

# New York Supreme Court

## APPELLATE DIVISION—FIRST DEPARTMENT

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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.*

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### BRIEF OF AMICI CURIAE

ADVANCE PUBLICATIONS, INC., ALM MEDIA, L.L.C.,  
ASSOCIATED PRESS, BLOOMBERG NEWS, GATEHOUSE  
MEDIA, INC., THE HEARST CORPORATION, THE NEW YORK  
NEWS PUBLISHERS ASSOCIATION, THE NEW YORK TIMES  
COMPANY, AND PEN AMERICAN CENTER IN SUPPORT OF  
PETITIONER-APPELLANT

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## **PRELIMINARY STATEMENT**

This brief *Amici Curiae* is respectfully submitted in support of Petitioner-Appellant Lisa Harbatkin (hereinafter, “Harbatkin,” or “Petitioner-Appellant”) for reversal of the judgment below, which denied unrestricted public access to historic “anti-Communist” records maintained by the City of New York’s Department of Records and Information Services under New York State’s Freedom of Information Law (Article 6 of the N.Y. Public Officers Law §§84-90 *et seq.*)(hereinafter, “FOIL”). The denial was improperly made under the narrow “unwarranted invasion of personal privacy” exemption to FOIL. N.Y. Public Officers Law §87(2)(b)(McKinney 2010).

Reporters, historians and citizens often seek government records under FOIL to uncover the details of past government practices and policies as a way to better understand and monitor how agencies use the powers with which they are entrusted. Unsurprisingly, such records may contain information about individuals, including deceased individuals, over which objections to disclosure may be raised. While as a matter of civil discourse, the memory of the deceased and the sensitivities of their surviving heirs are important considerations, it would be against the public interest to find an ever-expanding and unchecked privacy interest in government records that would effectively give surviving heirs the ability to control the historical record. Such a right by the government as well to invoke the privacy interests of the deceased and

their surviving heirs would enable the government to expansively shield from the public critical records that would otherwise be available to journalists, scholars and citizens. The denial of these records will deprive the public of important and accurate histories and biographies and, more importantly, impair the public's ability to hold government accountable for its past waste, negligence and abuse.<sup>1</sup>

Accordingly, *Amici* respectfully urge this Court to reject the lower court's expansive reading of personal privacy exemption under FOIL, as embodied in its interpretation of the extraordinary New York Court of Appeals case *Matter of New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 829 N.E.2d 266, 796 N.Y.S.2d 302 (2005) (hereinafter "Matter of New York Times" or "9/11" decision). In misinterpreting the 9/11 decision—which denied the media access to certain portions of 911 calls made during the terrorist attacks of September 11, 2001—the court below found an unchecked privacy interest for presumably deceased persons and their surviving heirs in historic government records generated more than half a century ago. The court mistakenly reached this conclusion, in essence, by equating the last words of certain 911 callers, made during the most horrific terrorist attack on American soil to archival statements made by New York City teachers haled into

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<sup>1</sup> In its declaration of purpose for FOIL, the New York Legislature expressed the paramount importance of public access to information for government accountability to the citizenry: "[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government with its citizenry, the greater the understanding and participation of the public in government." N.Y. Public Officers Law §84 (McKinney 2010).

abusive government loyalty interrogations from the 1930s to the 1960s. In so doing, the court below took a *sui generis* exception to disclosure, gingerly fashioned by the New York Court of Appeals, and converted it into a general rule for denying the public access to legitimate information. It is necessary to reject this unjustified expansion of the 9/11 case to discourage agencies from misusing FOIL and denying citizens access to their collective history, and to information critical to understanding and holding their government accountable.

*Amici* also respectfully urge the Court to reject the lower court's balance-of-interest analysis between privacy and the public interest in disclosure. By accepting the agency's blanket claim that the unredacted material at issue implicated enduring privacy interests, the lower court unreasonably swept aside arguments from Petitioner-Appellant regarding the age of the documents, the absence of particularized privacy interests offered by the government,<sup>2</sup> and the undisputed historical nature of the records themselves, thereby improperly shifting the burden to establish the exemption to the Requestor. Finally, the privacy interests alleged by the government are fatally undermined given that the New York City Board of Education ("Board of Education") had previously ordered the release of the records at issue by the year 2000 and the fact that anti-Communist records generated under

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<sup>2</sup> The concern of posthumous harm to reputation, debated by philosophers for centuries, and implicated by the court below in its decision, is not to be taken lightly. See RAY D. MADOFF, *IMMORTALITY AND THE LAW*, 29 (Yale University Press) (2010). But neither should such harm be assumed whenever a government actor invokes it as part of an effort to keep secret information that should be made public.

circumstances similar to those in dispute here are widely available to the public in the National Archives, the New York State Archives, and at private universities.

