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

New York County Clerk's Index No.: 104933/09

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.

REPLY BRIEF FOR PETITIONER-APPELLANT

GREENBERG TRAURIG LLP
MICHAEL J. GRYGIEL
WILLIAM A. HURST
CYNTHIA E. NEIDL
Attorneys Pro Bono for Petitioner-Appellant
54 State Street, 6th Floor
Albany, New York 12207
Tel: (518) 689-1400
Fax: (518) 689-1499

Dated: January 20, 2012

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

PRELIMINARY STATEMENT

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

The City has not met its heavy burden of demonstrating that an exception to full FOIL disclosure applies to the historically significant documents at issue on this appeal. In support of its claim that complete disclosure of these records would constitute an unwarranted invasion of privacy, the City has offered no evidence suggesting that even a single person interrogated or named in the records, or any of their surviving family members, would consider full disclosure a violation of their privacy. Instead, and stripped of its surplusage, the City's brief relies on (1) a more than thirty-year old unpublished decision permitting redaction of the names of living persons from the records; (2) an unsupported and unwarranted assumption that those interrogated and their surviving families would be "distressed" and "humiliated" if the records were fully disclosed; and (3) the self-serving promises

of confidentiality made by the Board decades ago when it interrogated teachers and informants. As discussed more fully below, these reasons are insufficient to support the continuing nondisclosure of the complete historical record from this debilitating period in our nation's history — when tyranny masqueraded as patriotism — as requested by Ms. Harbatkin.

The City also asserts that Ms. Harbatkin has failed "to articulate any valid cognizable reason" (City Br., 51)[1] for full disclosure of the "historical government records" at issue. (*Id.*, 47) While establishing a public interest -- or any justification for disclosure -- is not Ms. Harbatkin's burden under FOIL, the public interest in the City's policies and practices during the McCarthy period cannot be denied. Indeed, the City concedes on one hand that the public has an interest in the records, yet contends on the other that there is no public interest in the information redacted from those records. The City cannot have it both ways. This Court very recently acknowledged that names in public documents may properly be sought under FOIL, to "expose governmental abuses or evaluate governmental activities." *Matter of N.Y.S. United Teachers v. Brighter Choice Sch.*, 15 N.Y.3d 560, 565 (2010). The City's wholesale redaction of names, schools, addresses and other information provides an incomplete and incoherent account of the Board's

[1] The *Brief For Respondents* dated January 4, 2012, is referred to herein by page as "(City Br., __)."

activities, stifles further research on the subject, and obstructs a full examination of the Board's conduct by the public.

Finally, there is no support for the City's claim that its publication restrictions -- which it trivializes as "privacy procedures" (City Br., 6), a euphemism of the highest order -- are consistent with the Constitution and Ms. Harbatkin's First Amendment rights. The City's argument is based largely on right of access cases, which have no application here. The City has agreed to give Ms. Harbatkin access to the records, but has expressly conditioned that access on her promise of nondisclosure. The courts below erroneously failed to address Ms. Harbatkin's constitutional claims, and this Court should declare the City's Rule 3-02 and its related Form-D unconstitutional.

ARGUMENT

I. THE APPELLATE DIVISION ERRED IN FINDING THAT THE CITY CARRIED ITS BURDEN OF ESTABLISHING THAT HISTORICAL INFORMATION CONTAINED IN ITS "ANTI-COMMUNIST" INVESTIGATION FILES IS SPECIFICALLY EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW

A. The Speculative Privacy Interest Asserted by the City Is Devoid of Support In the Record.

1. The Decades-Old *Cirino* Decision Does Not Support the City's Position.

To bolster its claim that those interviewed or named in the records have a privacy interest in the "anti-Communist" files, the City places substantial reliance

on *Cirino v. Board of Education of the City of New York,* N.Y.L.J., July 10, 1980, No. 0011117/1980 (N.Y. County Sup. Ct. 1980), an unreported decision more than three decades old. (City Br., 30-31) Prior to the trial court's decision, the *Cirino* case had never been cited by any court, in New York State or any other jurisdiction.[2] The City characterizes *Cirino*, a case with dubious precedential value in any event, as "exactly the same as" the instant case. (City Br., 31) It plainly is not.

