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

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 OF *AMICI CURIAE* ADVANCE PUBLICATIONS, INC., ASSOCIATED PRESS, 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

ITAI MAYTAL
MILLER KORZENIK SOMMERS LLP
488 Madison Avenue, Suite 1120
New York, New York 10022-5702
Telephone: (212) 752-9200
Facsimile: (212) 688-3996
imaytal@mkslex.com

Attorneys for Amici Curiae

Date: July 25, 2011

CORPORATE DISCLOSURE STATEMENT

Advance Publications, Inc. is a privately held company and has no parents, affiliates or subsidiaries that are publicly owned.

Associated Press has no parents, subsidiaries, or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock, and no publicly held company owns 10 percent or more of its stock.

GateHouse Media, Inc. has no parent company. Fortress Investment Group LLC ("Fortress"), a publicly traded company, owns 39.6 percent of GHS stock. No other publicly traded company owns 10 percent or more of GHS stock.

The Hearst Corporation is a privately held company and has no parents, affiliates, or subsidiaries that are publicly owned.

The New York News Publishers Association is a trade association and has no parents, subsidiaries, or affiliates, and has no publicly held stock.

The New York Times Company is a publicly traded corporation. It has no parents, subsidiaries, or affiliates that are publicly traded. No publicly held corporation owns 10 percent or more of The New York Times Company.

PEN American Center is a human rights and literary association based in New York City. It is affiliated with the PEN International Center, and has no publicly held stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

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 made by improperly expanding the narrow "unwarranted invasion of personal privacy" exemption to FOIL. Id. at §87(2)(b)(McKinney 2010). *Amici*—a media trade association, publishers of daily and weekly newspapers and magazines, cable companies, internet sites, an international news service and a literary and human rights organization—have involved themselves in this controversy to underscore the far-reaching, adverse impact of the decision appealed from beyond the interests of the parties. (Maytal Aff. ¶¶ 4-5). [1]

[1] 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. ¶"__")." Appellant's Record on Appeal submitted to the First Department Appellate Division is cited herein by page as "(R___)." The Briefs of the Appellant, completed on December 29, 2010 and Respondents, completed on March 22, 2011, both submitted to the First Department, Appellate Division, are cited herein respectively as "(App. Br., __)" and "(Resp. Br. __)." Appellant's Brief filed with this Court is cited herein as "(Harbatkin Court of Appeals Br.__)."

The decision below, if permitted to stand, threatens to dramatically expand the privacy interest in government records (invocable vicariously by the government itself) and, by equal measure, diminish the utility of FOIL as a means to understand and monitor how agencies use the powers with which they are entrusted. Unsurprisingly, many government records contain information about individuals, including deceased persons, as to which objections to disclosure grounded in privacy concerns may be raised. By expanding any recognized descendible right of privacy under FOIL beyond what was intended by this Court in *Matter of New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 (2005) (hereinafter the "9/11 Decision"), the decision below, if upheld, would invite groundless objections to disclosure and frivolously deprive historians, the press and the public, in many instances, of "the means to access governmental records, to assure accountability and to thwart secrecy." *Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492, 619 N.Y.S.2d 695, 697 (1974).

Amici respectfully urge this Court to reject the Appellate Division's expansive misreading of the "unwarranted invasion of personal privacy" exemption under FOIL, as derived from the 9/11 Decision. In misinterpreting this Court's decision—which denied the media access to certain portions of 911 calls made during the terrorist attacks of September 11, 2001—the Appellate Division

found an amorphous 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 frantic last words of certain callers to 911, made during the most horrific terrorist attack on American soil to archival statements made by New York City teachers hauled into abusive government loyalty interrogations from the 1930s to the 1960s. In so doing, the Appellate Division took an exception to disclosure, narrowly crafted by this Court in the 9/11 Decision, and converted it into a general rule for denying the public access to legitimate public information that is critical to understanding and holding the government accountable for actions against its citizens. It is necessary to reject this unjustified expansion of the 9/11 Decision in order to discourage agencies from misusing FOIL and denying citizens access to their collective history.

As part of this Appeal, the City would have this Court affirm an erroneous decision that recognizes an ever-expanding and unchecked privacy interest in historical government records and leaves surviving heirs, a term left undefined below, with the ability to control the public's access to their history and the government's treatment of its citizens. The City would also have the Court permit the government to vicariously invoke the privacy interests of the deceased and their surviving heirs, wherever such interests may be implicated in government

records, and, thus, shield the government's actions from scholarly or journalistic inquiry under FOIL. This position is incompatible with the language and purpose of FOIL, and would severely impair the public's ability to hold government accountable for its past "waste, negligence and abuse."[2] *Encore Coll Bookstores, Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 416, 639 N.Y.S.2d 990, 993 (1995).