### **INTEREST OF THE *AMICI CURIAE***

*Amici* include a prominent media trade association, important media companies, and an international literary and human rights organization, whose goals include educating the public about rights of public access under state and federal law. *Amici* share an interest with Harbatkin in maintaining a robust public right of access under the FOIL to government records. *Amici* also share an interest with Harbatkin in keeping citizens of this State informed about the exercise of state power throughout its history and the continuing impact of that exercise on government institutions like the Board of Education. Vigorous and independent press coverage, and public oversight of such government agencies require regular access to historic records, even if those records may, at times, contain information about the lives of the deceased. *Amici* believe that while respect for decedents and their surviving heirs is important, such respect must not be codified in the form of an overbroad privacy exemption under FOIL. The public cannot afford having the law expand the privacy exemption under FOIL beyond the unique circumstances the Court of Appeals confronted in its review of 9/11 emergency records. Unless clear legal lines are drawn around that case, *Amici* believe that the public's open government interests will routinely be

trumped by the privacy interests decreed by the court below, but asserted by government agencies.<sup>3</sup>

Because *Amici* are familiar with the laws, policies, practical realities, and the historical record regarding public access to government records, it is respectfully submitted that they are well situated to provide this Court with special assistance in its evaluation of the issues underlying the pending appeal of N.Y. Public Officers Law §87(2)(b), and to bring to the Court’s attention arguments and information that might otherwise escape its attention or be overlooked. *Amici* understand the contours and limits of FOIL because they regularly depend upon the law to obtain primary information from government agencies and to report about government activities to their readers, listeners, and viewers. As such, the *Amici* can offer an assessment of FOIL that adequately protects the access interests of the press and general public as against other interests.

The media trade association, news organizations, and the literary and human rights organization below have joined this brief *Amici Curiae* to underscore their concern that to deprive the press and the public unrestricted access information about historic “anti-Communist” records maintained by the City of New York’s Department of Records and Information Services, at issue in this appeal, will work a profound disservice to the public interest:

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<sup>3</sup> The affirmation of counsel for *Amici*, submitted in support of the related motion for leave to file an *Amici Curiae* brief, is referred to herein by paragraph as “(Maytal Aff. ¶ “\_\_\_”).”

1. *Advance Publications, Inc.*, directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

2. *ALM Media, L.L.C.* publishes approximately 30 local and national legal and business publications, including *The American Lawyer*, *The National Law Journal*, *Corporate Counsel*, *The New York Law Journal* and the *Connecticut Law Tribune*. It also publishes newsletters and treatises and operates dozens of internet sites, including [law.com](http://law.com) and [globest.com](http://globest.com).

3. *Associated Press* (“AP”) is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

4. *Bloomberg L.P.*, based in New York City, operates Bloomberg News, which is comprised of more than 1500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over

450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com which receives 3.5 million individual users each month.

5. *GateHouse Media, Inc.*, headquartered in Fairport, New York, is one of the largest publishers of locally based print and online media in the United States as measured by its 86 daily publications. GateHouse Media currently serves local audiences of more than 10 million per week across 21 states through hundreds of community publications and local websites.

6. *The Hearst Corporation* is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the Houston Chronicle, San Francisco Chronicle and Albany Times Union; as well as interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the Denver Post and Salt Lake Tribune; nearly 200 magazines around the world, including Good Housekeeping, Cosmopolitan and O, The Oprah Magazine; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing,

including a minority joint venture interest in Fitch Ratings; Internet businesses, television production, newspaper features distribution and real estate.

7. *The New York News Publishers Association, Inc.* is the non-profit trade association representing the daily, weekly, and online newspapers of New York State.

8. *The New York Times Company* is the owner of The New York Times, The Boston Globe, The International Herald Tribune, 15 other newspapers, and more than 50 websites, including NYTimes.com, About.com, and Boston.com.