More than thirty years have passed since the *Cirino* case was decided, in which time the Berlin Wall has been dismantled, the former Soviet empire has collapsed, and Marxism has been pervasively discredited as a theory of political and economic organization. It can no longer realistically be maintained that disclosure would result in economic or personal hardship to the teachers — whether living or deceased — who were targeted because of their political beliefs and associations. Whatever privacy interest might be said to have existed during an earlier, and regrettable, chapter in our nation's history has long since faded away[3] and can no longer prevent full disclosure of the historical record

---

[2] As of January 20, 2012, a computerized case name search of all WESTLAW state and federal court databases using the term "Cirino" yielded no results concerning the decision relied on by the City.

[3] Albeit unwittingly, the City's discussion of famous folk singer Woody Guthrie's 2006 enshrinement in the Oklahoma Hall of Fame only reinforces this point. (City Br., 39-40) The "time of national upheaval and crisis" (*Id.*, 48) when affiliation with or sympathy for the Communist Party was a disqualifying taboo has long since passed, as this episode illustrates.

"pertain[ing] to the 'anti-Communist' activities of the Board from the 1930s through the 1960s." (R. 195) This is reinforced by the forceful recognition in *Cirino* that "any such hardship resulted from the McCarthy era witch hunt conducted under the aegis of the Feinberg Act, and not from disclosure of the abuses conducted in the name of patriotism." (R. 208)

Moreover, *Cirino* was decided in a framework and with the understanding that even the records "of individuals who were still alive" (City Br., 31 n.6) would remain sealed only "until the year 2000." (R. 208) In other words, those records would be made available in the public domain in their entirety at the beginning of the second millennium because of the withering of any privacy interest that occurs commensurately with the passage of time and actuarially with the death of the subjects. Based on the assertions of the City's attorney, who purportedly read certain unidentified materials relating to the issue, the City contends that the Board "did not address" whether it would provide full or redacted access to the records in the year 2000. (City Br., 46 (citing R. 315)) However, the only reasonable interpretation of the Board's statement that the records would be sealed until the year 2000 is that they would be unsealed at that point and made available in unredacted form. The City's self-serving and unsubstantiated suggestion that the

---

Contrary to the City's claim, it is simply no longer "evident" that "less famous people" with "alleged 'communist leanings' " would regard disclosure as somehow "detrimental to their or their surviving relatives' well-being." (*Id.*, 40)

Board was implicitly reserving its right to withhold some portion of the documents should be rejected.

Moreover, in *Cirino*, the court held that FOIL permitted redaction of "identifying details" from the Board of Education's files only of *living* subjects of the investigations — the only records addressed in the *Cirino* decision. The City contends that this "qualification" no longer applies because the Court of Appeals held in *Matter of New York Times v. City of New York Fire Dept.*, 4 N.Y.3d 477 (2005) ("*New York Times*" or "9/11 Case"), under the extraordinary circumstances of that case, that the surviving relatives of September 11 victims had a privacy interest protected by FOIL. (City Br., 31-32 n.6, 32-33) However, the City's logic rests on the improper assumption that the privacy interests of the surviving relatives of September 11 victims — a mere two years after that devastating event — are similar to the privacy interests of the surviving relatives of those interrogated by the Board decades ago. There is nothing in *Cirino* that suggests the court would have permitted the redaction of all names, addresses, schools, and other information the City has redacted here, but for the lack of a protected privacy interest in the surviving relatives of those named in the "anti-Communist" files.

The decision in *Cirino* -- which, at the risk of stating the obvious, is not binding authority on this Court -- fails to support the City's wrongful withholding of the records in this case.

2. The *New York Times* Case Does Not Support the City's Conjectural Privacy Claim.

Like the courts below, the City likens this matter to the 9/11 Case, which involved a request for FOIL disclosure of, among other things, calls made on the tragic morning of the September 11, 2001, to the City Fire Department's 911 emergency system. 4 N.Y.3d at 485 (stating that because none of the six privacy exemptions to FOIL were applicable, the court had to decide "whether any invasion of privacy here is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information."). Based on the "extraordinary facts in th[at] case," *id.* at 484, a privacy interest was recognized on behalf of the surviving relatives of those who, confronted with their imminent demise, placed emergency 911 calls. *Id.* at 485.