Amici also respectfully urge the Court to reject the Appellate Division's balance-of-interest analysis between privacy and the public interest in disclosure. By accepting the City's vicarious assertions that the material at issue implicated enduring privacy interests, the Appellate Division, in a conclusory fashion and without any reasoned discussion, ignored Petitioner-Appellant's arguments regarding the age of the documents, the absence of particularized privacy interests offered by the government, and the undisputedly significant historical nature of the records themselves. In so doing, the court accepted a hollow explanation from the City that a FOIL exemption might apply to the material at issue, and then improperly shifted the burden under the statute to the Petitioner-Appellant to refute that claim. FOIL's purpose of maximizing access to government records to

[2] 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).

promote "public accountability," (*N.Y. Public Officers Law* §84) would amount to nothing more than empty rhetoric if agencies were permitted, as occurred below, to shield their activities by vicariously asserting without evidentiary support the privacy interests in those records of deceased subjects and their surviving heirs.

Finally, the purported "privacy interests" asserted by the government below have previously been undermined by the government itself, in that the New York City Board of Education ("Board of Education") previously ordered the records at issue sealed only until 2000 and that other anti-Communist records produced under similar circumstances are widely available to the public in the National Archives, the New York State Archives, and at private universities. Thus, any conceivable privacy interests that may theoretically exist in these records have been marginalized and cannot now outweigh the valuable insights into New York City's history that the complete disclosure of the records would undoubtedly provide.

INTEREST OF THE *AMICI CURIAE*

Amici include a prominent media trade association, important media companies, and a 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 Appellate Division, and asserted by government agencies.

Since *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 under 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.

ISSUES ON APPEAL

1. Did the City's denial of unrestricted public access to historic "anti-Communist" records maintained by its Department of Records and Information Services adequately establish that disclosure would cause an unwarranted invasion of personal privacy under the *N.Y. Public Officers Law* § 87(2)(b)?

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

2. Are the City's preconditions on the exercise of the right to review public records concerning its anti-Communist investigations (but not records on any other subject) unconstitutional, and do those conditions also violate the First Amendment's content-neutrality requirement and lack the necessary procedural safeguards?

The First Department, Appellate Division, declined to rule on this question based on its conclusion that any ruling on the constitutional claim would be "merely advisory" because the Supreme Court below had not decided the issue.[3]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici curiae adopt the statement of the facts and procedural history of the brief of Petitioner-Appellant Lisa Harbatkin. (*See* App. Br. pp. 8-18; Harbatkin Court of Appeals Br. pp. 4-13).

ARGUMENT

I. The Appellate Division Misread this Court's Sui Generis decision in *Matter of New York Times v. City of New York Fire Dep't* ("9/11 Decision") and Overextended the "Unwarranted Invasion of Privacy" Exemption to the Freedom of Information Law ("FOIL")

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 the N.Y. Public Officers Law §87(2)(b). (*See* App. Br. pp.18-20 and 26 n.9). Rather than restate those legal standards and arguments, the *Amici* respectfully request this Court clarify and preserve the narrow scope of the "unwarranted

[3] Amici refer to and incorporate Petitioner-Appellant's position regarding the First Amendment issue on appeal as if fully stated herein. (*See* App. Br. pp. 38-44; Harbatkin Court of Appeals Br. pp. 15-20)

invasion of privacy" exemption.[4] Specifically, *Amici* ask that this Court check the unsupportable expanded application of the 9/11 Decision by the Appellate Division, which recognized, in effect, a descendible right of privacy under FOIL beyond what would seem to have been contemplated by this Court in that case. The Appellate Division achieved this result by holding in a conclusory fashion that "the privacy interests of the surviving subjects of the investigation and their relatives . . . outweigh[ed] petitioner's interest in being able to publish the names of teachers contained in the records at issue," without explaining why the privacy exemption applied or acknowledging that any privacy interests in the historic records at issue were diminished or extinguished over the 50 intervening years since the records were created.