9. *PEN American Center* is a human rights and literary association based in New York City. The organization consists of over 3,000 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression and the widest access to government information, and it attacks censorship in every form. It also advocates on behalf of writers harassed, imprisoned, and sometimes killed for their views and fosters international exchanges, dialogues, discussions, and debates. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

## **STATEMENT OF FACTS**

*Amici Curiae* adopt the statement of the facts and procedural history of the brief of Petitioner-Appellant Lisa Harbatkin. (See Petitioner-Appellant’s Brief (“App. Br.”) pp. 8-18).

## **ARGUMENT**

### **I. The “unwarranted invasion of privacy” exemption to FOIL should not apply to deceased individuals and their surviving heirs outside the sui generis circumstances confronted by the New York Court of Appeals in Matter of New York Times Co. v. City of New York Fire Dep’t**

Harbatkin’s brief to this Court effectively articulates the general principles underlying access to New York government records under FOIL and the governing test for applying the “unwarranted invasion of privacy” exemption to FOIL under N.Y. Public Officers Law §87(2)(b). (See App. Br. pp.18-20, 26 n.9). Rather than restate those legal arguments, the *Amici* submit this brief to ask the Court to clarify and preserve the narrow scope of the “unwarranted invasion of privacy” exemption.<sup>4</sup> Specifically, this brief asks the Court to check the unsupportable expanded application of the 9/11 decision by the court below.

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<sup>4</sup> N.Y. Public Officers Law §87(2)(b)(McKinney 2010) states, in relevant part: “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...if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.”

A. *The language of the 9/11 decision signals its sui generis status.*

In applying the holding from the 9/11 decision to the facts of the instant case, the court below failed to recognize that the Court of Appeals holding in that case had a very limited scope effectively confined to its facts.

The Court of Appeals addressed the unique and difficult issue of whether the New York City Fire Department was required by FOIL to disclose, four years later, potentially painful tapes and transcripts of firefighters who responded to the extraordinary events at the World Trade Center on September 11, 2001. *See Matter of New York Times*, 4 N.Y.3d at 482. Notwithstanding the substantial private interests, the Court upheld lower court rulings that the firefighter's communications, contained in 911 tapes and the oral histories of survivors, must be disclosed. *See id.* at 383. The only exceptions to disclosure were certain narrowly delineated redactions of statements that were of such a highly personal nature that they were likely to cause serious pain or embarrassment to an interviewee or surviving family members. *See id.*

It is clear that the Court engaged in prolonged deliberation when balancing the “compelling” privacy interests of 911 callers making “dramatic, highly personal utterances” and of their surviving families against the public's interest in understanding the effectiveness of 911 systems consistent with FOIL. *Matter of New York Times*, 4 N.Y.3d at 486, 492. But the Court noted that “in view of the extraordinary facts in this case” and the “unique nature of the attack” at the heart of

the case, special consideration should be given to the desires of surviving family members to either disclose, or keep private, the last words of their loved ones. *See id.* at 484, 491. The exceptional nature of the facts in the 9/11 decision is conveyed by the Court of Appeals throughout the decision, signaling the court's intention to craft an exceptional result. For example, the court stated:

“Thus, the only issue before us is whether the disclosure of words spoken by other callers would constitute an ‘unwarranted invasion of personal privacy.’ Supreme Court and the Appellate Division both held that it would, and, *in view of the extraordinary facts in this case*, we agree.” *id.* at 484. (emphasis added)

“The September 11 callers *were part of an event that has received and will continue to receive enormous — perhaps literally unequalled — public attention*” *id.* at 485. (emphasis added)

“[I]t is highly likely in this case--*more than in almost any other imaginable*--that if the tapes and transcripts are made public, they will be replaced and republished endlessly...” *id.* at 485. (emphasis added)

“Here, *because of the unique nature of the attack*, the Court has ordered disclosure of words spoken by the operators, while deleting the words of the callers.” *id.* at 491 (Rosenblatt, J., dissenting in part)(emphasis added)

In light of these deliberately dramatic portrayals of the facts by the Court of Appeals in the 9/11 decision, it would be unjustified were the courts of the State of New York to show solicitude to the privacy rights of all deceased persons and their surviving heirs at the expense of the rights of the New York public to disclosure in

any other circumstances than the September 11, 2001 tragedy, which hopefully will not occur again.<sup>5</sup>

