

Index No. 155678/2024

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

BENJAMIN CHEVAT,

Petitioner,

- against -

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

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

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PRELIMINARY STATEMENT

For the reasons set forth in Respondent New York City Department of Environmental Protection's ("DEP") ("Respondent") moving papers dated November 7, 2024, the Court should dismiss with prejudice the entirety of the Verified Petition in this Article 78 proceeding brought pursuant to the Freedom of Information Law ("FOIL"), New York Public Officers Law §§ 84, *et seq.*, as Respondent has already certified to Petitioner that the requested records do not exist, and Petitioner has not put forth any credible evidence to call into question Respondent's certification.

The arguments set forth in Petitioner's memorandum of law in opposition to Respondent's cross-motion to dismiss are purely speculative and cannot overcome the mootness of the Petition. Accordingly, for the reasons set forth herein, as well as those set forth in the Respondent's moving papers, the Court should dismiss the Verified Petition with prejudice pursuant to 3211(a)(7) of the Civil Practice Law and Rules.

ARGUMENT**POINT I****THE PETITION IS MOOT.**

As demonstrated in Respondent's moving papers, because the DEP has adequately and appropriately responded to the FOIL request at issue here, this matter is moot. Petitioner appears to argue that the Petition has not been rendered moot because Petitioner disagrees with the response to the FOIL request and contends, in an entirely speculative manner that responsive documents to the FOIL request exist and are in the possession of DEP. The Court, however, should not accept Petitioner's argument, as it is purely speculative. Because the DEP has certified that following a diligent search records responsive to Petitioner's FOIL request were not found, Petitioner cannot

challenge such a response through pure speculation based upon unsupported supposition including newspaper articles.

It is axiomatic that when a respondent certifies that after a diligent search, responsive non-exempt documents have been produced, the petition has been rendered moot. See Public Officers Law § 89(3); Covington v. Russo, 2010 N.Y. Misc. LEXIS 2329 (Sup. Ct. N.Y. Co. May 18, 2010) at *4; see also Matter of Carty v. New York City Police Dept., 41 A.D.3d 150 (1st Dep't 2007) (finding that the proceeding was rendered moot by respondent's certification that it had provided all responsive documents after having conducted a diligent search). Petitioner's sole rebuttal to this established legal principle is the assertion that "there is no reason to accept this representation of a diligent search." ECF No. 27 at ¶ 5.

On January 31, 2024, after an extensive search for the records requests, the DEP closed out Petitioner's FOIL request and notified Petitioner that the agency did not have the records requested. Dellafiora Aff. ¶ 7. The issues raised by Petitioner in opposition, such as they may be, are not substantive. Petitioner asserts that the DEP must have the requested records because it was involved in the City's September 11th response, 23 years ago. Additionally, Petitioner points to actions taken by other agencies, as opposed to the Respondent, to support this claim.

Such arguments by Petitioner are entirely speculative and, as such, the Court should reject them.

CONCLUSION

For the reasons stated herein and in Respondent's moving papers, Respondent respectfully requests that this Court grant its cross-motion and dismiss the Verified Petition in its entirety with prejudice and for such other and further relief as the Court deems just and proper.

Dated: December 12, 2024

New York, New York

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