

Index No. 155678/2024

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

In the Matter of the Application of BENJAMIN
CHEVAT,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, et al.,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules

**RESPONDENT'S MEMORANDUM OF LAW IN
SUPPORT OF THEIR CROSS-MOTION TO
DISMISS THE VERIFIED PETITION**

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Matter #: 2024-055088*

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BENJAMIN CHEVAT,

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(Schumacher, J.)

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Law and Rules

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**RESPONDENT’S MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-
MOTION TO DISMISS THE VERIFIED PETITION**

PRELIMINARY STATEMENT

The Court should dismiss the Verified Petition in its entirety with prejudice, as a matter of law, as the Respondent (“Department of Environmental Protection” or “DEP”) has already certified to Petitioner that the requested records do not exist. Petitioner brought this Article 78 proceeding concerning Petitioner’s request pursuant to the Freedom of Information Law (“FOIL”), New York Public Officers Law §§ 84, *et seq.* Accordingly, Respondent submits this memorandum of law in support of their cross-motion to dismiss the instant proceeding pursuant to Rule 3211(a)(7) of the Civil Practice Law and Rules on the grounds that Petitioner fails to state a claim.

Specifically, the Verified Petition seeks an order directing Respondents to (1) declare that the February 29, 2024 appeal denial was arbitrary and capricious; (2) “search its archives, again, [] for the October 2001 memorandum from Deputy Mayor Robert M. Harding [] and related materials”; and (3) report, “in detail”, the steps taken to conduct the search. Petitioners also seek

(1) a hearing to ascertain “the scope and duration of any search previously undertaken” by Respondent, with live testimony from DEP’s personnel; and (2) an Order directing DEP to provide a report with “the anticipated cost of compliance with the FOIL request”.

However, the Petition is moot as DEP has already issued a final determination, notifying Petitioner that a diligent search was conducted, and the requested records were not found. Therefore, the Petition should be dismissed.

STATEMENT OF FACTS

On September 8, 2023, the DEP received and acknowledged a request submitted by the Petitioner pursuant to the Freedom of Information Law (FOIL). See Verified Petition dated June 20, 2024 (“Pet.”), ECF No. 1; Affirmation of Diana Dellafiora, in support of Respondents’ Cross-Motion to Dismiss the Verified Petition dated November 7, 2024 (“Dellafiora Aff.”) ¶ 5. The request sought the following records and more: Pet. at ECF No. 1.

- October 2001 memorandum from Deputy Mayor Robert M. Harding referenced in May 14 , 2017 New York Times article, entitled, “Ground Zero Illnesses Clouding Giuliani’s Legacy.” (“Harding memo”)
- Underlying documents, studies, reports, assessments, memoranda, factual bases and other written information that informed the Harding memo’s estimate or projection of anticipated future claims from WTC toxic exposure.
- All documents setting forth the names and titles of recipients of the Harding memo in 2001 and 2002.
- All documents setting forth the manner in which the Harding memo was communicated and the reasons for its communications in 2001 and 2002 (e.g., litigation; lobbying; inter-government communication; intra-government communication; Freedom of Information request).

In the January 31, 2024 email communication, DEP advised Petitioner that his FOIL request was closed. Pet. at ECF No. 1; Dellafiora Aff. ¶ 6. DEP further advised Petitioner that DEP “does not have the records requested” and he “should direct [the] request to a different agency.” Pet. at ECF No. 1.

On February 13, 2024, Petitioner appealed the DEP's January 31, 2024 denial, based upon the fact that DEP does not possess the requested documents. In this appeal, Petitioner claimed the DEP failed to appropriately "certify that it does not have possession of such record or that such record cannot be found after diligent search", and instead "offer[ed] a boilerplate response, devoid of detail concerning any search, and lacking certification," and the public record demonstrates that DEP maintains the requested materials. Petitioner points to historical sources such as newspaper articles and DEP's prior efforts to assess air quality following the September 11th attacks, arguing that these purported "sources" demonstrate the agency's possession of the requested records. DEP denied Petitioner's appeal, advising him that after a "diligent search was performed in DEP's records in response to [the] request, no responsive records were found." Pet. at ECF No. 1. Petitioner filed the instant article 78 proceeding seeking only the "Harding memo", and related materials.

ARGUMENT

POINT I

THIS PROCEEDING IS MOOT AS THE DEP HAS ALREADY RESPONDED TO PETITIONER'S FOIL REQUEST.

The instant article 78 proceeding has been rendered moot by the DEP's response to Petitioner's FOIL request. It is well-settled that upon receipt of a FOIL request, an agency is required by statute to produce the record in question or "certify that it does not have possession of such record or that such record cannot be found after a diligent search." Public Officers Law § 89(3)(a); see Matter of Rattley v. N.Y.C. Police Dep't., 96 NY2d 873 (2001); Matter of Binghamton Precast & Supply Corp. v. New York State Thruway Auth., 196 AD3d 944, 945 (3d Dept. 2021). And an action or proceeding will be dismissed as moot where there is no longer any live controversy to resolve. Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801,

810-11 (2003). Courts may not issue decisions in those circumstances—unless the case falls within the three, limited exceptions to the mootness doctrine, and this case does not—because the decision would have “no practical effect on the parties.” Saratoga Cty., 100 N.Y.2d at 811. As a result, New York courts routinely dismiss moot claims. See Callwood v. Cabrera, 49 A.D.3d 394 (1st Dep’t 2008) (affirming dismissal of an Article 78 petition for mootness). Compelling an additional search in this case, where DEP has repeatedly certified that it has no responsive records, will have no practical effect on the parties.

Indeed, a certification by an agency that, after a diligent search, responsive non-exempt materials have been produced is sufficient to satisfy the agency’s obligations under FOIL and, based on that certification, a proceeding to compel disclosure with regard to those records becomes moot. See, e.g., Rattley v. N.Y. City Police Dep’t, 96 N.Y.2d 873, 875 (2001) (dismissing a proceeding to compel disclosure under FOIL as moot because the agency “satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate”); Alicea v. N.Y. City Police Dep’t, 287 AD2d 286, 287 (1st Dep’t 2001); Norde v. Morgenthau, 262 A.D.2d 129, 129 (1st Dep’t 1999); see also Porter v. David, 2014 N.Y. Misc. LEXIS 1723, at *17 (Sup. Ct. N.Y. Cnty. 2014) (“A party cannot be compelled to [produce] documents that it does not possess.”). Moreover, FOIL “does not specify the manner in which an agency must certify that documents cannot be located,” and “neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required.” Rattley, 96 N.Y.2d at 875; see also Grabell v New York City Police Dep’t, 139 A.D.3d 477,479 (1st Dep’t 2016).

On January 31, 2024, after an extensive search for the records requested, the DEP closed out Petitioner’s FOIL request and notified Petitioner that the agency did not have the records

requested. Dellafiora Aff. ¶ 6. Petitioner filed an appeal of the DEP's denial of the FOIL request. Dellafiora Aff. ¶ 7. DEP responded, reasserting that after a diligent search was performed of DEP's records, no responsive records were found. Dellafiora Aff. ¶ 8. This assertion included a certification from FOIL Appeals Officer Russell Pecunies. Id.

Although “a petitioner may be entitled to a hearing on the issue if it can articulate a demonstrable factual basis to support the contention that the requested document existed and within the agency's control,” “unsupported speculation that records have been withheld is an insufficient basis upon which to grant a petition.” Matter of Empire Ctr. For Pub. Policy v. New York State Energy & Research Dev. Auth., 188 AD3d 1556, 1558 (3d Dept. 2020); Matter of Jewish Press, Inc. v. New York State Police, 207 AD3d 971, 973 (3d Dept. 2022). Under FOIL, “[R]espondent, is only required to provide copies of ‘any information kept, held, filed, produced or reproduced by, with or for [respondent].’” Public Officers Law §§ 86(4), 87(2).

Petitioner's attempt to establish that the DEP possesses the requested records by referencing newspaper articles published in 2006 and 2017, both of which discuss events that occurred in 2001 fails. Established caselaw demonstrates that such speculative conjecture does not satisfy Petitioner's burden of articulating a demonstrable factual basis to support his contention that the DEP possesses the requested records. See Matter of Jackson v. Albany County Dist. Attorney's Off., 176 A.D.3d 1420 (3d Dep't 2019) (finding that although Petitioner submitted a police department property report that listed a roll of film, nothing in the record indicated that the roll of film or any photographs that may have been developed therefrom were ever in respondent's possession); Gould v. N.Y.C. Police Dep't, 89 N.Y.2d 267 (1996) (“[Respondent's] conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.”).

Petitioner's speculative conjecture is also clearly exemplified by the fact that the same

