim, liability, or expense arising from the researcher's unauthorized publication of the restricted materials (R70, R194, R202).

By letter dated June 15, 2009, respondents again offered petitioner unredacted access to the requested files, and eliminated the requirements concerning quotation and indemnification, leaving as the only requirement for access petitioner's agreement not to record, copy, disseminate or publish in any form any names or other identifying personal information obtained from the restricted materials. As an alternative, respondents also offered to petitioner the standard option utilized pursuant to FOIL for records containing some information that is protected by the personal privacy exemption. Petitioner may obtain copies of the records, with the personally identifying information concerning individuals discussed in these documents redacted, to protect the personal privacy of those individuals and, if deceased, the personal privacy of their surviving relatives. Respondents also indicated that the standard copying fee of 25¢ per page would apply to this option. Since there is at present no set of redacted records available,

the unredacted records would have to be copied and then redacted if petitioner chose this option (R202, R205-07).

The "anti-Communist" Records Series

In approximately 1976, the New York City Board of Education recognized that it had records of historical significance stored in basements and closets and entirely inaccessible to educators or other researchers (R195). The Board of Education then entered into an agreement with Teachers College, Columbia University, under which such records would be placed in the custody of Teachers College Library, which would leave them under professional archival management and make them accessible to researchers (R195).

In or about 2003, as part of a reorganization of Teachers College Library, those Board of Education records were transferred to the New York City Municipal Archives (R195). The Department of Records, through its Municipal Archives, preserves and makes available for research these historical records of the Board of Education (R195).

This collection of records includes several records series (including nos. 590, 591, 593, 594, 595, 596 and 597), some restricted and some open, that pertain to the "anti-Communist" activities of the Board of Education from the 1930s through the 1960s (R195). The restricted records contain personal and confidential information relating to teachers and

other school personnel who were investigated and/or questioned by the Board for alleged support of, or association with, the Communist Party (R195).

The individuals who are the subject of these files have a privacy right regarding information of a personal nature contained in the files, which includes a privacy right regarding the fact that the subject case file exists (R195). This is so not only because of the sensitive nature of the information contained within, and surrounding the creation of, the files, but also because apparently all of the information in the restricted series was provided under promises of strict confidentiality (R196). The records themselves indicate that the individuals providing the information contained within the records were given a promise of confidentiality and were assured that their words would be kept secret and confidential (R196).

This promise of strict confidentiality was part of the procedure routinely utilized in these interviews, as is demonstrated by this February 17, 1955 interview, from "Series 591: Anti-Communist Investigations Subject Files" (R197, R223-24):

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

> confidence between yourself and [Superintendent of Schools] Dr. Jansen.

That this promise of strict confidentiality was uniformly provided to persons being interviewed is further demonstrated by the January 13, 1956 interview of petitioner's mother, Margaret Harbatkin (R78-99). At page two, the interviewer, Saul Moskoff, makes clear the confidential nature of the information sought (R79-80, R196):[2]

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

Further, in an interview randomly selected from "Series 591: Anti-Communist Investigations, Subject Files," the interviewee was given a similar promise, reflected on page two of the interview transcript (R196, R211):

> [Mr. Moskoff:] The fact that you are here today, needless to say, has been given and will be given no publicity. This interview is regarded as a confidential matter between Dr. Jansen, myself, yourself, and of course,

[2] Notably, according to an article published on June 16, 2009 in the *New York Times*, petitioner's mother confided to petitioner that after she told Mr. Moskoff "she would never sleep again" if she provided or verified the names of fellow teachers, he turned off his tape recorder "and told her to keep saying she didn't remember the names." Ralph Blumenthal, When Suspicion Ran Unchecked in the New York Schools, *New York Times*, June 16, 2009, at A15 (R277).

> [teacher's adviser -- name redacted]. And I shall expect, [adviser's name redacted], that you will keep confidential the fact that you were here and that we had a discussion at all.

In this particular interview, there was additional discussion concerning the confidential nature of the discussions (R197, R214):

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

Likewise, in another transcript from a randomly selected file from "Series 594," the main series of individual case files, the interviewee was given the same promise of confidentiality during a March 8, 1955 interview (R197, R219):

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

In fact, in a review of 23 interviews selected at random from the approximately 1,100 of such interviews in the requested restricted records, such a promise of confidentiality was present in all of them (R198).

Moreover, individuals who were asked about Communist Party membership, among other things, were not only concerned about their own privacy, but also that of their family members. They were likewise promised total confidentiality, as in this October 21, 1954 interview (R198-99, R255-57) (emphasis added):

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

The information supplied by these individuals forms the content of much of the material in the "restricted files" (R199).

The "anti-Communist" Records Privacy Procedures

In approximately 1980, while the records were maintained by the Teachers College Library, Linda Cirino, a researcher and historian, requested access to some of the anti--communist files (R199). The Board initially denied Ms. Cirino access, contending, *inter alia*, that the disclosure would violate several privileges and would also be an unwarranted invasion of privacy of the people investigated (R199).

Ms. Cirino challenged this determination in Cirino v. Board of Education of the City of New York, N.Y.L.J., July 10, 1980, Index No. 001117/1980 (N.Y. County Sup. Ct. 1980) (R199, R208). The New York County Supreme Court ruled that the Board was required under FOIL to release the requested records to the petitioner, but directed the Board to redact identifying details from the records to protect those individuals who had not provided consent to petitioner. Although not mentioned in the decision in Cirino, the judgment in that case specified that redaction would be available for the names and identifying information for individuals who were still alive (R199). This was consistent with the privacy interest that existed prior to this Court's decision in New York Times Company v. City of New

York Fire Department, 4 N.Y.3d 477 (2005). In that case, this Court held that a privacy interest remains even after death. Id. at 484. Thus, this qualification in the Cirino judgment is no longer applicable under current law (R200).

In order to comply with the Court's ruling in Cirino, and to assure maximum access while protecting teachers from unwarranted invasion of personal privacy, the Teachers College Library developed an access policy and procedures for these records. The policy consisted of several elements (R200):

> a. Records that did not involve matters implicating the privacy rights of individual teachers would be made available to researchers without restriction.
>
> b. When a researcher had the permission of an individual teacher to have access to (or to have copies of) their individual case file, access would be provided. The file would be inspected to determine if it included the names of other teachers or individual targets of investigation (whose permission had not been obtained) and if so, such names would be redacted before the file was made available.
>
> c. A special procedure was developed to provide access to historians and other researchers concerned with learning about the investigations as an event of historical, sociological, and educational significance. Such researchers were to be given full access to the files, provided that they promised to respect the privacy of the teachers named in them. Such researchers were required to sign a written agreement to that effect.

A number of researchers used the files under the provision set forth in paragraph (b) above. These included several teachers or their family members, as well as other researchers. Several researchers and historians also used the files under the provision described in paragraph (c) above, and signed written agreements to maintain the confidentiality of the names and personal identifying information concerning the teachers named in the restricted files (R200-01).

Following the transfer of the records from the Teachers College Library to the Municipal Archives in or about 2003, the Department of Records undertook the major task of organizing the files and developing inventories and access tools (R201). Petitioner made the first inquiry about access to the anticommunist investigation files since the transfer of the files from the Teachers College Library (R201). At that time, the Municipal Archives began to formally establish its access procedures, which were substantially comparable to those that had been used at Teachers College Library, in accordance with the New York County Supreme Court's decision in Cirino (R201). The Department of Records thus determined to utilize the same procedures for access to the records in its archives, that had been used for decades by the Teachers College Library.

Specifically, access to and use of the Board of Education's "anti-Communist" Case Files is governed by 49 RCNY §

3-02 (R68-69, R201). Pursuant to these procedures, researchers who request access to a specific file for the purpose of researching the views or activities of a person named in that file must obtain permission for such access from the subject individual and from the named individual, as applicable (R201). 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 (R201).

When a researcher, such as petitioner, is engaged in general research not limited to a particular individual or individuals, the researcher may gain access to all files in the restricted series either by obtaining copies of the records that have personally identifying details redacted, or upon certifying that the researcher will neither record nor use any names or personally identifying material obtained from such files (R201). The regulations exempt from these restrictions published materials, and materials created for general distribution (R202).

Initially, researchers interested in accessing the restricted series for general research were asked to sign Form MA-101D prior to accessing the restricted series (R70, R202). This form required the researcher to agree to the following conditions: (1) an agreement not to disseminate or publish in any form any names or identifying personal information obtained

from the restricted materials; (2) an agreement to request permission from the Department of Records for any direct quotation from the restricted materials to be used in any publication and not to use any such quotation without permission; and (3) an agreement to indemnify the Department of Records and the City of New York with respect to any claim, liability, or expense arising from the researcher's unauthorized publication of the restricted material (R70, R202).