In analogizing this case to the 9/11 Case, the City argues that, although the City Fire Department came forward with no affidavits of surviving family members to establish their expectation of privacy in the 911 calls, this Court nonetheless concluded that the Department had established a compelling privacy interest. (City Br., 32-33, 35-36) While the presumption of a compelling privacy interest was eminently reasonable in the 9/11 Case, it cannot be fairly presumed here. Indeed, this Court sensibly concluded that the surviving family members of September 11 victims would be distressed and "deeply offended" by the disclosure of their loved ones' "expressions of the terror and agony" and "their deepest

feelings about what their lives and their families meant to them." *New York Times*, 4 N.Y.3d at 485. Here, any such conclusion that those interrogated over fifty years ago and their surviving families would be distressed, deeply offended, or in any way bothered by the full disclosure of the "anti-Communist" files would be patently unreasonable. That the City even suggests that the privacy interests in this case are in any way equivalent to those at issue in the 9/11 Case is indefensible.

Simply put, the City is ostensibly concerned at this late stage about protecting the subjects of the "anti-Communist" files and their descendants from the embarrassment that it perceives would follow from disclosure of their names.[4] The City's unsupported assertion that "[i]t is quite understandable that some of the persons interviewed, or their surviving relatives, would be distressed by public disclosure" that they were "accused or suspected" of being members of the Communist Party "at a time when Joseph Stalin led the Soviet Union" (City Br., 38) is nothing short of patronizing and even insulting to those men and women

[4] The City's attempt to legitimize its withholding of the names of both living and deceased public school teachers who were interrogated by the Board of Education by asserting that the *New York Times* decision authorized the redaction of not just personally identifying information but of "all of the words of the victims" (City Br., 33) is of no moment here. The reason the emergency 911 phone call recordings at issue in that case were found exempt from FOIL disclosure in their entirety was because of their unquestionably and deeply personal content -- *i.e*, as the potentially final declarations to loved ones and family members made by those facing the "prospect of imminent death." 4 N.Y.3d at 485. For the reasons identified above in the text, neither the transcripts of the political loyalty investigations conducted by the Board of Education nor the names of those who were interrogated implicate similar privacy interests. Further, the City's claim that Ms. Harbatkin can publish information from the transcripts "with the names changed" would amount to nothing less than a bowdlerization of the historical record. (City Br., 34)

who were the subjects of those interviews. This assertion is wholly speculative, conclusory and stands in stark contrast to the demonstrable personal anguish and trauma experienced by the surviving relatives of those killed on September 11, 2001.

3. The Other Cases Cited by the City Also Fail to Support Its Privacy Claim.

The few additional privacy exemption cases cited by the City are also readily distinguishable and fail to support its argument. (City Br., 41) The case of *Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse,* 65 N.Y.2d 294 (1985), centered on the application of an entirely different FOIL exemption, where petitioner law firm sought access to motor vehicle accident reports maintained by respondent in order to solicit potential clients for its personal injury practice. *Id.* at 296. This Court held that disclosure of names and addresses of automobile accident victims under those circumstances would constitute an "unwarranted invasion of personal privacy" pursuant to Public Officers Law § 89(2)(b)(iii)'s exemption for the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." *Id.* at 298.

Johnson v. New York City Police Department, 257 A.D.2d 343 (1st Dep't 1999), and *De Oliveira v. Wagner,* 274 A.D.2d 904 (3d Dep't 2000), each involved the narrow question of "whether disclosure of documents generated by the police during the investigation of a crime is warranted under FOIL, when disclosure is

sought by an individual who has been convicted of the very crime in question." *Johnson,* 257 A.D.2d at 346; *De Oliveira,* 274 A.D.2d at 904. Unsurprisingly, the decisions held that disclosure of documents which could reveal the identity of murder investigation witnesses to a convicted defendant was an unwarranted invasion of privacy with respect to those witnesses. *See Johnson,* 257 A.D.2d at 347-48; *De Oliveira,* 274 A.D.2d at 905. Needless to say, no such obvious privacy interest arising from concern over the personal safety of individuals based on fear of reprisals is implicated here. *See Johnson,* 257 A.D.2d at 347; *see generally De Oliveira,* 274 A.D.2d at 904.