***B. The 9/11 decision has to be viewed as sui generis to comport with the plain language of FOIL and with New York privacy law in other contexts.***

The court below’s reading of the 9/11 decision would allow for the redaction or denial of *any* records implicating the privacy of the deceased and of their surviving heirs in government records, regardless of the records’ age or historic value. However, *Amici* submit that the 9/11 decision must be viewed more narrowly—applying it solely to the case’s underlying facts—so as to bring the case more in conformity with the plain language of FOIL and with privacy law in other contexts in New York. Greater consistency in the law further clarifies for the public and FOIL officers the permissible bounds of privacy interests within government records.<sup>6</sup>

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<sup>5</sup> The burden alone of finding living participants of the City’s anti-Communist interrogations *from the 1930s to the 1960s*, or their “surviving heirs”, to obtain the consent to publish certain information in their files, would undoubtedly ensure unredacted and unrestricted versions of their files never become part of the public record. When only “surviving heirs” are available for “consent to publish” purposes, the court below never addressed whether heirs would be defined under New York intestacy law, copyright law or other laws, what to do when heirs disagree on granting consent, and whether it is even proper for heirs or even surviving participants to demand payment for their consent. All of these uncertainties generated by the court below make the unrestricted and unredacted public disclosure of these or similar historic documents extremely unlikely to occur under any circumstances.

<sup>6</sup> *Amici* recognize that extensions of privacy protections to surviving family members of a decedent under FOIL do not necessarily provide a general relational right of privacy under the common law but rather merely limit public access to government information and documents. Nevertheless, the City’s own concerns about financial exposure under the law based on the potential publication of the anti-Communist files sought in the instant case suggests that inconsistencies in how the courts view privacy interests can discourage FOIL officers from releasing documents that otherwise should be publicly accessible. (See App. Br. p. 32).

First, to view the 9/11 decision as a category unto itself would reconcile the case with the language of FOIL and prior cases that have otherwise denied the benefit of the privacy exemption to decedents and/or their surviving heirs. *See, e.g.,* N.Y. Public Officers Law §89(2)(b)(iv)(McKinney 2010)(FOIL recognizes a privacy interest where “disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the *subject party*.”)(emphasis added), *Tri-State Publ’g Co. v. City of Port Jenris*, 138 Misc. 2d 147, 151, 523 N.Y.S.2d 954, 957 (Sup. Ct. Orange Cty. 1988)(“Generally, where rights of personal privacy are involved the exercise of the rights are limited to the living and may not be asserted by others after decedent's death.”). *See also* 92 N.Y. JUR. 2D RECORDS AND RECORDING § 40 (2011)(“The protection against an unwarranted invasion of personal privacy is provided for the personal benefit and protection of the persons who are the subject party of the information sought to be disclosed.”)

Second, if the 9/11 decision were to be cabined to its facts, it would bring FOIL in line with New York’s privacy law in general, which is embodied in N.Y. Civil Rights Law §§ 50-51 and its interpretative case law. *See* N.Y. Civil Rights Law §§50-51 (McKinney 2010). Under New York law, causes of action involving rights of privacy do not survive the death of the subject party.<sup>7</sup> *See James v. Delilah Films*,

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<sup>7</sup> It is black letter law that privacy rights die with a person, in part to prevent legal claims from surviving relatives that would chill public discussion, debate and historical analysis about those who went before us. *See* RESTATEMENT (SECOND) OF TORTS §652I (2010). *See also* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 9-1, 383 (Thomson-West, 2d ed. 2011)(“The law allows scholars, pop history writers and gossip magazines to roar away about the dead: they are beyond caring. If offspring and relatives are upset, their remedy is to respond with the truth.”)

*Inc.*, 144 Misc.2d 374, 377-378, 544 N.Y.S.2d 447, 451 (Sup. Ct. N. Y. Cty. 1989) (noting that the right to privacy under Civil Rights Law §§ 50 and 51 does not survive death). Moreover, the vast majority of New York courts and federal courts applying New York law have stated that the right of privacy is a personal right, which cannot be enforced by another despite assignment or inheritance. See *e.g.*, *Brinkley v. Casablancas*, 80 A.D.2d 428, 436, 438 N.Y.S.2d 1004 (1st Dept 1981)(the right of privacy is “neither descendible...nor assignable.”); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953)(The right of privacy is “a personal and nonassignable right.”); *Rosemont Enterprises, Inc. v. Random House*, 58 Misc 2d 1, 7 (Sup. Ct. 1968), *aff’d* 32 AD2d 89, 301 NYS 2d 948 (1st Dept 1969)(right of privacy is a “purely personal one which may be enforced only by the party himself.”). A FOIL statute that tracks these principles would ensure the statute does not sweep too broadly and render private even documents that have been historically open to the public without question.<sup>8</sup>