A. *The Language of the 9/11 Decision Reflects its Sui Generis Nature.*

In applying the holding from the 9/11 Decision to the facts of the instant case, the Appellate Division erred when it failed to recognize that this Court's holding in that case was effectively confined to its extraordinary facts.

This Court addressed, in the 9/11 Decision, the unique and difficult issue of whether the New York City Fire Department was required by FOIL to disclose

[4] 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."

potentially painful tapes and transcripts of firefighters who responded to the horrific events at the World Trade Center on September 11, 2001 four years after the attack. *See Matter of New York Times*, 4 N.Y.3d at 482. Notwithstanding the substantial privacy interests, this 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 483. The only exceptions to disclosure were certain narrowly delineated redactions of statements that were considered to be 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 this 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 and 492. But this 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 and 491. The exceptional nature of the facts in the 9/11 Decision is noted by this Court throughout the decision, reflecting that the

exception to disclosure was unusual and based on extraordinary circumstances. For example, this Court stated that:

> 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....
>
> The September 11 callers *were part of an event that has received and will continue to receive enormous — perhaps literally unequalled — public attention*…
>
> [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 replayed and republished endlessly…

Id. at 484-485 (Emphasis added). See also id. at 491(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.)(Rosenblatt, J., dissenting in part)(Emphasis added).

Considering these pointed statements by this Court in the 9/11 Decision, it was erroneous of the Appellate Division to show solicitude to the privacy rights of deceased persons and their surviving heirs in the records at issue at the expense of the rights of the New York public given that the records were not generated under similar circumstances as the September 11, 2001 tragedy.[5]

[5] The burden alone of finding living participants of the City's anti-Communist interrogations or their "surviving heirs", to obtain the consent to publish certain information in their files, as the City would require, would ensure that complete versions of their files will never become public.

B. The 9/11 *Decision Must Be Viewed as Sui Generis to Comport with the Plain Language of FOIL and with New York privacy law*

The Appellate Division's misinterpretation 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 give proper effect to the plain language of FOIL and New York privacy law, and to clarify for the public and FOIL officers the permissible bounds of privacy interests in government records.[6]

First, to view the 9/11 Decision as a category unto itself would reconcile the case with the language of FOIL and prior cases where New York courts denied the benefit of the privacy exemption to decedents and their surviving heirs. *See*, *e.g.*, N.Y. Public Officers Law §89(2)(b)(iv) (McKinney 2010)(FOIL recognizes a

---

The Appellate Division did not define "surviving heirs" for "consent to publish" purposes (i.e. whether under intestacy, copyright or other laws), or address what to do when heirs disagree on granting consent, and whether it is even proper for surviving participants or their heirs to demand payment for their consent. All of these uncertainties make the complete disclosure of such historic documents to the public extremely unlikely to occur under any circumstances, thus sealing these historic records forever.

[6] *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* Resp. Br. p. 32).

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 limited to its facts, it would keep FOIL consistent 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.[7] *See, e.g., James v. Delilah Films, Inc.*, 144 Misc.2d 374, 377-378, 544 N.Y.S.2d 447, 451 (Sup. Ct. N. Y. Co. 1989) (noting that the right to privacy under the N.Y. Civil

[7] 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.")

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 Dep't 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) (Under New York law, court finds the right of privacy is "a personal and nonassignable right."); *Rosemont Enterprises, Inc. v. Random House*, 58 Misc 2d 1, 7, 294 N.Y.S.2d 122 (Sup. Ct. N.Y. Co. 1968), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1st Dep't 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.[8] In recognition of this policy, the 9/11 Decision must not be read as broadly as the City and the Appellate Division would require.

C. The 9/11 Decision, if Not Unique, at Most Acknowledges Privacy Interests in Records that Contain "the Words of People Confronted, Without Warning, With the Prospect of Imminent Death," Which Are Inapplicable to the Records Being Sought From the City in the Instant Case.

[8] "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).

In the 9/11 Decision, this Court held that redaction of all words of 911 callers during the terrorist attacks was necessary to protect the privacy interests of the surviving heirs of the victims as well as the "feelings and experiences of people no longer living." *Matter of New York Times*, 4 A.D.3d at 484. This Court's apparent intent was to shield the final agonies of the 9/11 victims and their grieving families from media scrutiny and great public fascination, and to protect the dignity of those that passed away in the terrorist attack. *See id.* This Court 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.