By letter dated June 15, 2009, respondents' counsel informed petitioner's counsel that the Department of Records had modified this agreement, and that it would provide access to the restricted files pursuant to either of two offered alternatives (R202, R205-06). Petitioner could request redacted copies of the requested files, and pay reasonable copying charges for their production (R205). Alternatively, the Department of Records provided petitioner with a modified agreement, allowing her to inspect the files in unredacted form, but omitting the requirements that petitioner request and receive permission prior to using any direct quotation and that petitioner agree to indemnify the City of New York for any claims arising from petitioner's unauthorized publication of any of the restricted material (R202, R205). The only remaining requirement is that petitioner agree not to record, copy, disseminate or publish in any form any teachers' names or other identifying personal

information obtained from such restricted materials (R202, R207). The relevant form, MA-101D, has been revised to reflect this modification, and has been in use since July 2009, for all persons seeking access to the unredacted records (R313, R317).

Respondents maintain that disclosure of the teachers' names or their personally identifying details obtained from these files, without restriction as to the publication of this information, would constitute an unwarranted invasion of the personal privacy of such individuals, and such disclosure is accordingly not required under FOIL (R202-03).

CPLR Article 78 Proceeding

On or about April 6, 2009 petitioner commenced this CPLR Article 78 proceeding, challenging the determination of the Department of Records and seeking an order: (1) overruling the determinations made on November 6, 2008 and December 9, 2008 by the Department of Records in response to petitioner's FOIL request; (2) declaring Section 3-02, Title 49 of the Rules of the City of New York and the accompanying Form MA-101D unconstitutional and unenforceable; (3) directing and ordering the City to furnish petitioner with immediate unrestricted access to unredacted copies of the information and records specified in petitioner's FOIL requests; and (4) awarding petitioner costs, disbursements, and attorneys' fees (R9-32).

Following respondents' offer in their June 15, 2009 letter, to allow petitioner access to the unredacted records subject only to her agreement not to copy, record, publish or disseminate the names or identifying details of the individuals mentioned in the records, and eliminating the requirements concerning quotation and indemnification, respondents filed a verified answer to the petition on or about June 16, 2009, averring that the FOIL Appeal Officer's determination was in all respects legal, proper, reasonable, and in conformity with all applicable laws and regulations, and was neither arbitrary nor capricious; and further stating that petitioner's other claims were moot and/or failed to state a cause of action in light of respondents' June 15, 2009 letter (R184-207).

Petitioner filed four affidavits in reply on or about July 2, 2009 (R278-311). In her own reply affidavit, petitioner argued, inter alia, that the City's redactions inhibit the research process; the City's claim that disclosure would cause unwarranted invasion of personal privacy lacks merit; that redacting names would be impractical; that the age of the records in issue renders this case unique; and that the City's June 15, 2009 "settlement offer" was inadequate (R278-97).

Respondents filed a sur-reply affirmation dated June 16, 2009, correcting several erroneous statements in petitioner's reply papers, and noting that there is ample reason

to be concerned about the reliability of information in the restricted records (R312-17). Respondents reiterated that the "only information that is being protected by the disputed redactions is the identities of persons who were the subjects of these investigations"; that "to publicly reveal the identifying information concerning the persons who are the subjects of the documents, without their consent or the consent of their surviving relatives, would forseeably be painful for many of these persons and their families, for varied reasons" (R316). Respondents further noted that the revised Form MA-101D, and alternative of providing redacted records, were not part of a settlement offer, as such changes were not contingent on withdrawal or dismissal of the litigation (R316).

DECISIONS BELOW

New York County Supreme Court Order and Judgment

By order and judgment filed March 18, 2010, the Supreme Court, New York County (Diamond, J.) denied the Article 78 petition and dismissed the proceeding (R5-7). The Court reviewed the parties' respective arguments, standard of review, policy underlying FOIL, and the statute's exemption for privacy (R5-6). Citing Cirino v. Board of Education of the City of New York, N.Y.L.J., July 10, 1980 (Sup. Ct. N.Y. County 1980), the Supreme Court noted that "a FOIL request by another historian seeking essentially the same information from the Board of

Education as sought herein was denied by the Supreme Court, New York County in 1980, which found, inter alia, that the unwarranted invasion of personal privacy exemption was applicable" (R6). The Court also discussed the relevant case law construing the privacy exemption in Public Officer's Law § 89(2)(b), holding as follows (R6-7):

> Thus, Public Officers Law § 89(2)(b) plainly permits an agency to delete identifying details from records made available by it to the public in order to prevent an unwarranted invasion of personal privacy. In this respect, the City interviewed the Communists at issue with the express commitment that each examination would remain confidential. Contrary to Harbatkin's assertion, there is nothing in the record before the court which even suggests that it was only to further parochial concerns or frustrate subsequent attempts to learn about the process that the City promised these individuals that their names would remain confidential. Notably, the petitioner has not claimed that the respondents' promise of confidentiality was in itself violative of the terms of any statute. Moreover, as already discussed, the City has shown that disclosure of their individual names was of grave concern to these individuals. In Matter of Scarola v. Morgenthau (246 AD2d 417 [1st Dept 1998]), the First Department held that statements made by individuals alleged by petitioner to be "known informants" were exempt from disclosure under Public Officers Law § 87(2)(b) since disclosure of such documents would, *inter alia*, be an unwarranted invasion of their personal privacy.
>
> Although Harbatkin insists that her reasons for requesting the identities is "completely scholarly and respectful,"

> revealing the identity of confidential informants would nevertheless constitute an unwarranted invasion of privacy with respect to these confidential informants (Matter of Johnson v. New York City Police Dept.,257 AD2d 343 [1st Dept 1999]; Matter of Scarola v. Morgenthau, 246 AD2d 417 [*supra*]). In any event, whatever limited scholarship interest the petitioner may have in exposing the identities of those who named names is clearly outweighed by the City's promise of confidentiality made to its employees and the potential embarrassment to and harassment of, at least some of those individuals and their families.
>
> In light of the sensitive nature of the information, the minimal burden that compliance with the respondents' offer places on the petitioner and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents have properly refused petitioner access to the unredacted files unless she agrees not to publish the names of individuals identified in the records.

Finally, the Supreme Court ruled that the age of the records involved does not mandate disclosure, and that although the age of the information sought could be relevant to the inquiry as to whether the exemptions under Pub. Off. Law § 87(2) were applicable, age alone was insufficient to find the exemptions inapplicable (R7). The Supreme Court accordingly denied the Article 78 petition and dismissed the proceeding.

Appellate Division, First Department Decision and Order

By decision and order entered May 31, 2011, the Appellate Division, First Department unanimously affirmed the Supreme Court's order and judgment, agreeing with the trial court's conclusion "that the privacy interests of the surviving subjects of the investigation and their relatives (see Matter of New York Times Co. v. City of N.Y. Fire Dept., 4 NY3d 477 [2005]) outweigh petitioner's interest in being able to publish the names of teachers contained in the records at issue" (R325-26). The Appellate Division found that the exemption in Public Officers Law § 89(2)(b)(v) was not applicable here, since the transcripts of interviews regarding Communist party membership, which could have led to termination of employment, could not fairly be characterized as "not relevant" to the work of the Board of Education (R325). The Appellate Division further declined to rule on petitioner's claim that the Rules of the City of New York Department of Records and Information Services, found in 49 RCNY § 3-02, which specifically address standards for access to the "restricted files" in the anti-Communist records, violates her state and federal constitutional rights to free speech. The Appellate Division opined that as the trial court decided the CPLR Article 78 petition solely on FOIL grounds, any ruling on petitioner's constitutional claim would

be merely advisory. The Appellate Division accordingly affirmed the denial of the CPLR Article 78 petition.

RELEVANT STATUTES

Public Officers Law § 87(2)(b) states:

> **§ 87. Access to agency records.**
>
> 2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:
>
> *** * ***
>
> (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article; . . . .

Public Officers Law § 89(2) states in relevant part:

> **§ 89. General provisions relating to access to records; certain cases**
>
> The provisions of this section apply to access to all records, except as hereinafter specified:
>
> *** * ***
>
> 2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.
>
> (b) An unwarranted invasion of personal privacy includes, but shall not be limited to: . . .
>
> *** * ***

> (c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure; . . .
>
> * * *

ARGUMENT

POINT I

THE COURTS BELOW CORRECTLY DETERMINED THAT DISCLOSURE OF THE IDENTIFYING INFORMATION CONCERNING THE INDIVIDUALS NAMED IN THE RESTRICTED SERIES FILES WOULD CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY. THE PRIVACY INTERESTS OF THE SURVIVING SUBJECTS OF THE INVESTIGATION AND THEIR RELATIVES OUTWEIGH PETITIONER'S INTEREST IN DISCLOSING OR PUBLISHING THE NAMES OF TEACHERS CONTAINED IN THE RECORDS.

As the Courts below properly ruled, disclosure of the names of the individuals, or personally identifying material obtained from these files, without restriction as to the publication of this information, would constitute an unwarranted invasion of the personal privacy of such individuals.

Accordingly, such disclosure is not required under FOIL, and petitioner's FOIL application was properly denied.