***C. The 9/11 decision, if not distinct, at most acknowledges privacy interests in records that contain “the words of people confronted, without warning, with the prospect of imminent death,” which are nothing like the records being sought from the City in the instant case.***

In the 9/11 decision, the Court of Appeals held that redaction of all words of 911 callers during the terrorist attacks was necessary to protect the privacy interests

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<sup>8</sup> “American law provides no protections for reputational interests after death”, whether for defamation or the invasion of privacy. See RAY D. MADOFF, IMMORTALITY AND THE LAW, 39 (Yale University Press) (2010).

of the survivors of the dead as well as the “feelings and experiences of people no longer living.” *Matter of New York Times*, 4 A.D.3d at 484. The court’s intent was to shield the final agonies of their family members from media scrutiny and great public fascination, and to protect the dignity of those that passed away in the terrorist attack. *See id.* The Court of Appeals described the nature of the privacy interests at stake:

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

*Matter of New York Times*, 4 N.Y.3d at 485 (emphasis added)

Assuming, *arguendo*, the 9/11 decision fashions any descendible right of privacy under FOIL outside the facts of the September 11 terrorist attacks, it does so only for records that capture the final, intimate moments of a person’s life.<sup>9</sup>

As such, the court below could not reasonably have equated the privacy interests acknowledged in the 9/11 decision with those in the instant case, especially since the records at issue contain nothing remotely similar to the dying declarations in the 9/11 records. At no point did the City argue below that the records generated by

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<sup>9</sup> Indeed, the State of New York’s Committee on Open Government has applied the 9/11 decision only in response to requests for records pertaining to particular deaths, which presumably could include painful, last moments of a person. *See e.g.*, FOIL-AO-16398 (January 9, 2007)(records regarding “the killing of a NY state trooper”); FOIL-AO-16791(September 20, 2007)(records regarding an accidental death of a NY police officer); FOIL-AO-15904 (April 10, 2006)(records regarding death in a hi-lo trailer accident.)

the Board of Education several decades ago, as part of its ideological purges of alleged Communists among its teachers, contained statements from participants that resembled the appalling, horrific and intimate final comments assumed to be in the 9/11 records. Instead, the records contained testimony of New York City teachers summoned and pressured by the government to confess to their own alleged communist affiliations and to inform on their alleged Communist colleagues. Consequently, those records should not be granted the private status they received below and should have been disclosed to the Petitioner-Appellant.

**II. Even if the Court finds the Anti-Communist Records Contain Private Information, the Balance of Interests Tips Strongly in Favor of Disclosure.**

Even were the Court to agree with the decision below that a legally protected privacy interest exists in the record at issue, it must still, as a reviewing court, balance the privacy interest against the competing, equally strong public interest in disclosure to determine when a disclosure rises to the level of being an “unwarranted” invasion within the meaning of FOIL’s privacy exception. *Matter of New York Times*, 4 N.Y.3d at 485.

To the extent that there are any conceivable privacy interests to be weighed against the public interest in disclosure, *Amici* submit that the balance tips overwhelmingly in favor of public disclosure in part for the reasons offered by Petitioner-Appellant. The Harbatkin Brief effectively outlines various grounds to conclude that the City’s unsupported assertions of privacy are vitiated and

outweighed by the vital public purposes to be served by disclosure of the record at issue. (See App. Br. pp. 22-33) These grounds include, but are not limited to, (1) the City's wholly speculative and generalized privacy claim, (2) the long passage of time that has transpired since the records were generated,<sup>10</sup> and (3) the undisputed and invaluable historic nature of the material themselves.

**A. The New York Board of Education Ordered the Unsealing of the Material at Issue by the Year 2000.**

In addition to the reasons proffered by the Petitioner-Appellant, *Amici* submit that the privacy interests here are further vitiated by the fact that the New York City Board of Education, addressing a request by another historian for essentially the same material sought by Petitioner-Appellant, denied initial disclosure under the condition that the entire series of anti-Communist case files would be unsealed by the year 2000. See *Cirino v. Bd. Of Educ. Of New York*, No. 001117/1980, N.Y.L.J., (N.Y. Co. Sup. Ct. July 10, 1980)(hereinafter, "Cirino").

