To Be Argued By:
MICHAEL J. GRYGIEL
(Time Requested: 20 Minutes)

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Court of Appeals
of the
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 PETITIONER-APPELLANT

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Introduction and Background

Petitioner-Appellant Lisa Harbatkin ("Ms. Harbatkin" or "Petitioner") respectfully submits the following brief in support of her appeal from the Appellate Division, First Department's decision and order entered on May 31, 2011. (R. 324-326)[1] The decision affirmed Supreme Court, New York County's denial of Ms. Harbatkin's Petition, brought pursuant to New York's Freedom of Information Law ("FOIL"), Article 6 of the N.Y. *Public Officers Law*, §§ 84-90 *et seq.*, for unrestricted public disclosure of the historic "anti-Communist" case files maintained by Respondent the City of New York's Department of Records and Information Services (the "City"). (R. 5-7) The Appellate Division also improperly declined to rule on the City's motion to dismiss the declaratory judgment aspect of combined proceeding below in which Ms. Harbatkin sought a determination that the City's imposition of various restrictions on her use of the anti-Communist case files in her research and writing violated her rights of free speech protected under the federal and New York State Constitutions, an issue it deemed "merely advisory" because Supreme Court had failed to decide it. (R. 326) For the reasons presented in the record, and as discussed more fully herein, this Court should reverse the decision appealed from and order the immediate

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

disclosure of the records at issue in unredacted form while striking down the conditions the City has imposed on their use as flagrantly unconstitutional.

Summary of Argument

Ms. Harbatkin is a native New Yorker who has dedicated her professional life to historical scholarship concerning the New York City Board of Education's notorious anti-Communist investigations which peaked in their intensity during the 1950's, known as the McCarthy Era and so-named for the anti-Communist practices of Sen. Joseph McCarthy. Her work includes, *inter alia*, research and writing pertinent to how the Board of Education's anti-Communist campaign affected New York City public school teachers who were subjected to — and, in many instances, victimized by — these political loyalty investigations, and the lingering effect of the investigations on public and educational policy. (R. 14-15)

In response to Ms. Harbatkin's FOIL requests, the City refused to disclose the names of individuals contained in the anti-Communist case files — compiled from the 1930s through the 1960s, when the Board of Education was conducting investigations into the political beliefs and associations of "approximately 1,100" (R. 16, 198) public school teachers — ostensibly to protect their privacy. The Appellate Division's cursory affirmation of the City's denials of access to these records should be reversed, and the City should be directed to disclose the requested information. Disclosure will provide the general public with an

opportunity to assess the circumstances culminating in the Board of Education's anti-Communist investigations of the mid-twentieth century, including the City's use of informants (both voluntary and involuntary) within the public school system to identify potential targets of those investigations. The public has the right to know this information consistent with FOIL's commitment to open government and public accountability on a matter that directly implicates an issue of significant historic concern to New York's citizens. Putting aside that these materials are historically dated, the transparently pretextual nature of the City's privacy claim, which the lower courts accepted, is revealed by its willingness to supply the names of any and all teachers who were investigated to Ms. Harbatkin — *provided*, however, that she agrees not to publish them "in any form." (R. 317) The courts below erred because the City's conclusory assertion that disclosure of the requested records would result in an unwarranted invasion of personal privacy was insufficient to justify nondisclosure under FOIL in this instance.

As had the trial court, the Appellate Division cited, and ultimately found dispositive, the decision in *Matter of New York Times Co. v. City of New York Fire Dep't.*, 4 N.Y.3d 477, 484 (2005), where this Court recognized, for the first time, that a privacy interest may exist "in the feelings and experiences of people no longer living." Ms. Harbatkin acknowledges, in accordance with that decision, that a descendible right of privacy may, in exceptional circumstances, exist under

FOIL. However, this Court's solicitude for that interest in that case was attributable to the deeply personal nature of the 911 calls of those trapped in the inferno that was the World Trade Center towers on September 11, 2001. The historical records here are intrinsically different from those at issue in *Matter of New York Times*, and any privacy interest is no longer of comparable strength. The First Department's holding significantly expands the descendible right of privacy recently established in *Matter of New York Times*, and is not supported by the interests implicated on the instant appeal.