On or about September 22, 2011, this Court reserved decision on its jurisdictional inquiry with respect to petitioner's appeal taken as of right, and petitioner's motion for leave to appeal. There is no basis for this Court to grant petitioner permission to appeal from the Appellate Division, First Department's legally correct ruling. Nor is there any basis for this Court to assume jurisdiction to entertain petitioner's appeal taken as of right, as there is no substantial constitutional issue directly involved, as required by CPLR § 5601(b)(1). Petitioner's constitutional argument, that 49 RCNY § 3-02 is unconstitutional and violates her First Amendment rights, provides no basis for an appeal as of right. Neither the Appellate Division, First Department, nor the New York County Supreme Court, decided this proceeding on constitutional grounds. Rather, both lower Courts ruled against petitioner solely on the basis of FOIL, New York Public Officers Law §§ 84 et seq., and the statutory exemption in that statute preventing an unwarranted invasion of personal privacy (Pub. Off. Law § 87(2)). Thus, there is no substantial constitutional question directly involved, for this Court to assume jurisdiction to review the issue in an appeal as of right. In the event, however, that this Court reaches and considers

petitioner's constitutional claims, such claims are without merit, and the denial of the petition and dismissal of the proceeding should be affirmed.

Petitioner argues that the Appellate Division, First Department erred in finding that the names and identifying information contained in the "anti-Communist" investigation case files are exempt from disclosure under FOIL; that respondents did not meet their burden of showing that nondisclosure of the Board of Education's records is justified under FOIL's narrow exemptions; that the record does not support respondents' asserted "speculative privacy interest" and "unsubstantiated speculation" that disclosure would violate the named individuals' privacy rights; and that respondents failed to articulate "a particularized and specific justification for denying access," as required by FOIL (Pet.'s Br. at 21-30). Petitioner characterizes the privacy interests at issue here as "attenuated," in light of the nature and age of the documents in issue, and argues that the strong public interest involved further compels disclosure (Pet.'s Br. at 30-37). Petitioner further argues that the Board of Education's promises of confidentiality were made in order to shield its own conduct from public scrutiny, and are therefore entitled to little weight in the balancing process; and that FOIL's disclosure obligations cannot be abrogated by or subordinated to a "private

confidentiality agreement" (Pet.'s Br. at 38-43). Finally, petitioner contends that requiring her consent to restrictions on her free speech rights, by prohibiting her from disclosing or publishing indentifying information from the restricted files as a condition of unrestricted access, violates her First Amendment rights, by imposing "unconstitutional conditions" on her protected expressive activities (Pet.'s Br. at 43-51). Specifically, she claims that the "unconstitutional condition" on her protected expressive activities requires her to "either give up her First Amendment rights or give up full access to the anti-Communist files" (Pet.'s Br. at 45). She argues that the City's regulations violate the First Amendment by restricting publication based on content, and that the City failed to demonstrate "a compelling interest in imposing content-based restrictions on the publication of information from the anti-Communist case files" (Pet.'s Br. at 47-48). All of these arguments, however, were properly rejected. Petitioner does not offer any reason for this Court to allow her to disclose or publish names or other identifying information from the confidential interviews, nor does she demonstrate any error in the lower Court's rulings upholding the exemption from disclosure under FOIL.

Pursuant to New York Public Officers Law § 87(2)(b), an agency may properly deny access to records or portions

thereof, if disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." Public Officers Law § 87(2)(b), which creates the privacy exception, refers to § 89(2), which contains a partial definition of "unwarranted invasion of personal privacy." Section 89(2)(b) states that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to" six specific kinds of disclosure. Thus, although Pub. Off. Law § 89(2)(b) describes a number of categories that fall within its scope, by its own terms this list is not exhaustive. Id.; see also New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 485 (2005) (recognizing that the list of categories in Pub. Off. Law § 89(2)(b) is not exhaustive). This Court in New York Times Company pointed out that as none of the six enumerated privacy exemptions were relevant to that case, the Court decided whether any invasion of privacy there was "unwarranted," by "balancing the privacy interests at stake against the public interest in disclosure of the information." Id., 4 N.Y.3d at 485. In the instant case, disclosure of the names and other personally identifying information[3] of individuals contained within the

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

restricted series of the Board of Education's "anti-Communist" case files, or personally identifying details obtained from these files, without redaction, would constitute an unwarranted invasion of the personal privacy of such individuals.[4]

In fact, although petitioner only briefly mentions the case in her appellant's brief (Pet.'s Br. at 19, 30 n.9) (and not at all in her Table of Authorities), the New York City County Supreme Court's ruling in Cirino v. Board of Education of the City of New York decided this very question, concerning these very same files (R6, R208); and the Supreme Court properly relied on Cirino in its decision upholding the privacy exemption here (R6). Ms. Cirino, a researcher and historian, made a FOIL request for the Board's "anti-Communist" files. N.Y.L.J., July 10, 1980, Index No. 001117/1980 (N.Y. Co. Sup. Ct. 1980) (Fingerhood. J.) (R208). The Board denied Ms. Cirino any access, for several reasons. Specifically, the Board argued that disclosure would be an unwarranted invasion of personal privacy of the persons investigated, and that disclosure would reveal law enforcement investigatory techniques (invoking the FOIL law enforcement exemption), and would violate the attorney-client, attorney work product and/or material prepared in

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

anticipation of litigation privileges. Id. The Court adopted the personal privacy argument, and rejected all the other arguments. Accordingly, the New York County Supreme Court found that FOIL required the Board to release the requested records to Ms. Cirino, but directed the Board to redact names and personally identifying details from the records to protect those individuals who had not provided Ms. Cirino with consent.[5] Id. The Cirino case is not just directly analogous to, but is exactly the same as, the case at bar, in that the same records are being requested under the same statute, and the same result, requiring redaction prior to public disclosure and publication, was properly reached here.[6]

[5] Petitioner cites the Department of Records' purported failure to consult with the individuals mentioned in the files as grounds for disclosure, citing Bahnken v. New York City Fire Department, 17 A.D.3d 228 (1st Dept.), appeal denied, 6 N.Y.3d 701 (2005), in support of this proposition (Pet.'s Br. at 25-26). Unlike the small group of hospitals in Bahnken, however, disclosure of the records at issue here affect thousands of individuals whose whereabouts are unknown to respondents. Nothing in Bahnken implies that an agency subject to FOIL has a duty to track down and notify individuals potentially affected by an unwarranted invasion of personal privacy, and no such duty exists.

[6] Although not mentioned in the decision in Cirino, the judgment in that case (as settled by the Court based on the submission by Ms. Cirino's attorneys) specified that redaction would be applicable to the names and identifying information of individuals who were still alive (R199). This was consistent with the then legally recognized privacy interest that existed prior to this Court's decision in New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477 (2005). In New York

In addition to Cirino, which holds that release of these records with redactions is all that is required under FOIL, this Court's more recent and controlling FOIL jurisprudence mandates the same result. In determining whether a specific disclosure is warranted under FOIL, courts must balance the privacy interests at stake against the public interest in disclosure of the information. New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 485 (2005). In New York Times Company, the New York City Fire Department denied public access to unredacted recordings of 911 emergency service calls made by individuals who were killed in the terrorist attacks occurring on September 11, 2001, as well as survivors of the attacks who made 911 calls. This Court expressly found that the privacy interests there were "compelling," and that a privacy right exists, as petitioner here admits (Pet.'s Br. at 30-31), "in the feelings and experience of people no longer living." Id. at 484. This Court opined:

> Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life

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Times Company, this Court held that a privacy interest remains even after death. Id. at 484. Thus, under current law, this qualification in the Cirino judgment is no longer applicable.

> of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead.

Id. at 484-85.

This Court therefore decided that the caller's words in those records could be redacted to protect their privacy interests. Id. at 486-87. This Court thus made significant rulings concerning the right of privacy under New York law, including, for the first time, a right of privacy that survives the death of an individual and vests in the decedent's surviving relatives.

Significantly, the redactions that this Court upheld in New York Times Company under FOIL were much more extensive than those in issue here. This Court authorized redaction of all of the words of the victims, not just their identifying information, so the City disclosed only one side of the 911 conversation (the 911 operator or fire alarm dispatcher's words). In the case at bar, we are only seeking nondisclosure of the names or identifying details (or alternatively, respondents will redact names and identifying details). The complete conversation between Saul Moskoff, the interviewer, and

each teacher, is otherwise entirely disclosed and available to petitioner, and she can disclose and publish those words, either without the names or identifying details, or with the names changed.

Subsequently, the Appellate Division, First Department further clarified this Court's ruling, to include redaction of not only the words of the callers themselves, but also redaction of the words of the 911 operators which repeated the callers' words or which stated personally identifying information concerning the callers. New York Times Company v. City of New York Fire Department, 39 A.D.3d 414, 415 (1st Dept., 2007) (R260). The *New York Times* challenged the redactions that had been made to the 911 calls, insofar as the words of 911 operators were redacted, when the operators repeated personally identifying information provided by the callers. These redactions were made, in addition to the callers' words, because the City realized that sometimes the 911 operator or fire alarm dispatcher did repeat identifying details provided by the victims. Such redactions had not been previously requested, because such statements by the 911 operators were not noted until the redactions were being made. The City's counsel summarized telephone conversations and correspondence that counsel and other City representatives had with surviving relatives of eight deceased callers, in which they conveyed

their opposition to the release of such personally identifying information (R260). One relative then intervened, anonymously, in the second appeal to the Appellate Division, First Department (R260). The Appellate Division held that personally identifying information repeated by the 911 operators should be redacted to protect the privacy of the callers and their surviving relatives.

Petitioner attempts to distinguish the holding in New York Times Company by erroneously asserting that the record in that case contained "objections from surviving relatives" (Pet.'s Br. at 29-30), and privacy claims by individuals whose privacy rights were affected, i.e., the callers or surviving relatives (Pet.'s Br. at 30, 32-33). This is factually and legally incorrect, as there were no statements by individuals or their surviving relatives in the record before this Court in New York Times Company (R259-60). Only in the second round, following this Court's decision in 2005, in the subsequent litigation before the Appellate Division, First Department in 2007, was information concerning the wishes of surviving relatives, seeking the maintenance of the privacy of information concerning their loved ones, submitted to the Court (R260).

The absence of such evidence was even noted in the dissenting (in part) opinion in New York Times Company, although

the dissenting Judges also concluded, as had the Judges in the majority, that this absence was not dispositive:

> Notably, the City has not provided any affidavits from survivors or victim's family members suggesting that disclosure of 911 tapes, or any other material sought, would violate their privacy. The record contains only the opposite: affidavits from nine intervenors, family members who want full disclosure. Nevertheless, I do not challenge the majority's assumption that full disclosure would cause considerable anguish to many victims' families.

Id., 4 N.Y.3d at 493 (Rosenblatt, J., dissenting in part).

Personal privacy concerns vary greatly among reasonable individuals. In New York Times Company, this Court stated:

> We acknowledge that not everyone will have the same reaction to disclosure of the 911 tapes. The intervenors in this case, whose husbands and sons died at the World Trade Center, favor disclosure. They may feel, as other survivors may also, that to make their loved one's last words public is a fitting way to allow the world to share the callers' sufferings, to admire their courage, and to be justly enraged by the crime that killed them. This normal human emotion is no less entitled to respect than a desire for privacy. …But the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful.

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

Petitioner in this case, a surviving relative, favors full disclosure, as did the intervenors in New York Times

Company. She believes that there is value in making her mother's interview public, and has placed it in the public record (R78-99). That is petitioner's choice to do so, as a surviving relative. However, as in New York Times Company, petitioner's point of view does not and should not control the privacy rights of others, namely the thousands of other subjects who were interviewed or named in the documents, and the thousands of surviving relatives of those subjects who are deceased. See id., 4 N.Y.3d at 486 (while the families of some survivors may favor disclosure, to which they are entitled, "the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful"). As this Court held, "surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead." Id., 4 N.Y.3d at 485. This Court's conclusion in New York Times Company, 4 N.Y.3d at 487, that "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private," is equally applicable here. Any public interest in the identities of those interviewed, including those who "named names," is outweighed by the interest in privacy of those family members and interviewers who prefer that those identities remain private, and not be publicly disclosed.

The interviews in this record, as quoted herein, demonstrate that there were persons who were extremely concerned that their participation in the interview remain confidential (R214, R255-57). Indeed, some persons lied to their families about their participation in the investigation (and presumably, about their prior affiliation with the Communist Party) (R255-57).

It is quite understandable that some of the persons interviewed, or their surviving relatives, would be distressed by public disclosure of the fact that they were interviewed about Communist party affiliation, and even that they were members of the Communist Party, or were accused or suspected of being so, at a time when Joseph Stalin led the Soviet Union. Some persons might have renounced such membership years ago, or not. Even more readily apparent is the great concern that many subjects or their surviving relatives would have if the subject "named names" during the course of the interview, as many did. One has only to note the controversy that followed such well-known figures as Elia Kazan and Jerome Robbins until their deaths, for their similar actions, to understand the agony and possible harassment that the public release of such information could cause the subjects or their surviving relatives, conceivably resulting in much unwanted and unwelcome negative publicity and media attention and exploitation. See New York

Times Company, 4. N.Y.3d at 486 (if 911 tapes and transcripts were made public, they would in some cases "be exploited by media seeking to deliver sensational fare to their audience").

Indeed, the controversy about Communism is not simply a bygone historical anecdote. Just recently, the *New York Times* reported that the famous folk song writer and singer Woodie Guthrie was for many years denied recognition in his home state of Oklahoma, because he was scorned by local officials due to his radicalism and alleged affiliation with Communism. The article by Patricia Cohen, entitled "Bound for Local Glory at Last," and published on December 28, 2011 in the *New York Times* at C1, begins as follows:

> TULSA, Okla. -- Oklahoma has always had a troubled relationship with her native son Woody Guthrie. The communist sympathies of America's balladeer infuriated local detractors. In 1999 a wealthy donor's objections forced the Cowboy Museum in Oklahoma City to cancel a planned exhibition on Guthrie organized by the Smithsonian Institution. It wasn't until 2006, nearly four decades after his death, that the Oklahoma Hall of Fame got around to adding him to its ranks.

An Oklahoma resident familiar with the dispute explained to the reporter that Guthrie "was kind of taboo because some influential people in this town thought Woody Guthrie had communist leanings." Id. at C5, col. 6. As Woody Guthrie's sister recalled, his memory was finally being honored "after so

many years of Oklahomans' snubbing her brother's memory." Id. It is evident that other less famous people with alleged "communist leanings" certainly might not welcome the public disclosure petitioner seeks at this time, for reasons similar to those noted above.

Moreover, people who were identified during the interviews, whether correctly or erroneously, have a privacy interest in keeping their names and identities confidential, as such disclosure could be painful, embarrassing, and/or detrimental to their or their surviving relatives' well-being.

Finally, for the subjects who lied to their families about their involvement, it is readily apparent that it would be extremely painful for many of these subjects and their families, or their surviving relatives if the subject is deceased, if their lies were publicly exposed, or if family members or surviving relatives first learned that their family member had lied to them through publication of that involvement. In sum, it would be an unwarranted invasion of the personal privacy of the subjects named in these records, and if deceased their surviving relatives, to publicly disclose their names and any indentifying information. "This is the sort of invasion that the privacy exception exists to prevent." See New York Times Company, 4 N.Y.3d at 486.

This and other Courts have found an unwarranted invasion of personal privacy pursuant to Pub. Off. Law § 89(2)(b), and protected personally identifying information from disclosure, in other circumstances that were less or no more compelling than the circumstances here. See Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse, 65 N.Y.2d 294 (1985) (identifying information regarding victims of motor vehicle accidents); Johnson v. New York City Police Department, 257 A.D.2d 343 (1st Dept., 1999), appeal dismissed, 94 N.Y.2d 791 (1999) (witness statements in police reports); De Oliveira v. Wagner, 274 A.D.2d 904 (3d Dept., 2000) (police communications with victim's relatives); Buffalo Broadcasting Co. v. New York State Department of Correctional Services, 174 A.D.2d 212, 215 (3d Dept.), appeal denied, 79 N.Y.2d 759 (1992) (videotapes of strip searches of inmates); Irwin v. Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 318-19 (4th Dept., 2010) (denying public disclosure of unpublished photographs electronically stored in agency's database, as, inter alia, unwarranted invasion of personal privacy under FOIL).

In addition, it is extremely significant for purposes of FOIL that the persons interviewed were given explicit promises of confidentiality. An express promise of confidentiality for information of a personal nature "serves as

a compelling reason to decline to disclose the information." See Johnson, 257 A.D.2d at 348; See also Dobranski v. Houper, 154 A.D.2d 736, 739 (3d Dept., 1989) (information that would identify a source who was promised confidentiality is exempt from disclosure).

In New York Times Company, in addition to the 911 calls, this Court also considered whether "oral histories," consisting of subsequent interviews with Fire Department personnel who were present at Ground Zero on September 11, 2001, were exempt from disclosure under the personal privacy exemption of Pub. Off. Law § 89(2). Id., 4 N.Y.3d at 488-90. This Court ultimately found that the oral histories were disclosable under FOIL, relying heavily on the fact that "the record did not reflect that any interviewee was given a promise of confidentiality or led to believe that his or her words would be kept secret." Id. at 489. The Fire Department had initially submitted an affidavit stating that all interviewees had been assured that the interviews would be held in complete confidence. Id. In fact, this statement had been made in error, and the Fire Department later withdrew that claim and did not rely on the existence of any such promise of confidentiality. This Court considered this fact to be of great significance in its decision, noting that this statement,

assuring confidentiality, “if true, could be highly relevant to this case...” Id.