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

Finally, the Fourth Department's decision in *Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314, 318-19 (4th Dep't 2010), is also inapposite because the public records at issue were of no public interest. There, a

disgruntled user of the respondent's facility demanded two free annual compost site access passes in exchange for the use of his photograph in the respondent's newsletter. When the respondent refused to provide the passes, the petitioner made a FOIL request seeking all photographs in the respondent's storage system. The respondent withheld, among other things, unpublished photographs depicting individuals other than petitioner. On review, the Fourth Department affirmed because the individuals depicted consented to the use of their photographs only for educational purposes, the petitioner's reason for seeking the photographs was not disclosed, and there was no public interest in the photographs. Here, in significant contrast, the record firmly establishes—and the City does not dispute— that there is significant public interest in the City's "anti-Communist" files. (City Br., 14; Board of Education's investigations were "an event of historical, sociological, and educational significance").

B. The Promises of Confidentiality Made by the Board of Education Behind Closed Doors In Part to Shield Its Own Conduct from Public Scrutiny Deserve Little Weight In the Balancing Process.

Despite its attempt to sanitize the circumstances surrounding the promises of confidentiality made by the Board of Education, the City does not effectively dispute that such promises were made for the purpose of shielding the Board's own conduct from public scrutiny as much as to protect those who were targeted by its ideological cleansing activities. (R. 289-90) Nor does it gainsay that any such

promises were given under the coercive circumstances of what amounted to a government inquisition. The City also does not address the fact that permitting the government to withhold information based on its self-serving promise of confidentiality is contrary to FOIL's presumption of open access to official government records. Finally, the City fails to address the fact that the promises of confidentiality were given decades ago, and that the "tenor of the times" is now completely different.

Notwithstanding the circumstances under which the Board's self-serving, anachronistic promises of confidentiality were made, the City continues to argue that such promises constitute a "compelling" reason to decline disclosure. (City Br., 41-42) In support of its argument, the City once again analogizes this case to the 9/11 Case, contending that the Court of Appeals considered the promise of confidentiality " 'highly relevant' " to the issue of whether an expectation of privacy existed in "oral histories" recorded by fire fighters in the days following September 11. (City Br., 42-43; citing *New York Times*, 4 N.Y.3d at 489) However, any such promise in that case would have been "highly relevant" only because there was no evidence whatsoever that the fire fighters, who voluntarily gave "oral histories," had any expectation of privacy in their interviews. Thus, the Court was not suggesting that any such promise would have carried the day, but rather would provide some support for the otherwise unsupported notion that any

expectation of privacy existed in the "oral histories." Moreover, it is unquestionable that a promise of confidentiality would be significantly more relevant in the 9/11 Case, where the interviews were voluntarily given only a few years prior by presumably still living individuals, than here, where the interviews were anything but voluntary and were conducted more than fifty years ago.

The City also points to a few statements by individuals interrogated suggesting that the individuals understood their statements would be kept confidential, and were concerned that if their statements were disclosed, there could be repercussions for them or their families. (City Br., 45) There is no dispute that promises of confidentiality were made and were likely believed and relied on at the time by some. The question, however, is the significance of such promises today. It would be unreasonable to assume that full disclosure today would result in hardship to the teachers who were targeted because of their political beliefs and associations or their surviving families. There is no evidence in the record that a single person today would be distressed, humiliated, or harassed by the full disclosure of the records at issue in this case. Whatever privacy interests existed fifty years ago have long since faded away and can no longer prevent full disclosure of the "anti-Communist" files.

C. The Strong Public Interest in the Historic "Series 590-597" Records Further Compels Full Disclosure.

While the City concedes — as it must — that there is significant public interest in the "anti-Communist" files, it nevertheless argues that this interest is limited only to the unredacted portions of the records it has disclosed (City Br., 46-47). This proposition is absurd. The public interest in the files extends to the information redacted by the City, including the names of those interrogated and the names mentioned in the interviews. Moreover, as detailed by Ms. Harbatkin, the redactions significantly inhibit the research process and preclude meaningful follow-up research. (R. 281-285) Further, "the City has not simply redacted personal identifying information such as names and home addresses - *in effect it has obliterated from the public record most of the contextual information accompanying the redacted information.*" (R. 284; emphasis in original)

Although not mentioned in the City's brief, the purpose of FOIL is undeniably to promote the public's right to be informed about the processes of governmental decision-making. N.Y. Pub. Off. Law § 84; *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566-67 (1986). Just recently, this Court reaffirmed that the policies of FOIL are "to assist the public in formulating 'intelligent informed choices with respect to both the direction and scope of governmental activities.'" *Matter of N.Y.S. United Teachers*, 15 N.Y.3d at 564 (quoting *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). While

upholding the non-disclosure of information under FOIL § 89(2)(b)(iii), the Court acknowledged that names in public records may be used to "expose governmental abuses or evaluate governmental activities." *Id.* This is precisely why Ms. Harbatkin seeks the full records here, and why the City's self-serving denial of full access should be rejected.