The City's legal obstructionism did not stop with the mere denial of public access. Pursuant to a regulation[2] it enacted for the sole purpose of controlling public access to the anti-Communist case files, the City required Ms. Harbatkin — and all other citizens seeking access to the withheld records — to agree, in advance and as a condition of obtaining full disclosure, to obtain permission from its Department of Records/Municipal Archives before using "any direct quotation" from the restricted materials in any publication. This was not only a direct and substantial impediment to Ms. Harbatkin's ongoing research, but a frontal assault on the First Amendment. Our constitutional system does not allow the government

[2] Section 3-02 ("Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files"), Chapter 2, Title 49 of the Rules of the City of New York ("Rule 3-02") and implementing Form MA-101D ("Form D"). (R. 68-69, R. 70) Subsequent to Ms. Harbatkin's initiation of the Article 78 proceeding in the lower court, the City apparently modified Section 3.02 by withdrawing its pre-publication approval requirement.

to impose prior restraints on speech, a form of censorship that is anathema to the marketplace of ideas.

There is no greater offense to the First Amendment and no greater harm to our constitutional order than a government that can prevent the publication of information with which it disagrees or of which it disapproves, which is exactly what the lower courts have allowed here. By effectively upholding the validity and enforceability of Rule 3-02 and its implementing Form D, those courts have allowed the City to require all individuals, as a condition of unrestricted access to the Board of Education's historic anti-Communist files, to certify that they will not "record, copy, disseminate or publish" any names or personally identifiable material contained in those files. (R. 70, 317) This sweeping regulation, which holds those who would have unredacted access to the archives hostage to the conditions on publication imposed by the City, strikes at the very core of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This guiding principle constrains the government in all of its varied activities, ranging from the direct (*e.g.*, by requiring official approval before information can be published) to the indirect (*e.g.*, through

the imposition of an indemnification requirement as a precondition of protected expressive activity) regulation of speech.

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

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

There can be no doubt that the City's anti-Communist archives reflect a tragic, but important, chapter in not just the City's but the nation's history.

Moreover, the City of New York is hardly the first governmental entity to seek to suppress embarrassing information about historic practices that were coercive or threatening to the citizens it was entrusted with governing. Yet if the courts below are right, Ms. Harbatkin may be deprived of complete access to that information and prohibited from publishing information contained in what are unquestionably historically valuable and authentic documents. The chilling effect on Ms. Harbatkin's First Amendment activities could hardly be more severe. It is not too much to say that, ostensibly to protect the privacy of those citizens subjected to the ideological purges undertaken by its Board of Education several decades ago, the City has replicated the system of censorship characteristic of the repressive Communist regimes that it was seeking to combat during the McCarthy period. If the lessons of the law and history have taught us anything, it is that the First Amendment does not tolerate such conduct.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal:

1) pursuant to CPLR 5601(b)(1), because the order of the Appellate Division, First Department, which finally determined this action directly involved the construction of the Constitution of the United States, *i.e.*, Petitioner's right to freedom of speech under the First Amendment; or, alternatively,

2) pursuant to CPLR 5602(a)(1)(ii) because the order of the Appellate Division, First Department, finally determined this action and is not appealable as of right.

QUESTIONS PRESENTED

1) The City of New York is the custodian of records concerning widely condemned investigations conducted during the mid-twentieth century into the alleged Communist affiliations of New York City school teachers and others by the New York City Department of Law under the auspices of the New York City Board of Education. In response to Ms. Harbatkin's FOIL request for access to its historic "anti-Communist" series of investigative files, the City of New York's Department of Records and Information Services partially disclosed some records, but withheld others and redacted the names of so-called confidential informants who reported on public school teachers during the anti-communist investigations, the names of the targets of those investigations, the names of the public schools where the investigations were conducted nearly a half-century ago, and even the names of the neighborhoods in which those schools were located, all on the purported grounds of protecting the identity of informants and others swept up in the investigations. Did the City's denials of public access to the records in unredacted format adequately establish that disclosure would cause an unwarranted invasion of personal privacy under N.Y. *PUBLIC OFFICERS LAW* § 87(2)(b)?

The Appellate Division, First Department answered this question in the affirmative.

2) At the time teachers and informants were interrogated, the City promised them confidentiality — thereby establishing a cloak of secrecy intended more to leverage compliance and shield the Board of Education's own conduct from public scrutiny than to protect those who were targeted by its ideological cleansing activities. Does the City's agreement not to reveal in perpetuity the names or other identifying information relative to "teachers and other school personnel investigated and/or questioned by the Board" (R. 195) and its lawyers because they were suspected of political disloyalty contravene FOIL's presumption of open access to official government records by subordinating the City's disclosure obligations to the terms of a private confidentiality agreement?