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

> [T]here has been given and will be given no publicity to the fact that you and I are having this discussion. It is regarded as a matter of strict confidence… (R80).
>
> * * *
>
> The fact that you are here today, needless to say, has been given and will be given no publicity. This interview is regarded as a confidential matter… (R211).
>
> * * *
>
> I have every reason to believe what you said at the beginning, that this is a confidential matter… (R214).
>
> * * *
>
> [T]here has been and will be no publicity given to the fact that you and I are having this discussion this afternoon. This is regarded as a matter of strict confidence… (R219).

There can be no question here that the individuals called to be interviewed were "led to believe that his or her words would be kept secret." See New York Times Company, 4 N.Y.3d at 489. This promise of confidentiality, notably missing in New York Times Company, is another reason to affirm on the basis of the personal privacy exemption under FOIL, on the grounds that the redaction of names and personally identifying information is justified and proper under FOIL here, as it was in Cirino. See also Johnson v. New York City Police Department, 257 A.D.2d 343, 348 (1st Dept.), appeal dismissed, 94 N.Y.2d 791 (1999) ("if NYPD were able to show that the witness was expressly promised confidentiality, that would serve as a compelling reason to decline to disclose the information"); Pennington v. Clark, 16 A.D.3d 1049, 1052 (4th Dept.), appeal denied, 5 N.Y.3d 712 (2005) (upholding denial of request for certain records "to prevent disclosure of confidential information or identification of confidential sources").

As noted, the judgment in Cirino specified that redaction would be available for the names and identifying information for individuals who were still alive (R199). This was consistent with the lack of a recognized privacy interest that survived death, which was the state of New York law prior to this Court's decision in New York Times Company. This Court changed the law, to hold that a privacy interest remains even

after death. Id., 4 N.Y.3d at 484. Moreover, as set forth above, there is ample evidence in this record to suggest that this was exactly the result anticipated by those who participated in the interviews (R255-57) (emphasis added):

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

In addition, given that approximately 1,100 interviews were conducted (R198), and an unknown number of other individuals were identified in these records, identifying all of

those individuals who are living or deceased would be a practical impossibility.

Petitioner argues that in Cirino, the New York City Board of Education agreed that the entire anti-Communist case files would be made available in unredacted form no later than the year 2000 (Pet.'s Br. at 19, 30 n.9). This is incorrect (R315). The Board of Education's position was that these records would remain completely inaccessible to the public until the year 2000 (R315). The Board of Education relied on common law privileges and several exemptions in the FOIL statute, not just the privacy exemption. The Board did not address whether it planned to provide access to the records in redacted or unredacted form, in the year 2000. Nor did the New York County Supreme Court in Cirino discuss the issue. That Court simply rejected all the claimed privileges and exemptions, except for the privacy exemption, and directed the Board of Education to provide access to the records with identifying information deleted to protect individuals' privacy (R315).

There is little, if any, public interest in the disclosure of the individuals' names who identified or were identified as Communist Party members or sympathizers, as part of the Board of Education's "anti-Communist" activities. According to petitioner, only complete public disclosure of the archived case files could "further illuminate the widespread

political suppression that occurred during this period" (Pet.'s Br. at 36). Petitioner fails to explain, however, why this "compelling and undeniable" public interest (Pet.'s Br. at 36) would not be served (and is not currently being served) through petitioner's ability to review the unredacted files, or through the release and publication of any or all of these records with names and personally identifying information redacted, as required under the FOIL exemptions applicable here. Respondents here are not seeking to protect their own actions, nor are they hiding their activities during this period of time. Everything respondents did is fully revealed in these case files, and just the names of the people who were interviewed and named therein are being protected from disclosure pursuant to FOIL exemptions. Petitioner's research is not being compromised or imperiled in any way, nor does the application of these narrow, limited exemptions under FOIL affect the core purpose of FOIL (see Pub. Off. Law § 84).

All that FOIL requires is access to these records with the individuals' identifying details redacted to preserve personal privacy. See Pub. Off. Law § 89(2)(c)(i). The Department of Records has offered petitioner an alternative form of access, to provide the maximum disclosure consistent with FOIL and the Department of Records' utmost efforts to provide unusually open access to historical government records. The

Department of Records has offered petitioner unfettered access to the complete, unredacted set of records, including all of the restricted files, subject only to her agreement not to publish or disclose the identities of the private individuals contained within them (R317).

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

Petitioner's own submissions on this case demonstrate that there is ample reason to be concerned about the reliability of the information in these records. The affidavit of Louis Schwartz, sworn to July 2, 2009, states that he was identified through a case of mistaken identity, in that someone testified that he saw Mr. Schwartz at a meeting that Mr. Schwartz denies

attending; the person who actually attended and Mr. Schwartz apparently wore similar eyeglasses (R309-11, R314). Moreover, the June 16, 2009 *New York Times* article states that petitioner's mother confided to petitioner that in an off-the-record conversation, the interviewer advised petitioner's mother, who had indicated that she was deeply upset about revealing the names of others, to keep stating on the record that she did not remember the names of others (R276-77, R314-15). Petitioner's mother's interview transcript demonstrates that this is what she did (R78-101, R315).

That inaccuracies exist in this very sensitive information, gathered during an information-gathering investigation, is readily apparent, and further supports the exemption for the names and identifying information in the materials. As is evident in the interview transcripts (R78-179, R209-57), the interviewer encouraged people to speculate, conjecture, guess, and report rumors they heard, about other people who they thought might be or might have been members of the Communist party. Mr. Moskoff was trying to gather leads for further investigation, and nobody confirmed or vouched at that time for the accuracy of the information about other teachers that was provided by the teachers who were interviewed.

Accordingly, if this information is publicly released, disclosure could have the additional damaging effect of

producing inaccurate information about individuals, namely, false assertions that they were Communists at that time, in the 1930's and 1940's. This could cause more damage to the subjects, if they are still alive, and/or to their family and surviving relatives, in that hurtful falsehoods would be published about them, and there might be no way to at this late date to disprove or rebut the false information after all these years.

Petitioner's ability to research this period of history, and the Board of Education's actions, policy and procedures during this time, would not be inhibited or compromised by the provision of full, unrestricted access to the requested files, contingent upon petitioner's agreement not to publish or disclose the names of those interviewed and/or implicated, pursuant to promises of strict confidentiality; or provision of access to the files with identifying names or information redacted. See Pub. Off. Law § 89(2)(c)(i).

The redacted interview transcripts show that the redactions at issue do not conceal the government's procedures and methods. The words of the government representatives are not redacted, except and only to the extent these representatives repeat identifying information (R315). Nor are the words of the persons being interviewed redacted, again except for identifying information. Indeed, the parties here

have used the redacted interview transcripts to show the reasons the subjects joined the Communist Party, and the subjects' feelings about being interviewed and providing information to the interviewer. The only information that is being protected by the disputed redactions is the identities of persons who were the subjects of these investigations, whom petitioner presumably considers were victimized by these investigations, and those persons named and identified during the interviews (R315-16).

Even, arguendo, if petitioner were able to articulate some public interest that would be served as a basis for the public release of these names, this balancing test would still apply, and it will remain heavily skewed toward protecting the privacy interests of these countless individuals who were interviewed during the investigation, and/or who "named names" during the investigation. See, e.g., New York Times Company, 4 N.Y.3d at 487 (concluding that the public interest in the words of the 911 callers is outweighed by the privacy interest of those family members and callers who prefer that those words remain private). It must be emphasized that petitioner fails to articulate any valid cognizable reason justifying her need to publish or disclose the names of these individuals. Assuming that petitioner's use of the information were completely scholarly and respectful, in this age of the Internet and widespread computerized access to information, there is no

control of the treatment of information once it is in the public domain. See e.g., New York Times Company, 4 N.Y.3d at 486 (publication of 911 tapes and transcripts would in some cases lead to exploitation by the media seeking to sensationalize them for their audiences); see also Bellamy v. New York City Police Department, 87 A.D.3d 874, 875 (1st Dept., 2011) (denying release of identities of certain persons who spoke to police during criminal homicide investigation, noting that "[a]fter learning the names, all one would need is an Internet connection to determine where they live and work").

In sum, respondents' requirements under FOIL with respect to these records have already been decided and fully approved in Cirino. Records must be publicly released only with the redaction of identifying details to protect the personal privacy of the individuals named within them. This case does not warrant a different result. The Department of Records has already offered petitioner access to the records in redacted form, and has moreover remarkably offered petitioner full access to the case files, in exchange for petitioner's promise not to publish or disclose the identities of the individuals named within them. The Department of Records has thus made every effort to provide disclosure to the maximum extent possible, consistent with FOIL, while respecting the privacy rights of the individuals referenced in the materials. Petitioner's challenge

to this determination is without basis, and was properly rejected by the Courts below.

