

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 39M

Justice

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INDEX NO. 155678/2024

BENJAMIN CHEVAT

06/20/2024,

Plaintiff,

MOTION DATE 11/24/2025

- v -

MOTION SEQ. NO. 001 002

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 18, 20, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 54

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for DISCOVERY

In this Article 78 proceeding, Petitioner Benjamin Chevat seeks an order declaring the February 29, 2024 appeal denial was arbitrary and capricious. The Court notes that Petitioner initially requested the Court to compel Respondent to produce records from the Department of Environmental Protection (DEP) concerning the response of the City of New York to the September 11, 2001 collapse of the World Trade Center, along with historical records and disaster preparation materials, but now seeks only the October 2001 memorandum from Deputy Mayor Robert M. Harding ("Harding memo").

This proceeding involves a FOIL request sent by Petitioner to Respondents for records concerning the response of New York City to the September 11, 2001 collapse of the World Trade Center, along with historical records and disaster preparation materials. The DEP denied the FOIL request, indicating that the agency did not have the records requested (NYSCEF Doc No 48). Petitioner appealed and the appeal was also denied with the determination that a diligent search

was performed in the DEP's records and no responsive records were found (NYSCEF Docs No 48-19). Petitioner then commenced this Article 78 proceeding seeking an annulment of Respondent's denial as well as an order requiring Respondents to make the Harding memo available.

On December 12, 2024, Respondent cross-moved to dismiss this proceeding on the grounds that Respondent already certified to Petitioner that the requested records do not exist (NYSCEF Doc No 29). Thereafter, still during the pendency of the motion, Respondent filed a letter withdrawing their cross-motion and indicating that Respondent located "multiple boxes that are believed to contain at least some responsive records" (NYSCEF Doc No 52).

The purpose behind FOIL is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public (*Matter of Reclaim the Records v NY State Dept. of Health*, 45 NY3d 1, 11 [2025] citing *Gould v NY City Police Dept.*, 89 NY2d 267, 274 [1996]). To implement this purpose, FOIL provides that government records are presumptively available for public inspection unless a statutory exemption applies (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). The court must narrowly construe FOIL exemptions, and the agency that seeks to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within an exemption "by articulating a particularized and specific justification for denying access" (*id.*).

Given that the Court generally presumes all records are open and statutory exemptions to FOIL requests are to be construed narrowly, the standard of review of an Article 78 proceeding challenging an agency's denial of a FOIL request is more stringent than the general standard applicable to most Article 78 petitions (*Matter of NY Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153 [1st Dept 2010]).

Here, Petitioner substantially prevailed because it was only after the commencement of this proceeding that Respondents produced documents responsive to Petitioner's FOIL request (*Matter of Madeiros v NY State Educ. Dept.*, 30 NY3d 67 [2017]). Pursuant to the Court Ordered

Stipulation of Adjournment dated December 2, 2025, Petitioner's counsel conducted a review of documents at Respondent's office on November 17, 2025 and the parties are conferring and developing a production plan (NYSCEF Doc No 57).

The Court finds that the February 29, 2024 appeal denial by DEP was arbitrary and capricious. The reasons for the denial lacked any individualized reasoning and were vague and conclusory. The Petition is therefore granted.

Motion Sequence #2

Under Motion Sequence 2, Petitioner moves pursuant to CPLR 408 for pre-hearing discovery, including the service of two deposition notices, including one pursuant to NYCRR 202.20-d, concerning the search for and the DEP's earlier positions pertaining to the existence of documents responsive to Petitioner's Freedom of Information request, and a second directed to DEP FOIL Appeal Officer Pecunies, along with the service of a Notice of Discovery and Inspection (NYSCEF Doc No 45).

Under CPLR Article 78, a petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CPLR 408 (*Town of Pleasant Val. v NY State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15 [2d Dept 1999]). Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief (*id*). When leave of court is given, discovery takes place pursuant to CPLR 3101 (a), which provides generally that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action' (CPLR 3101[a]). "Material and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*Balsamello v Structure Tone, Inc.*, 226 AD3d 580, 581 [1st Dept 2024] citing *Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). The test is one of usefulness and reason (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Petitioner claims that the depositions sought are material and necessary to this proceeding. Respondent opposes contending that relevant material has already been provided to Petitioner and that Petitioner has failed to allege that discovery is likely to produce additional responsive records.

Petitioner has asserted facts to establish their cause of action and has demonstrated a need for discovery. The documents in the record are insufficient to determine the issues presented here. And thus the depositions are necessary. Further, Respondents have not demonstrated that providing the requested discovery would be prejudicial or unduly burdensome. Accordingly, since no prejudice is likely to result to the Respondent and the discovery is to obtain information necessary to establish Petitioner’s cause of action, the motion is granted.

Accordingly, it is

ORDERED that the Petition is granted (Motion Sequence No 1) and the February 29, 2024 appeal denial by DEP was arbitrary and capricious; and it is further

ORDERED that Petitioner’s motion (Motion Sequence No 2) for pre-hearing discovery is granted; and it is further

ORDERED that Petitioner shall serve a copy of this Decision and Order, along with Notice of Entry on all parties within 30 days.

This constitutes the Decision and Order of the Court.

5/28/2026
DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE