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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MARYLIN G. DIAMOND** **PART 48**

Justice

Matter of the Application of LISA HARBATKIN,

Petitioner,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law & Rules,

- against -

NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES et al.,

Respondents.

INDEX NO. 104933/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that: The petitioner Lisa Harbatkin brings this proceeding for a judgment pursuant to CPLR article 78 and Public Officers Law §§ 84-90 (FOIL) (1) compelling the respondent defendant New York City Department of Records and Information Services and its agents (collectively, the City) to grant public access to the New York City Department of Education's anti-Communist records, and (2) declaring that the City's imposition of unlawful conditions on Harbatkin's use of those records constitutes a denial of her constitutional rights.

Harbatkin, a scholar, is seeking unfettered access to historical materials maintained by the City of New York's Department of Records consisting of internal memoranda, witness statements, and transcripts of approximately 1,100 interviews concerning an investigation of Communist infiltration of the New York City Schools from the 1930's through the 1960's. Harbatkin's parents were among the targets of the investigation. Initially, in a letter dated December 9, 2008, the FOIL Appeal Officer granted unredacted access, provided that Harbatkin agreed not to publish names, obtain the City's permission to use direct quotes, and indemnify the City with respect to any claim arising from unauthorized publication. Harbatkin then commenced this proceeding. Subsequently, in a letter dated June 15, 2008, the City, eliminating the requirements concerning quotation and indemnification, offered to allow access to the unredacted files subject only to an agreement not to publish the names of individuals identified in the records.

In opposition to the petition, the City argues that under Public Officers Law §§ 87 (2)(b) and 89(2), disclosure of the names of the Communists identified in the files would constitute an unwarranted invasion of the personal privacy of such individuals. It claims that when asked at their interviews about Party membership, the individuals expressed concern about both their own privacy and that of their family members and that, as a result, in every case, the individuals providing the information were promised confidentiality. The City suggests that to the extent the individuals identified in the case files have contributed to Harbatkin's research, they are free to supply Harbatkin with the requisite permission to have their own case files made available to Harbatkin.

Discussion

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Thus, a court may not substitute its judgment for that of an

administrative agency when there is a rational basis for the agency's determination (*Matter of Nehorayoff v Mills*, 95 NY2d 671 [2001]). Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98 [1997]; *Matter of Fineway Supermarkets, Inc. v State Liquor Authority*, 48 NY2d 464 [1979]).

The policy underlying FOIL is "to insure the maximum public access to government records" (*Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 296-297 [1985]). The burden of proof rests on the agency that claims exemption from disclosure (*Matter of Westchester Rockland Newspapers, Inc. v Kimball*, 50 NY2d 575 [1980]). In order to ensure that the public has 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" (*Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 [1992]). That the documents may have been furnished in confidentiality does not necessarily render them beyond the scope of FOIL disclosure (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557 [1984]; *Matter of City of Newark v Law Department of City of New York*, 305 AD2d 28 [1st Dept 2003]; *Matter of New York 1 News v Office of President of Borough of Staten Island*, 231 AD2d 524 [2d Dept 1996]; *Matter of Bello State of New York Dept. of Law*, 208 AD2d 832 [2d Dept 1994]). However, the privacy exemption authorizes each agency to deny access to records or portions of such records that, if disclosed, would constitute an "unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). The statute defines an "unwarranted invasion of personal privacy" as, *inter alia*, the disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency (Public Officers Law § 89 [2] [b] [v]).

Initially, the court notes that a FOIL request by another historian seeking essentially the same information from the Board of Education as sought herein was denied by the Supreme Court, New York County in 1980, which found, *inter alia*, that the unwarranted invasion of personal privacy exemption was applicable. *See Cirino v. Bd. of Educ. of the City of New York*, NYLJ, July 10, 1980, (Shirley Fingerhood, J.). In this respect, the petitioner herein does not seriously dispute that the information at issue herein was of a personal nature given with an understanding of confidentiality. Nor has the petitioner shown that the information was relevant to the Department of Education's ordinary work of teaching students.

In *Matter of Bellamy v New York City Police Department* (59 AD3d 353, 354-355 [1st Dept 2009]), the First Department held that where privacy interests are implicated by the type of information sought to be redacted, the court must determine whether release of such information falls within one of the specific categories listed in Public Officers Law § 89 (2)(b) and, if not, whether there is nevertheless any unwarranted invasion of privacy "'by balancing the privacy interests at stake against the public interest in disclosure of the information'" (quoting from *Matter of New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 485 [2005]). In the *New York Times* case, the Court of Appeals held that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead and that, pursuant to Public Officers Law § 87(2)(b), the Fire Department was not required to release tapes and transcripts of the 911 calls made on September 11, 2001 without redacting certain identifying information of the callers that was repeated by the 911 operators.

Thus, Public Officers Law § 89(2)(b) plainly permits an agency to delete identifying details from records made available by it to the public in order to prevent an unwarranted invasion of personal privacy. In this respect, the City interviewed the Communists at issue with the express commitment that each examination would remain confidential. Contrary to Harbatkin's assertion, there is nothing in the record before the court which even suggests that it was only to further parochial concerns or frustrate subsequent attempts to learn about the process that the City promised these individuals that their names would remain confidential. Notably, the petitioner has not claimed that the respondents' promise of confidentiality was in itself violative of the terms of any statute. Moreover, as already

discussed, the City has shown that disclosure of their individual names was of grave concern to the these individuals. In *Matter of Scarola v Morgenthau* (246 AD2d 417 [1st Dept 1998]), the First Department held that statements made by individuals alleged by petitioner to be "known informants" were exempt from disclosure under Public Officers Law § 87 (2)(b) since disclosure of such documents would, *inter alia*, be an unwarranted invasion of their personal privacy.

Although Harbatkin insists that her reasons for requesting the identities is "completely scholarly and respectful," revealing the identity of confidential informants would nevertheless constitute an unwarranted invasion of privacy with respect to these confidential informants (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343 [1st Dept 1999]; *Matter of Scarola v Morgenthau*, 246 AD2d 417 [*supra*]). In any event, whatever limited scholarship interest the petitioner may have in exposing the identities of those who named names is clearly outweighed by the City's promise of confidentiality made to its employees and the potential embarrassment to, and harassment of, at least some of these individuals and their families.

In light of the sensitive nature of the information, the minimal burden that compliance with the respondents' offer places on the petitioner and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents' have properly refused petitioner access to the unredacted files unless she agrees not to publish the names of individuals identified in the records.

Finally, contrary to the petitioner's suggestion, the age of the records involved does not mandate disclosure. In *Matter of Bellamy v New York City Police Dept* (59 AD3d at 353), the First Department held that although the age of the information sought could be relevant to the inquiry as to whether the exemptions under Public Officers Law § 87(2) were applicable, age alone was insufficient to hold the exemptions inapplicable.

Accordingly, the petition is hereby denied and the proceeding dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 3/11/10

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION **[ ] NON-FINAL DISPOSITION**