As noted, the New York City Department of Records has since July 2009 modified its form agreement, omitting the requirement in its application to review the restricted files that the applicant request and receive permission prior to using any direct quotation from the material, and omitting the requirement that the applicant agree to indemnify the City of New York for any claims arising from the unauthorized publication of any of the restricted material (R202, R205-07, R317). The only remaining requirement in the revised form, Form MA-101D, is an agreement not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from such restricted materials (R202, R205-06, R317). This revision was not made contingent on withdrawal or dismissal of the litigation, and was therefore not a settlement offer, as petitioner continues to erroneously contend (Pet.'s Br. at 14-16, 50 n.20). This revised form has been in general use for the restricted files since July 2009 (R316-17), and is wholly consistent with 49 RCNY § 3-02, which refers to the revised form (R68-69). See 49 RCNY § 3-02(B)(2).

Alternatively, petitioner can obtain a copy of the redacted records for a fee of 25¢ per page, to cover the copying

costs (R205).[7] Because a redacted set of the restricted documents does not currently exist, the records in issue would have to be photocopied, and then redacted to delete any identifying information (R205). Release of the information petitioner seeks, with the confidential information redacted, is a procedure that is contemplated by FOIL for information, as here, that is exempt from disclosure under FOIL. See Pub. Off. Law § 89(2)(c); see also Pennington v. Clark, 16 A.D.3d at 1052 (access to records may be denied, or redacted to prevent disclosure of confidential information); Whitfield v. Bailey, 80 A.D.3d 417, 418-19 (1st Dept., 2011) ("When a document subject to FOIL falls within an exemption, the agency 'may be required to prepare a redacted version with the exempt material removed'") (internal citations omitted).

[7] Petitioner incorrectly states in her brief that she would be charged for the cost of reproducing two complete sets of redacted records (Pet.'s Br. at 16). She claims that the requirement of reimbursing respondents for the cost of two sets of records, when only one is actually produced, violates FOIL and imposes a financial burden on petitioner's exercise of her constitutional rights (Pet.'s Br. at 16). Contrary to petitioner's statement, however, petitioner will not be charged double copying costs (i.e., 50 cents per page), if she chooses to obtain a redacted set of the records (R312-13). As respondents have clearly maintained throughout this litigation, petitioner will be charged 25 cents per page for any redacted records she requests, as permitted by FOIL. See Pub. Off. Law § 87(1)(b)(iii) (R205, R313).

In Schenectady County Society for the Prevention of Cruelty to Animals v. Mills, ____ N.Y.3d ____, 2011 N.Y. Lexis 3178 (2011), this Court recently held that to comply with FOIL, an agency must redact the record requested under FOIL, to remove the exempt information, when redaction can be effected without unreasonable difficulty. This Court reiterated that redaction of exempt information, rather than a blanket denial of the FOIL request, should be used when a record, as here, contains both exempt and non-exempt information. See id.; see also Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 464 (2007) ("even when a document subject to FOIL contains . . . private, protected information, agencies may be required to prepare a redacted version with the exempt material removed"); New York Times Company, 4 N.Y.3d at 482-83; Scott, Sardano & Pomeranz, 65 N.Y.2d 294; New York Civil Liberties Union v. New York City Police Department, 74 A.D.3d 632 (1st Dept., 2010) (reports sought under FOIL can be redacted to adequately protect their confidential nature).

In Schenectady County, this Court held that in responding to the petitioner's FOIL request, the Education Department had the choice of producing the existing record in full, or removing the information (i.e., licensed veterinarians' home addresses) that it did not want to produce (and that the petitioner did not demand). Likewise, in the case at bar, respondents have offered to either produce the record in full,

subject to petitioner's nondisclosure agreement; or to redact the interviewees' names and identifying information of those individuals named in the files, pursuant to the express promises of confidentiality contained therein, consistent with the requirements under FOIL for private and confidential information that is exempt from disclosure under FOIL.

In New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d 560, 564 (2010), this Court denied the disclosure under FOIL of the names of teachers employed by the Charter Schools under Pub. Off. Law § 89(2)(b)(iii)'s privacy exemption, noting that "ordering disclosure of the names would do nothing to further the policies of FOIL . . ." This Court noted that under Pub. Off. Law § 89(2), access to records may be denied under FOIL that "if disclosed would constitute an unwarranted invasion of personal privacy." Id. at 563-64. Such exemption in that case included the sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes, as set forth in Pub. Off. Law § 89(2)(b)(iii). The petitioner organization, New York State United Teachers ("NYSUT"), apparently sought the teachers' names as a convenient mechanism for contacting prospective members, but this Court opined that the organization "may not rely on FOIL to achieve that end." Id. at 565. This Court declined to grant the FOIL request seeking disclosure of only the names of

the teachers employed by the Charter Schools, without their addresses, reasoning that the privacy concerns underlying the personal privacy exemption are no less implicated by the release of the teachers' names without their addresses. Id. at 566; see also Harris v. City University of New York, 114 A.D.2d 805, 805-06 (1st Dept., 1985) (denying access under FOIL to identifying information, including the names, addresses and social security numbers, from the curricula vitae of college faculty who were promoted to full professor in past five years, to protect those individuals from an unwarranted invasion of their personal privacy, under Pub. Off. Law §§ 87(2)(b) and 89(2)); Bellamy v. New York City Police Department, 87 A.D.3d 874 (1st Dept., 2011) (denying disclosure under FOIL to unredacted police reports containing the names and statements of witnesses who did not testify at petitioner's criminal trial, but who spoke to the police during an investigation into the gang-related homicide; such unredacted versions of the documents were found to be exempt from disclosure under Pub. Off. Law § 87(2)(b) (privacy exemption) and § 87(2)(f) (safety exemption)).

This Court's ruling in Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 N.Y.2d 92 (1989) is also relevant here. In that case, this Court denied a FOIL request for a list of the names and homes addresses of persons who hold licenses for rifles and shotguns.

The FOIL exemption at issue was the fund-raising exemption discussed above. Pub. Off. Law § 89(2)(b)(iii). After upholding the exemption, this Court stated:

> Our construction of the term "fund-raising" is not in any sense inimical to the policies of FOIL. It does not deny disclosure of official information helpful to the public in making "intelligent, informed choices with respect to both the direction and scope of governmental activities (see Public Officers Law, § 84)." (Matter of Fink v. Lefkowitz, supra, at 571). It is not even suggested that disclosure of the names and addresses of the permittees would promote this objective. Indeed, it is precisely *because* no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exemption of section 87(2)(b) fits comfortably within FOIL's statutory scheme.

Id. at 97 (italics in original). Similarly, in the case at bar, the procedures offered to petitioner does not deny disclosure of official information relative to the government's actions here.

An unwarranted invasion of personal privacy "is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities... This determination requires balancing the competing interests of public access and individual privacy." Pennington v. Clark, 16 A.D.3d at 1052; Dobranski v. Houper, 154 A.D.2d at 737. The Courts below properly balanced these interests in invoking the FOIL exemption in this case. As the Courts below concluded, the

Department of Records has a reasonable basis in law for its restriction pursuant to FOIL's personal privacy exemption. Respondents have offered a good-faith basis for the redaction and/or restriction on publication or disclosure of the names and identifying details of the individuals found in the records. To publicly reveal the identifying information concerning the persons who are the subjects of the documents, without their consent or the consent of their surviving relatives, would forseeably be painful and possibly humiliating for many of these persons and their families, and could subject them to unwanted publicity and harassment. As discussed herein, publication of these names would constitute an unwarranted invasion of personal privacy, and therefore disclosure of the names and/or other indentifying information is not required under FOIL. See Public Officers Law §§ 87(2)(b) and 89(2)(b); accord, New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d at 564 (denying disclosure under FOIL of the names of teachers employed by the Charter Schools under Pub. Off. Law § 89(2)(b)(iii)'s privacy exemption, noting that "ordering disclosure of the names would do nothing to further the policies of FOIL . . ."). Petitioner has the choice of viewing the unredacted documents, provided she agrees not to disclose or publicize the names or other identifying information of those individuals mentioned in the restricted case files; or of

obtaining a redacted set of the confidential documents in issue, consistent with FOIL requirements for documents that are exempt from disclosure under FOIL. See Schenectady County for the Prevention of Cruelty to Animals, 2011 N.Y. Lexis 3178.

POINT II

THE REQUIREMENT THAT PETITIONER AGREE NOT TO COPY, PUBLISH, DISSEMINATE OR RECORD THE NAMES AND CONFIDENTIAL IDENTIFYING INFORMATION IN THE RESTRICTED FILES DOES NOT VIOLATE HER CONSTITUTIONAL FIRST AMENDMENT RIGHTS TO FREE SPEECH.

As to the only requirement remaining in effect, that petitioner agree not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from the restricted materials (R317), petitioner's argument that this remaining requirement violates her First Amendment rights because she must give up her protected expressive activities to be granted access to the restricted files (Pet.'s Br. at 43-51) is likewise without merit. Petitioner cites no cases which hold that it is unconstitutional for the government to provide access to confidential information in its possession on the condition that the person not disseminate or publish the confidential information.