Id. at 485 (Emphasis added)

Based on this well-developed language by this Court, it would seem that if the 9/11 Decision fashions any descendible right of privacy under FOIL outside the facts of the September 11 terrorist attacks, which *Amici* challenge and the Appellate Division and the City support, it can only reasonably apply to records

that capture the final, intimate moments of a person's life.[9]

As such, the Appellate Division 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 final statements of anguish captured in the 9/11 records. At no point did the City argue below that the records generated by the Board of Education several decades ago, as part of its ideological purges of alleged Communists, contain statements from participants that resembled the in extremis utterances 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. The Appellate Division Erred in Not Recognizing as Tenuous, at Best, Any Privacy Interests Conceivably at Stake in the Anti-Communist Files and in Not Recognizing that the Overwhelming Public Interest in the Anti-Communist Files Tips in Favor of Complete Disclosure

[9] 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.)

Even were this Court to agree with the Appellate Division that a legally protected privacy interest exists in the records at issue, it must still, as a reviewing court, balance that privacy interest against the competing and very strong public interest in disclosure to determine whether 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. It must also reaffirm, in contrast to Appellate Division, that FOIL places a burden on agencies withholding records to prove with particularized evidentiary support that such records fall within one of the express exemptions provided in the statute or otherwise qualify for nondisclosure. *See, e.g., Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 470 (1979) (an agency seeking to prevent disclosure must "articulate particularized and specific justification" for denying access); *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567, 475 N.Y.S.2d 263, 267 (1984)(agency's "conclusory pleading allegations and affidavits" presented "without the benefit of evidentiary support" did not satisfy the agency's burden of proof under FOIL to qualify records for complete exemption from disclosure).

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 outlined various grounds to

conclude that the City's vicarious and barren 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, Hartbakin Court of Appeals Br. pp. 20-25). 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,[10] and (3) the undisputed and invaluable historic nature of the material themselves. Harbatkin's position is further supported by the fact that the New York Board of Education previously ordered the entire series of the "anti-Communist" files—the same files sought by Petitioner-Appellant—sealed from the public *only until the year 2000* (*See* infra p. 18), and that related records, which implicate privacy concerns similar to those raised here, are available without restrictions to the public at the National Archives, the New York State archives and various private universities (*See* infra p. 20).

A. Any Privacy Interests in the Material at Issue are Diminished if Not Extinguished by The New York Board of Education's Having Ordered the Material Sealed Only Until the Year 2000.

In addition to the reasons proffered by the Petitioner-Appellant, *Amici* submit that the privacy interests here are further vitiated, if not eviscerated, by the

[10] Whatever value may have existed in maintaining the privacy in the material at issue has diminished or been extinguished 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 considerably less effect many decades later.

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 with the condition that the entire series of anti-Communist case files would be sealed only until the year 2000. *See Cirino v. Bd. Of Educ. Of New York*, No. 001117/1980, N.Y.L.J., (Sup. Ct. N.Y. Co. July 10, 1980) (hereinafter, "Cirino").

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

> 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. ¶9. Ex. 2. (Emphasis added)[11]

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

[11] A certified copy of the letter was obtained by affiant Maytal from the public record of the Cirino judgment.

anti-Communist files at issue, it is *eleven* years late in honoring the expiration of the seal order by the former New York City Schools Chancellor.

B. Any Privacy Interests in the Material at Issue Are Called Into Doubt Given that the National Archives and New York State and Private University Archives Provide Unconditional Public Access to Comparable Anti-Communist Files

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,[12] the National Archives, the New York State archives and the 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. These three archives provide the following:[13]

---

[12] 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.)

[13] *Amici* request that the Court take judicial notice of facts appearing on the websites of the government and non-party archives that can be easily verified. *See e.g., People v. Jones*, 73 N.Y.2d 427, 431, 541 N.Y.S.2d 340, 342 (1989) ("[A] court may take judicial notice of facts

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."[14]

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.[15] In addition, the Senate's archives from the Committee of the Judiciary and Related Committees (1816-1988), specifically the Senate Internal Security Subcommittee ("SISS"), provide records from anti-communist Congressional investigations of the early 20th century.[16]

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

---

"'which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.'"); *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).

[14] 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.")

[15] 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

[16] 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

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."[17] It allows for the publication of unpublished material from the archive, subject to copyright law constraints.[18] 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.[19]

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.

C. Complete Disclosure of the Material at Issue Best Serves the Public Interest in an Accurate Historical Record of the Political and Investigative Actions of New York Agencies.