The Appellate Division, First Department did not determine this question.

3) As a precondition to the exercise of the right to review these historic public records concerning its anti-Communist investigations (but not records on any other subject matter) for the purpose of scholarly research connected therewith, the City requires any party seeking access to certify that he/she will not "record, copy, disseminate or publish in any form any names or other identifying personal information" obtained from the restricted materials. (R. 317) Has the City placed unconstitutional conditions on the exercise of free speech and research

activities, and do those conditions also violate the First Amendment's content-neutrality requirement and lack the necessary procedural safeguards?

The Appellate Division, First Department stated that a ruling on Petitioner-Appellant's constitutional challenge would be "merely advisory" because Supreme Court had not decided the issue.

STATEMENT OF THE CASE

A. Ms. Harbatkin's Historical Research Activities.

Ms. Harbatkin is a scholar actively involved in research and writing regarding the New York City Board of Education's notorious anti-Communist investigations into public school teachers' political beliefs between the 1930's and 1960's. During these investigations Saul Moskoff, Assistant Corporation Counsel assigned to the Board of Education and an individual well-known for his McCarthyism and anti-Communist sentiments, conducted extensive interrogations with numerous teachers suspected of espousing Communist beliefs. (R. 16) Each interrogation was transcribed and preserved by the City, along with additional records about the informants who identified individual teachers as suspected Communist sympathizers. (R. 17) Ms. Harbatkin has a personal connection to the City's anti-Communist campaign: her parents, both public school teachers, were among those interrogated by the City when McCarthyism reached a fever pitch during the 1950's. Ms. Harbatkin's father was one of the 400 teachers forced to

surrender his teaching license, and livelihood, in the wake of the City's interrogations. (R. 16)

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

Through the course of her research, Ms. Harbatkin discovered that the New York City Municipal Archives, a sub-agency within the Department of Records and Information Services, housed records of the anti-Communist interviews and related materials. (R. 18) In June of 2007, Harbatkin contacted a City archivist and requested access to those files. (*Id.*) The archivist informed her that the City was developing procedures to govern public access. (*Id.*) After repeated assurances that such procedures were forthcoming, but faced with a continuing denial of access (R. 53-61), Ms. Harbatkin filed, as required by law, a FOIL request on October 17, 2008, seeking disclosure of the City's anti-Communist records. (R. 24) New York City Assistant Commissioner and Records Access Officer Kenneth R. Cobb denied Ms. Harbatkin's FOIL request in a letter dated November 6, 2008. (R. 24) Ms. Harbatkin filed an administrative appeal on November 26, 2008, which was denied in a letter dated December 9, 2008, from New York City Department of Records Deputy Commissioner and FOIL Officer Eileen M. Flannelly. (R. 25, 34-35, 182-183) The appeal denial letter, which marked the City's final and binding decision regarding Ms. Harbatkin's FOIL request, informed Ms. Harbatkin that complete access to the anti-Communist

records would be contingent upon her compliance with the City's newly created Section 3-02 of Title 49, Rules of the City of New York titled "Municipal Archives Guidelines for Archival Use of Board of Education 'Anti-Communist' Case Files" ("Rule 3-02"), enacted as a direct response to her efforts to gain access to these historic materials. (R. 24, 34-35)

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

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

not been obtained; and (4) all photocopies will be redacted to remove information identifying individuals whose permission has not been obtained.[3] (R. 21-22, 70)

Pursuant to these requirements, the City sought to compel Ms. Harbatkin to complete Form MA-101D ("Form D") as a precondition of granting access to certain anti-Communist files. (R. 70) In its present iteration,[4] Form D requires a party seeking access to the anti-Communist files to certify that he/she will not disseminate or publish "in any form any names or other identifying personal information" obtained from the restricted materials. (R. 317)

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

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

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

[4] In enacting a revised post-litigation version of Form D, the City has apparently abandoned the requirements that a party requesting access (1) obtain permission from the Department of Records/Municipal Archives for any direct quotation from the restricted materials to be used in any public presentation, and (2) indemnify the City against any claims or liability arising from unauthorized publication of the material. (R. 317) While neither court below addressed these conspicuously unconstitutional conditions on free speech challenged by Ms. Harbatkin below, they are no longer at issue in the case in view of their withdrawal by the City.