In a letter, dated November 7, 1979, from former New York City Schools Chancellor Frank J. Macchiarola to an attorney of researcher and historian Linda Cirino, the Chancellor denied Ms. Cirino access to the anti-Communist files she sought, stating, in relevant part:

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<sup>10</sup> Whatever value may have existed in maintaining the privacy in the material at issue has diminished in the intervening 50 years or more. The government actors and the subjects of the loyalty interrogations have presumably passed away. The disclosure of anything in the records that might damage a deceased person's reputation here and adversely affect the peace of mind of their family in the years immediately following the underlying events, respectfully, have considerable less effect many decades later.

This determination applies to all the records of the Board of Education regarding enforcement of the Feinberg Law at Teachers College, and to all those who desire access to them. Accordingly I have directed that these records be sealed *until the year 2000*, and have ordered Mrs. Jane P. Frank, the Director of the Library at Teachers College, to take all necessary steps to ensure that no one be allowed access to any part of these records.

See Maytal Aff. ¶6. Ex. 2. (emphasis added)<sup>11</sup>

Thus, the Board of Education issued an order, which explicitly called for an eventual unsealing of the very material that the City now wishes to redact and restrict. Not only has the City acted in error in denying unrestricted access to the anti-Communist files at issue, it is *eleven* years late in fulfilling the former New York City Schools Chancellor's order to grant such access to the public.

***B. The National Archives and New York State and private university archives provide unconditional public access to anti-Communist files similar to those sought by Petitioner-Appellant.***

Finally, *Amici* submit that while the City may choose to deny the public—under the guise of concern for questionable privacy interests—unrestricted access to the material at issue,<sup>12</sup> the National Archives, the New York State archives and the

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<sup>11</sup> A certified copy of the letter was obtained from the public record of the Cirino judgment.

<sup>12</sup> Researchers who wish to see the records of the Board of Education's anti-Communist investigations (Series 590-597), now under the jurisdiction of the New York City Department of Records/Municipal Archives, must sign a form agreeing “not to record, copy, disseminate or publish in any form any names or other identifying personal information, relating to teachers and other school personnel investigated and/or questioned by the New York City Board of Education for alleged support of or association with the Communist Party, that [they] obtain from the restricted materials.” Researchers are also cautioned by the Municipal Archives that violating the terms of this form agreement may “result in possible legal action against them and the organization, if any, that they represent.” (See Maytal Aff. ¶3 n.1, Ex. 1.)

Tamiment Library & Robert F. Wagner Labor Archives at New York University have all unconditionally released similar material (arguably as sensitive as the City's anti-communist files) to the public. They have done so, in recognition of the material's special importance to New York and our national history, and in furtherance of the goal of public oversight. What these three archives provide is as follows:<sup>13</sup>

1. *New York State Archives*: The New York State Archives provides unrestricted access to or use of investigation files generated by the Rapp-Coudert Committee, a committee created by the New York legislature, as it probed suspected radical activities (mainly communist, but also Fascist and Nazi activities) in New York City public schools and colleges from 1940-1942. "By the conclusion of its investigation, the Rapp-Coudert Committee' had interviewed almost 700 people and interrogated some 500 witnesses in a series of open and closed hearings on the extent of 'subversive activities' in New York City education, resulting in the removal of teachers, professors, and college administrators from their positions."<sup>14</sup>
2. *National Archives*: The National Archives provides unrestricted access to a wide range of textual records, motion pictures and sound recordings derived from the House Committee on Un-American Activities ("HUAC") (1945-69) and the House Committee on Internal Security (1969-75). The records include, *inter alia*, correspondence, transcripts of executive sessions, public hearings and investigative and other records of the investigative sections of both House committees.<sup>15</sup> In addition, the Senate's archives from the Committee of the Judiciary and Related Committees (1816-1988), specifically the Senate Internal

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<sup>13</sup> *Amici* request that the Court take judicial notice of facts appearing on the websites of the government and non-party archives. See e.g., *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 20, 871 N.Y.S.2d 680, 685 (2d Dep't 2009) (material derived from government website found to be the subject of judicial notice); *Wang v. Pataki*, 396 F Supp 2d 446, 458 (S.D.N.Y. 2005)(judicial notice taken of non-party news website).