Weighed against the tenuous, at best, 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.[20] As set forth in the

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

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

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

[20] 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," the undeniable public interests articulated by Amici and Petitioner-Appellant here should mandate

Harbatkin brief, the purpose of seeking unrestricted access to anti-Communist files is not voyeuristic, or to cause gratuitous pain to the subjects or their surviving heirs, but, like other scholarly or journalistic pursuits, 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). To follow the experiences of particular individuals identified by name or by surrounding details in the record, could help scholars and journalists in this inquiry, and would enable them to further "expose government abuses or evaluate governmental activities." *Matter of New York State United Teachers v. Brighter Choice School*, 15 N.Y.3d 560, 915 N.Y.S.3d 194 (2010). Indeed, scholars and journalists have traditionally relied upon the granular details and the emblematic impact of personal experiences from ordinary individuals to reconstruct, explain or report upon past or present government practices or policies. (*See* Maytal Aff. ¶6). *See, e.g.,* Danny Hakim, *A Disabled Boy's Death, and a System in Disarray*, N.Y. TIMES (June 5, 2011); *Life In The Plume: IBM's Pollution Haunts a Village*, SYRACUSE POST-STANDARD

---

complete, unrestricted and unredacted disclosure of the records at issue, particularly when the privacy interests in this case are dubious at best. *Gould v. New York City Police Dept*., 89 N.Y.2d 267, 274, 653 N.Y.S.2d 54, 56 (1996) ("To ensure maximum access to government documents, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption'"); *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.").

(Jan. 11, 2009); Kyla Calvert, *Once Groundbreaking, N.Y. System Now Dysfunctional*, HEARST NEWSPAPERS (July 30, 2009). Personal stories, where available in the public record, have also provided unique insights to scholars and journalists focused on uncovering and explaining the culture of fear and surveillance that overtook public schooling in New York City during the first half of the 20th century. *See, e.g.,* Clarence Taylor, *Reds at the Blackboard – Communism, Civil Rights, and the New York City Teachers Union,* pp 103-129 (Columbia University Press) (2011). Finally, contrary to the City's paternalistic and alarmist speculations (*See* Respondents-Respondents Brief pp. 32-33), full disclosure of the historic records at issue may actually 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 addressing their own unresolved questions about their loved ones' experiences.

CONCLUSION

The City of New York seeks to deprive the public of unrestricted access to invaluable historic material by advocating for an unduly expansive construction of the privacy exemption to FOIL, based on a misreading of this Court's 9/11 Decision, which properly should be confined to its unique and tragic facts. None of the City's arguments for resisting complete 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 Appellate Division should be reversed.

Dated: New York, New York
July 25, 2011

MILLER KORZENIK SOMMERS LLP

By _____
Itai Maytal

488 Madison Avenue, Suite 1120
New York, New York 10022-5702
Phone: 212-752-9200
Facsimile: 212-688-3996
E-mail: imaytal@mkslex.com
Attorneys for *Amici Curiae*

Of counsel:

RICHARD A. BERNSTEIN
NEIL M. ROSENHOUSE
SABIN, BERMANT & GOULD LLP
Four Times Square, 23rd Floor
New York, NY 10036-6526
Counsel for Advance Publications, Inc.

POLLY GRUNFELD SACK
Senior Vice President
Secretary, and General Counsel
GATEHOUSE MEDIA, INC.,
350 WillowBrook Office Park
Fairport, New York 14450
General Counsel for GateHouse Media, Inc.

DAVID H. TOMLIN
KAREN KAISER
THE ASSOCIATED PRESS
450 West 33rd St.
New York, NY 10001
Counsel for Associated Press

JONATHAN DONNELLAN
RAVI V. SITWALA
THE HEARST CORPORATION
300 West 57th Street
New York, NY 10019
Counsel for The Hearst Corporation

LEON FRIEDMAN
PEN AMERICAN CENTER (PEN)
588 Broadway
New York, NY 10012
Counsel for Pen American Center

GEORGE FREEMAN
DAVID E. MCCRAW
DANA GREEN
THE NEW YORK TIMES COMPANY
620 Eighth Avenue, 18th Floor
New York, NY 10018
Counsel for The New York Times Company

APPENDIX A

The media trade association, news organizations, and the literary and human rights organization listed below have joined this brief *Amici Curiae* to underscore their concern that to deprive the press and the public unrestricted access to 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:

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. ***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.

3. ***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.

4. ***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.

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

6. ***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.

7. ***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.