As previously noted, on September 22, 2011, this Court reserved decision on its sua sponte jurisdictional inquiry, as

to whether petitioner has an appeal as of right pursuant to CPLR § 5601(b), on the basis that a substantial constitutional question is directly involved. Petitioner, in addition to moving for leave to appeal, filed a notice of appeal to this Court dated July 26, 2011, seeking to declare that the Department of Records' regulations, governing public access to agency records, violate petitioner's constitutional rights under the First and Fourteenth Amendments of the United States Constitution.

Petitioner argues that respondents' regulations impose unconstitutional conditions on her First Amendment rights to publish names and identifying personal information in the restricted files (Pet.'s Br. at 43-46). Petitioner argues that the restrictions on publication are content-based and unconstitutional, and that respondents have no compelling interest in imposing content-based restrictions on the publication of personal information from the anti-Communist case files (Pet.'s Br. at 46-48). Finally, petitioner argues that the City's regulation fails to comply with constitutional procedural requirements (Pet.'s Br. at 48-50). The New York County Supreme Court (Diamond, J.) did not reach petitioner's constitutional claims at all (R5-7). The Appellate Division, First Department declined to rule on petitioner's constitutional claims, noting that the New York County Supreme Court did not

reach that issue (R326). The Appellate Division noted as follows (R326):

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

This Court should dismiss petitioner's purported appeal as of right, as there is no substantial constitutional question directly involved, to support an appeal as of right pursuant to CPLR § 5601(b)(1). Petitioner's constitutional argument, that 49 RCNY § 3-02 is unconstitutional and violates her First Amendment rights, provides no basis for an appeal as of right. Neither the Appellate Division, nor the New York County Supreme Court decided this proceeding on constitutional grounds. Rather, both lower Courts ruled against petitioner solely on the basis of FOIL, New York Public Officers Law §§ 84 et seq., and the statutory exemption preventing any disclosure that would cause an unwarranted invasion of personal privacy (Pub. Off. L. § 87(2)). Thus, there is no substantial constitutional question directly involved, within the meaning of

the CPLR, for this Court to assume jurisdiction to review the issue in an appeal as of right.

Petitioner argues that the publication restrictions imposed by 49 RCNY § 3-02 and Form MA-101D are content-based, thus requiring the "most exacting scrutiny" analysis (Pet.'s Br. at 46-47). She claims that the regulation is not content-neutral, since it does not apply to all of the records and information in the Municipal Archives, but only to those in the restricted series involving the "anti-Communist" investigation (Pet.'s Br. at 47). Thus, petitioner argues, "the City's requirements classify and regulate on the basis of content" (Pet.'s Br. at 47). Petitioner, however, is mistaken. The City's regulation, restricting access to the "anti-Communist" case files and requiring a signed certification agreeing not to copy, publish, record or disseminate any names or personally identifiable information from the files (see 49 RCNY § 3-02(B)(2)), as set forth in Form MA-101D (R317), is clearly a content-neutral speech restriction. This is so because it "serves purposes unrelated to the content of the regulated expression," see Mastrovincenzo v. City of New York, 435 F.3d 78, 99 (2d Cir. 2006), namely, maintaining the promised confidentiality of those teachers who were interviewed and possibly named in the records.

A regulation's allegedly "incidental" or "harmful secondary effects" on those such as petitioner do not render the regulation content-based, because it may still be justified without reference to the content of the regulated speech. Mastrovincenzo, 435 F.3d at 99 (citation omitted). Where as here a regulation "serves purposes unrelated to the content of expression," it is deemed content-neutral, "even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (upholding City's sound amplification regulation enacted to limit and control noise during concert events at Central Park band shell). Section § 3-02 is a content-neutral regulation triggering intermediate scrutiny, not strict scrutiny, as petitioner contends, since it is justified without reference to the content of the regulated speech. See Ward, 491 U.S. at 791.

The City did not adopt the regulation in issue (maintaining the privacy of those mentioned in the confidential records), because of disagreement with the message being conveyed. The justification here, to prevent public disclosure of the names and identifying information, pursuant to express promises of confidentiality, and to safeguard against the invasion of personal privacy, serves purposes unrelated to the content of the expression, concerning the City's Communist investigation. Notably, the names and identities of those

interviewed as part of the investigation are kept confidential and are not subject to disclosure, whether or not those individuals admitted to or denied being members of the Communist party, and whether or not those individuals "named names." Thus, the regulation at issue here was not adopted because of disagreement with the message being conveyed, and it serves purposes unrelated to the content of the expression, namely, maintaining the personal privacy and confidentiality of those interviewed, and those who were possibly implicated as part of the investigation. Thus, because it is justified without reference to the content of the regulated speech, the challenged regulation is content-neutral. See Ward, 491 U.S. at 791.

Accordingly, a regulation is not "content based" in a constitutional sense simply because "content" must be analyzed in order to apply the regulation. Rather, the constitutional concept of "content neutrality" is based upon "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). As noted, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Id.; Ward v. Rock Against Racism, 491 U.S. at 791. The Supreme Court has "never held, or suggested, that it is improper to look

at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." Hill v. Colorado, 530 U.S. 703, 721 (2000).

Thus, even though respondents must analyze the records in issue to determine what material is confidential and subject to redaction, and cannot be publicly disclosed, the intent of the regulation is not to suppress the expression of unpopular views, or to censor or cover up the City's actions during these investigations. Rather, the regulation preventing publication of the names in the "anti-Communist" case files is designed solely to protect the substantial public interest in maintaining express promises of confidentiality and preventing invasion of personal privacy resulting from the disclosure or publication of the names of those interviewed, and those who were possibly identified, based on their alleged affiliation or participation in or connection with the Communist party. Such a regulation is content neutral, and does not violate the First Amendment. The City has no interest in imposing its own views of the anti-Communist investigation on petitioner or any other researchers. See Ward, 491 U.S. at 792. To the contrary, petitioner can access all of the information, conditioned on her agreement not to disclose names or personal identifying information; or she can obtain redacted copies of the restricted case files, at a

charge of 25¢ per page, to cover the photocopying costs, as permitted by FOIL, Pub. Off. Law § 87(1)(b)(iii) (R205, R313).

In this case, the statutory exemptions under FOIL, and the implementing regulations and procedures, establish the government's proper concern with and protection of individual privacy interests in issue here. United States Supreme Court cases uniformly establish that there is no constitutional right of access to or disclosure of government information, and those legal principles are well settled. Petitioner's contention, that the requirement that she agree not to record, copy, disseminate or publish in any form the names or identifying personal information obtained from the restricted materials violates her First Amendment rights because she must give up her protected expressive activities in order to be granted access to the restricted files, is without merit. Petitioner failed to establish that it is unconstitutional for the government to provide access to confidential information on the condition that the person not disseminate or publish the confidential information.

Exemptions to disclosure of government documents, such as those at issue here, have consistently been upheld under the Constitution. As the United States Supreme Court has consistently ruled, "[t]here is no discernible basis for a constitutional duty to disclose, or for standards governing

disclosure of or access to information." Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978). In considering the question of whether the news media had a constitutional right of access to a county jail for publication and broad-costing, the Supreme Court, reiterated that there is "no constitutional right to have access to particular government information," and that the First Amendment does not mandate "a right of access to government information or sources of information within the government's control." Id. at 14, 15.

The Supreme Court reached the same conclusion in rejecting a facial challenge to a California state statute limiting access to information about persons who had been arrested. In Los Angeles Police Department v. United Reporting Publishing Corporation, 528 U.S. 32 (1999), the Court ruled that for purposes of assessing facial invalidation, "what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment". Id. at 40. The California statute in Los Angeles Police Department, 528 U.S. at 34, 40, simply required that if the respondent publishing company wanted to obtain the addresses of arrestees, it must qualify under the applicable state statute to do so, by agreeing to two conditions to public access, namely, that the person requesting the arrestee's

address declare that the request is being made for one of five prescribed purposes, and that the address will not be used directly or indirectly to sell a product or service. Since the respondent did not attempt to so qualify under the statute, it was properly denied access to the addresses. The Supreme Court ruled that the statute was not facially invalid under the First Amendment, agreeing that the provision was "not an abridgement of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department." Id. at 40. The same is true of the regulation in issue here. Title 49 RCNY § 3-02 is not invalid under the First Amendment, as the regulation is not an abridgement of petitioner's or anyone else's right to engage in speech, be it research or otherwise, but is simply a rule regulating access to confidential information in the hands of respondent New York City Department of Records and Information Services.

In Whalen v. Roe, 429 U.S. 589, 605 (1977), the Supreme Court similarly recognized privacy concerns regarding regulations requiring physicians to report the identity of persons receiving certain prescription drugs, but upheld the regulatory regime that protected those interests. The Court noted that it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in

computerized data banks or other massive government files," and cautioned that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." Tellingly, the Court observed that "New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy." Id. at 605. In the case at bar, the statutory exemptions under FOIL, and the implementing regulations and procedures, likewise establish the government's proper concern with, and protection of, individual privacy interests in issue here. These cases uniformly establish that there is no constitutional right to access to government information.