The City also suggests that Ms. Harbatkin must demonstrate the public interest in the redacted information withheld by the City. However, the City's position is contrary to the presumption of disclosure under FOIL, *see Matter of Fink*, 47 N.Y.2d at 571, and it turns the burden of proof in FOIL cases on its head. It is the City that bears the burden of proof, which requires that it articulate a particularized and specific justification for nondisclosure of subject names and other identifying information contained in the "anti-Communist" case files. N.Y. Pub. Off. Law § 89(4)(b); *Russo v. Nassau Community College,* 81 N.Y.2d 690, 697-98 (1993); *Capital Newspapers Div. of Hearst Corp. v. Whalen,* 69 N.Y.2d 246, 252 (1987); *Westchester Rockland Newspapers, Inc. v. Kimball,* 50 N.Y.2d 575, 580 (1980); *Matter of Fink,* 47 N.Y.2d at 571.

Further, the City argues that the public interest in the redacted information should be discounted because the information may not be "reliable." (City Br., 48-50) However, the fact that certain individuals may not have been entirely truthful in the interviews does not diminish the importance or value of these materials. The

City identifies no reason that the honesty of those interrogated decades ago makes the materials themselves unreliable or lessens the public importance of the files. Indeed, only the complete records will permit a full and fair investigation and analysis of the Board's conduct.

Finally, the City goes so far as to insinuate that Ms. Harbatkin seeks the information for use "as an object of idle curiosity or a source of titillation." (City Br., 33 (internal quotation marks and citation omitted)) This accusation is as unfounded as it is insulting. Although having no obligation under FOIL to do so, Ms. Harbatkin has set forth in painstaking detail the legitimate reasons she is requesting the historical information that has been withheld from her. (*See* R. 279-85) There is no dispute regarding the significant public interest in the records, and the City's claim that certain information should be withheld cannot stand.

II. THE CITY'S RULE 3-02 AND ITS FORM D IMPOSE UNCONSTITUTIONAL CONDITIONS ON MS. HARBATKIN'S FIRST AMENDMENT RIGHTS

A. Rule 3-02 Imposes Content-Based Restrictions That Cannot Withstand Strict Constitutional Scrutiny.

Both the City's Rule 3-02 and its Form D impose publication restrictions on anyone accessing the City's "anti-Communist" files.[5] While members of the

[5] The City's brief leaves no doubt that Rule 3-02 remains in effect and conditions Ms. Harbatkin's complete access to the anti-Communist case files on the forfeiture of her First Amendment right to publish information of undoubted historical value: "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***." (City Br., 2;

public may view the records in unredacted form, they are prohibited from recording, copying, disseminating or publishing in any form "any names or other identifying personal information" contained in the records. (R. 317) The City's claim that this certification requirement imposes a "content-neutral speech restriction" (City Br., 63) is erroneous because the ostensible purpose of the requirement -- to protect the privacy of the teachers who were interrogated (*id.*) -- necessarily and directly derives from particular subject matter: the names of the teachers whose ideological beliefs were being investigated and "other identifying information" (City Br., 29 n. 3) in the interrogation transcripts. It is difficult to conceive of a clearer or stronger nexus between the challenged restriction and the content of the information it regulates. In contrast, the general permit requirement upheld in *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006), which required all street vendors who wanted to sell "non-food goods or services" to obtain a renewable license, was content-neutral when applied to "sidewalk purveyors of clothing painted with graffiti" because it was (1) not aimed at the expressive purpose of the clothing, and (2) adopted to keep "public streets free of congestion for the convenience and safety" of citizens. *Id.* at 81, 82, 99. Thus, the license requirement was a neutral law of general applicability which did not target

---

emphasis supplied) This unconstitutional *quid pro quo* – unfettered access predicated on the relinquishment of protected free speech rights -- is pervasively repeated throughout the City's brief. *See, e.g., id.* at 6, 7, 16, 17, 19, 48, 50, 53, 56, 60 and 66.