No. 91

In the Matter of Lisa Harbatkin,
Appellant,
v.
New York City Department of Records and Information Services, et al.,
Respondents.

Michael J. Grygiel, for appellant.
Elizabeth I. Freedman, for respondents.
Advance Publications, Inc. et al., amici curiae.

SMITH, J.:

In the middle years of the twentieth century, the New York City Board of Education investigated a large number of teachers and other employees who it suspected of being present or

former members of the Communist Party. The investigation included interviews with many such people, who were promised confidentiality and asked to provide the names of those who had been in the Party with them.

An historian of the period now seeks disclosure under the Freedom of Information Law (FOIL) of unredacted transcripts of the interviews. We hold that she is entitled to everything in the transcripts except material that would identify informants who were promised confidentiality.

I

It seems that the Board of Education's "Anti-Communist Investigations" existed as early as 1936 and as late as 1962, but were at their most intense in the 1940s and 1950s. During that time, according to the petition in this case, an assistant Corporation Counsel for New York City "was assigned full-time for nearly a decade to ferret out alleged Communists and unrepentant former Communists in the New York City public school and university system." The records generated by the investigation include, according to the City, documentation of some 1,100 interviews.

According to a random sampling of the records by the City, all of the interviews included a promise of confidentiality, couched in very similar language. The interviewer would typically begin by saying that "there has been and will be no publicity given to the fact that you and I are

having this discussion." He would add that the interview was "a matter of strict confidence between the Superintendent of Schools, acting through me, and yourself." Sometimes the interviewee would ask for, and receive, more assurance on that subject. The City points to one interview transcript that contains several such exchanges, including the following:

> "I know that the sins of the parents are visited upon their children, and it's quite a thing for my son --
>
> "Q. Well, nobody would know. This is strictly confidential.
>
> "A. I wouldn't want him, under any circumstance, to find out.
>
> "Q. No, he won't, don't you worry about that."
>
> ***
>
> "rather than have any repercussion on my son, I would --
>
> "Q. Please accept my word for it -- so just don't talk about it any more, there will be none, because, believe me, you are not the first teacher we have spoken to under these circumstances -- there have been a substantial number, believe me -- nobody knows they have been here, not even their principals; in some cases, like in your case, the members of their family don't know; they will never know, it's a closed door, so don't be concerned about it."

Petitioner is a historian with a personal reason for her interest in this bit of history: Both her parents were targets of the Anti-Communist Investigations, and her mother was among those interviewed. Beginning in 2007, petitioner sought

access to the City's records relating to the investigations. She was granted access to some records, but the City's Department of Records and Information Services expressed concern that some of the material she sought would invade the privacy of people identified in the files. Eventually, the Department adopted a rule, the effect of which is to require redaction of any names and other identifying information, unless the person in question, or his or her legal heirs or custodians, has agreed to disclosure.

As a result, petitioner has seen only redacted versions of the interview transcripts. For example, one transcript in the record on appeal contains this among many similar passages:

> "Q. I see. All right. Now let's take this third group. Who were the members of this group that you recall?
>
> "A. [lengthy redaction] this [redaction], you say, [redaction] -- and that red-haired girl, [redaction].
>
> "Q. That's [redaction]?
>
> "A. Right."

The City offered petitioner access to unredacted files on condition "that she agree not to publish names," a condition she rejected. She brought this proceeding under article 78 of the CPLR to require the Department to disclose the files without redaction.

Supreme Court dismissed the petition, holding that the City was entitled to redact the documents to avoid an

"unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]), and the Appellate Division affirmed (Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 84 AD3d 700 [1st Dept 2011]). Petitioner appealed as of right to this Court pursuant to CPLR 5601 (b) (1), which permits such appeals "where there is directly involved the construction of the constitution of the state or of the United States," and also moved for permission to appeal pursuant to CPLR 5602 (a). We retained the appeal as of right, and refrained from deciding the motion for permission to appeal, pending oral argument.

We now conclude that petitioner's constitutional arguments lack substance, and therefore dismiss the appeal as of right. We grant the motion for permission to appeal, and modify the Appellate Division order, permitting the City to redact only names and other identifying details relating to informants who were promised confidentiality.

II

FOIL requires government agencies to "make available for public inspection and copying all records" subject to a number of exemptions (Public Officers Law § 87 [2]). The exemption at issue in this case permits an agency to deny access to records that "if disclosed would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). Public Officers Law § 89 (2) (b) says that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited

to" seven specified kinds of disclosure. In a case, like this one, where none of the seven specifications is applicable, a court "must decide whether any invasion of privacy . . . is 'unwarranted' by balancing the privacy interests at stake against the public interest in the disclosure of the information" (Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 485 [2005]).

We begin by considering the redaction of names and identifying details of people, other than the people interviewed, mentioned in the interview transcripts. We conclude that today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy. Certainly, this was not always true. At the time of the investigations, and for some years thereafter, public knowledge that people were named as present or former Communists would have subjected them to enormous embarrassment, or worse. But that embarrassment would be much diminished today -- both because the activity of which they were accused took place so long ago, and because the label "Communist" carries far less emotional power than it did in the 1950s.

We do not say that disclosure will be completely harmless to those named in the documents, if they are still alive, or to members of their families who care about their memories (see Matter of New York Times Co., 4 NY3d at 484-485 [recognizing that a right of privacy exists in the affairs of the

dead]). But the diminished claims of privacy must be weighed against the claims of history. The story of the Anti-Communist Investigations, like any other that is a significant part of our past, should be told as fully and as accurately as possible, and historians are better equipped to do so when they can work from uncensored records. Petitioner, or any other historian trying to trace the course of the investigations, would obviously face a serious handicap if required to work with the redacted transcript from which we quoted above.

We strike a different balance, however, when we consider petitioner's request for the names of interviewees who were promised that no one would find out they were being interviewed. We find it unacceptable for the government to break that promise, even after all these years. We quoted earlier in this opinion from the interview of a teacher who feared that her son might learn she was being questioned about Communist activities. It is unlikely that she is still alive -- the interview shows that her teaching career began in 1934 or earlier -- but her son may be. The risk that he would be hurt or embarrassed by learning now of his mother's interview may be small, but a representative of New York City's government solemnly assured her that the government would not subject him to that risk. Perhaps there will be a time when the promise made to her, and to others similarly situated, is so ancient that its enforcement would be pointless, but that time is not yet.

Accordingly, the order of the Appellate Division should be modified in accordance with this opinion and, as so modified, affirmed, without costs.

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Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided June 5, 2012