Other statutes condition access to confidential information on nondisclosure of the confidential information. For example, the Federal Privacy Act of 1974, 5 U.S.C. § 552a, strictly limits the disclosure and dissemination of records concerning individuals that are maintained by federal government agencies. Violations of this statute not only subject the violator to civil suits for damages, but if committed willfully, are crimes. See 5 U.S.C. § 552a(g), (i). Under the Privacy Act, it is a crime for any person to knowingly and willfully request or obtain any record concerning an individual from a

federal agency under false pretenses. 5 U.S.C. § 552a(i)(3). The Privacy Act, which was enacted in 1974, contains far more comprehensive, punitive and detailed restrictions on dissemination of personal information contained in federal government records than does the regulation at issue here.

In National Aeronautics and Space Administration ("NASA") v. Nelson, ___U.S.___, 131 S. Ct. 746 (2011), the Supreme Court rejected a challenge under the Privacy Act of 1974, 5 U.S.C. § 552a, to two parts of a standard employment background investigation conducted by federal employees. The Court held that the challenged portions of the government's background check did not violate any constitutional privacy right, because of, inter alia, the protections against public dissemination provided by the Privacy Act, whose safeguards against public disclosure satisfied any "interest in avoiding disclosure." Id., 131 S. Ct. at 751.

The Supreme Court noted not only the government's reasonable interests in conducting basic employment background checks, in order to ensure the security of its facilities and in employing a competent, reliable workforce, id. at 758; but also recognized that the information was "subject to substantial protections against disclosure to the public." Id. at 761. Although government accumulation of personal information may pose a threat to privacy, a statutory or regulatory duty to

avoid unwarranted disclosures generally allays these privacy concerns. Id. at 761, citing Whalen, 429 U.S. at 605. The Court pointed out that the information collected is shielded by the Privacy Act from "unwarranted disclosure":

> The Privacy Act, which covers all information collected during the background-check process, allows the Government to maintain records "about an individual" only to the extent the records are "relevant and necessary to accomplish" a purpose authorized by law. 5 U.S.C. § 552a(e)(1). The Act requires written consent before the government may disclose records pertaining to any individual. § 552a(b). And the Act imposes criminal liability for willful violations of its nondisclosure obligations. § 552a(i)(1). These requirements, as we have noted, give "forceful recognition" to a Government employee's interest in maintaining the "confidentiality of sensitive information . . . in his personnel files." Detroit Edison Co. v. NLRB, 440 U.S. 301, 318, n. 16, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979). Like the protections against disclosure in Whalen and Nixon, they "evidence a proper concern" for individual privacy. Whalen, supra, at 605, 97 S. Ct. 869, 51 L. Ed. 2d 64; Nixon, supra, at 458-459, 97 S. Ct. 2777, 53 L. Ed. 2d 867.

Id. at 762. The Court further observed that authorized designated employees who review and certify the completeness of the information provided on the forms "may not disclose any information contained in the form to anyone else." Id. at 763. The Court endorsed the Privacy Act's substantial statutory and regulatory protections against unwarranted disclosures and undue dissemination of personal information collected by the

government; and noted that the possibility of public disclosure was "remote," and did not undermine those substantial safeguards. Id. at 762, 763. The Supreme Court concluded that the government's inquiries as part of the employment background check did not violate any constitutional right to information privacy, in light of, inter alia, the protection provided by the Privacy Act's nondisclosure requirement. Id. at 763-64.

While NASA v. Nelson was concerned with the parameters of the presumed constitutional right to informational privacy, and not whether the denial of access to government records violated First Amendment rights, the Supreme Court obviously upheld statutory protections in the Privacy Act against unwarranted disclosures and undue dissemination of personal information collected by the government, see id., 131 S. Ct. at 762; and such protections certainly do not violate the Constitution. The privacy protections that were enforced there, as here, include, inter alia, requiring written consent from the subject of the information before the government can disclose confidential records pertaining to that individual, and prohibiting any authorized person who reviews the information in the files from disclosing any information contained therein to anyone else. Id. at 762, 763. These safeguards against disclosure are even more stringent than those contained in the

City's applicable regulation here, found in 49 RCNY § 3-02(B)(1) and (2).

Moreover, New York State Workers Compensation Law ("WCL") § 110-a, entitled "Confidentiality of workers compensation records," sets forth restrictions on disclosure that are similar to those at issue here. Pursuant to WCL § 110-a(1)(a), subject to specific enumerated exceptions, "no workers' compensation record shall be disclosed, redisclosed, released, disseminated or otherwise published by an officer, member, employee, or agent of the board to any other person." Pursuant to WCL § 110-a(1)(b)(iii), "individually identifiable information" means any data concerning any injury or claim that is linked to an identifiable employee or other person. Pursuant to WCL § 110-a(2), such worker's compensation records that contain individually identifiable information may, unless otherwise prohibited, be disclosed to, among others,

> (f) a person engaged in bona fide statistical research, including but not limited to actuarial studies and health and safety investigations, which are authorized by statute or regulation of the board or other governmental agency. Individually identifiable information shall not be disclosed unless the researcher has entered into a confidentiality agreement with the board and has agreed that any research findings will not disclose individually identifiable information; . . .

WCL § 110-a(2)(f) (emphasis added). This state statute contains a procedure that is very similar to the procedure that is being challenged in this case.

As another example, Workers Compensation Law Part 430, §§ 430.1 et seq., mandates that the Workers Compensation Board comply with the Personal Privacy Protection Law, Public Officers Law, Article 6-A, §§ 91 et seq. (which applies to state government employees, see Pub. Off. Law § 92(1)), concerning access to personal information in its records. Significantly, in permitting access to "personal information" (which means "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject," see Pub. Off. Law § 92(7)), the statute provides that "an agency may withhold the identity of a source who furnished said information under an express promise that his or her identity would be held in confidence." Pub. Off. Law § 95(5)(b). Such a provision, which protects against the disclosure of personal information (see Pub. Off. Law § 92(4)), does not violate First Amendment rights.

In addition, it is a common practice in litigation for one side to provide confidential documents to the other during discovery. Such confidential information is routinely provided pursuant to a protective order issued by the court. These protective orders restrict the use of the confidential documents

to specified litigation purposes, and prohibit any other dissemination or disclosure of the confidential information. Violation of a protective order is subject to findings of contempt and sanctions, as is the violation of any court order. Certainly the courts do not routinely violate the First Amendment by issuing protective orders restricting the use of confidential documents and information. If these protective orders are constitutional, than surely, the requirement at issue here is constitutional as well.

In the case at bar, allowing petitioner to disclose the names or personal information in the restricted files, which confidential information is exempted from disclosure under Pub. Off. Law §§ 87(2)(b) and 89(2)(b), "would do nothing to further the policies of FOIL." See New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d 560, 564 (2010). If anything, it is precisely because no governmental purpose is served by public disclosure of this information, that the privacy exemption here falls squarely within FOIL's statutory scheme. See id. at 564-65. Petitioner fails to demonstrate that her desire to publish the names and identifying information from the restricted "anti-Communist" case files outweighs the significant individual privacy interests of those named in the confidential records, and of those who were assured confidentiality in their testimony, and if deceased, of their

surviving relatives. Petitioner fails to show how or why her research project cannot proceed, and how and why it would be impeded or compromised, without publication and disclosure of the names and personal identifying information contained in those files.

As in New York Times Company, 4 N.Y.3d at 486-87, the disclosure sought herein is not required by the public interest. Petitioner has not shown that the information in the restricted files that can be disclosed -- including the names and words of the interviewers, and the words of the interviewees with only the teachers' names and personal identifying details redacted -- will be insufficient to meet the public's need to be informed about this period of history. See id. at 487. As in New York Times Company, the public interest in the names of the interviewees, and those named in the interviews, is outweighed by the interest in privacy of those family members who prefer that those names remain private. See id.

There was no substantial constitutional issue for the lower Courts to reach, and there is still no substantial constitutional issue for this Court to resolve. The Freedom of Information Law, a state statute, is dispositive of the claims being asserted here. Petitioner does not demonstrate that the statute is unconstitutional as applied, or that her constitutional challenges have any merit or basis in law, to

support an appeal as of right pursuant to CPLR § 5601(b). Nor does petitioner demonstrate that this case warrants an appeal by permission of this Court pursuant to CPLR § 5602(a).

CONCLUSION

THE DECISION AND ORDER APPEALED FROM, AFFIRMING THE DENIAL OF PETITIONER'S CPLR ARTICLE 78 PETITION AND DISMISSAL OF THE PROCEEDING, SHOULD BE AFFIRMED, WITH COSTS.

Dated: New York, New York
January 4, 2012

Respectfully submitted,

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