<sup>14</sup> New York State Archives - Rapp-Coudert Committee Investigation Files, <http://iarchives.nysed.gov/xtf/view?docId=L0260.xml;query=;brand=default> ("Access Restrictions: There are no restrictions regarding access to or use of the material.")

<sup>15</sup> National Archives - Records of the House Committee on Un-American Activities (1945-69) and the House Committee on Internal Security (1969-75), <http://www.archives.gov/research/guide-fed-records/groups/233.html#233.25.1>

Security Subcommittee (“SISS”), provide records from anti-communist Congressional investigations of the early 20th century.<sup>16</sup>

3. *Tamiment Library & Robert F. Wagner Labor Archives*: The Tamiment Library, which is open to the public and housed at New York University, is a repository “for several related and popular front organizations, as well as the records describing many of the government investigations and prosecutions of the Communist Party and its members.”<sup>17</sup> It allows for the publication of unpublished material from the archive, subject to copyright law constraints.<sup>18</sup> The archive also contains the records of the United Federation of Teachers, dated from 1916-2002, which include the unions records from the Rapp-Coudert Committee’s investigations of New York teachers in 1941.<sup>19</sup>

*Amici* submit that the willingness of these various state, federal and private archives to disclose material similar to the anti-Communist files sought here should raise further doubt regarding the strength of the privacy claims made by the City.

To be weighed then against the tenuous privacy interests within the material at issue is the undeniable public interest in understanding how and why the government of New York used its powers from the 1930s to the 1960s to investigate and punish suspected political dissenters and alleged Communist subversives within the ranks of the Board of Education. As set forth in the Harbatkin brief, the purpose of seeking unrestricted access to anti-Communist files, is not voyeuristic, or to cause gratuitous

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<sup>16</sup> National Archives – Records of the Senate Committee on the Judiciary and Related Committees, <http://www.archives.gov/research/guide-fed-records/groups/233.html#233.25.1>

<sup>17</sup> Tamiment Library & Robert F. Wagner Labor Archives – Collections Overview, <http://www.nyu.edu/library/bobst/research/tam/collections.html#arch>

<sup>18</sup> Tamiment Library & Robert F. Wagner Labor Archives – Protocols, <http://www.nyu.edu/library/bobst/research/tam/usingtam.html#protocols>

<sup>19</sup> Tamiment Library & Robert F. Wagner Labor Archives - United Federation of Teachers Records, <http://dlib.nyu.edu/findingaids/html/tamwag/uft.html>

pain to the subjects or their surviving heirs, but to answer fundamental questions for the public on how and why the New York City Board of Education derailed careers and disrupted lives in pursuit of teachers who were accused of supporting a disfavored political party. (See App. Br. pp. 33-34). Following the experiences of particular individuals identified in the record, which includes transcripts of interrogations, could help journalists and historians in this inquiry. Disclosure may also restore dignity to deceased individuals and their surviving families that were tarnished by the City's ideological purges, by giving them a voice in the historical record, and may also address their own unresolved questions about their loved ones' experiences.

Although it is well established by this Court that a person seeking access to agency records need not “set forth good cause, or, indeed, any cause for requesting the documents,”<sup>20</sup> the undeniable public interests articulated by *Amici* and Petitioner-Appellant here should mandate complete, unrestricted and unredacted disclosure of the records at issue, particularly when the privacy interests in this case are dubious at best.

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<sup>20</sup> *Johnson v. New York City Police Department*, 257 A.D.2d 343, 346 (1st Dept. 1999)(citing *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274, 675 N.E.2d 808, 811(1996)). See also *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80, 464 N.E.2d 437 (1984) (“FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose.”)

## **CONCLUSION**

The City of New York seeks to deprive the public of unrestricted access to invaluable historic material by advocating for an expansive construction of the privacy exemption to FOIL, and following a 9/11 precedent that should be confined to its unique and tragic facts. None of the City's arguments for resisting unrestricted and unredacted disclosure of the contested documents is supportable under FOIL. For the foregoing reasons, and those reasons set forth in Petitioner-Appellant Harbatkin's brief, *Amici* respectfully request that the decision of the court below be reversed.

Dated: New York, New York  
March \_\_, 2011

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