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

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In the Matter of the Application of
BENJAMIN CHEVAT,

Index No. 155678/2024

Petitioner,

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

-against-

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

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**November 24, 2025 AFFIRMATION OF PETITIONER'S ATTORNEY IN SUPPORT OF APPLICATION TO TAKE PRE-HEARING DISCOVERY**

ANDREW J. CARBOY, an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am a member of the Law Offices of Andrew J. Carboy LLC.

2. My firm and Turken Heath & McCauley LLP represent Benjamin Chevat, Director of 9/11 Health Watch, Petitioner in this Article 78 proceeding. 9/11 Health Watch is a leading non-profit organization, advocating for patients afflicted by toxic exposures resulting from the September 11th attacks. Respondent is the New York City Department of Environmental Protection or "DEP."

3. I submit this affirmation in support of Petitioner's motion to take discovery in advance of any hearing, given recent and extraordinary developments. Petitioner seeks an Order, pursuant to CPLR Sec. 408 permitting pre-hearing discovery in Article 78 proceedings. Such discovery would include the service of two (2) deposition notices, including one pursuant to NYCRR 202.20-

d, concerning the search for documents, and the DEP's earlier positions pertaining to their existence, in response to Petitioner's Freedom of Information Law ("FOIL") request, and a second directed to DEP FOIL Appeal Officer Pecunies, along with the service of a Notice of Discovery and Inspection.

4. Petitioner, along with Karen Klingon, Executrix of the Estate of Robert Klingon, a lower Manhattan resident; Yvonne Baisley, Executrix of the Estate of FDNY Firefighter Robert Fitzgibbon; Phil Alvarez on behalf of his brother, NYPD Detective Luis G. Alvarez, deceased; and Charlotte Berwind, Executrix of the Estate of volunteer firefighter Charles E. Flickinger, Jr., sought documents from the City of New York ("City") that should be freely available to all New Yorkers.

5. Pursuant to the Freedom of Information Law ("FOIL"), on September 8, 2023, they requested public records from the New York City Department of Environmental Protection ("DEP") concerning the response of the City to the September 11, 2001 collapse of the World Trade Center, along with historical documents and disaster preparation materials. **(NYSCEF #3)** These public records pertained to risk assessments made by DEP for the reopening of lower Manhattan and public schools in September 2001 and airborne toxic hazards, generally. Why did the City assure first responders, recovery workers, returning residents, students and office personnel of safe air quality while simultaneously lobbying for federal "liability protection" against thousands of toxic exposure claims it anticipated? What did the City know and when did it know it?

6. DEP denied the FOIL request **(NYSCEF #4)**, rejecting a subsequent administrative appeal. **(NYSCEF #7)** DEP claimed, variously, that responsive records did not exist or could not be found. The Director of 9/11 Health Watch then commenced this Article 78 proceeding in June

2024, seeking, among other relief, a hearing as to the sufficiency of the City's "search" for these public records. **(NYSCEF#1)** DEP even sought to dismiss this proceeding, characterizing Petitioner's "*unsupported speculation that records have been withheld.*" **(Exhibit 3)**

7. One year later, on July 14, 2025, the New York City Council enacted Resolution 560-A ("Resolution 560-A"). Taking effect immediately, Resolution 560-A directs the New York City Department of Investigation ("DOI"), one of the country's premier investigative agencies, to *"conduct an investigation to ascertain the knowledge possessed by mayoral administrations on environmental toxins produced by the September 11, 2001 terrorist attacks on the World Trade Center and to submit a report to the Council thereon."* **(NYSCEF #31:** Resolution 560-A; **NYSCEF #32**: Record of Passage; see also, **NYSCEF #30:** Affirmation of Counsel Describing Resolution 560-A) As bases for Resolution 560-A, the City Council cited the City's denial of the public records to both 9/11 Health Watch and to the New York Congressional delegation. **(NYSCEF #31)**

8. As United States Representatives Jerrold Nadler and Dan Goldman explained, following the enactment of Resolution 560-A:

> *For years, we have demanded transparency from the Adams Administration about what the Giuliani and Bloomberg Administrations knew about toxins in the air following 9/11 and when they knew it. We sent multiple letters to the Adams Administration requesting the release of critical records, yet each time, they denied our requests.*
>
> *These records could provide long overdue accountability for potentially devastating decisions that cost thousands of lives. New Yorkers deserve the truth.* **(NYSCEF #35)**

9. In addition to the relief sought in the Petition, Petitioner now requests the opportunity to conduct pre-hearing discovery.

10. After two years of denying the existence of documents responsive to our FOIL request,

while professing to have conducted a diligent, yet fruitless, search for them, the DEP now admits "finding" records, at least sixty-eight (68) boxes, in total. Overlooking sixty-eight (68) boxes in even a cursory or careless search is unlikely.

11. On November 17, 2025, we reviewed twenty-four (24) boxes of responsive documents at DEP headquarters. Uniform in construction and labeling, the boxes contained approximately 5,000 pages of records, each, concerning DEP's response to the September 11th attacks.

12. Highly organized and placed in yellowing folders, the DEP records appeared in their original 2001 condition, with handwritten notes in document margins, along with faded "*Post-its*" and, in some instances, cut-out maps of lower Manhattan streets fastened to them. Broadly, the DEP files fell into two categories: **A)** asbestos air and surface testing, dating from the immediate aftermath of the WTC collapse; and **B)** testing for contaminants (metals, chemicals) and equipment calibration. The City now advises that there are at least forty-four (44) additional boxes of responsive DEP documents to be produced for examination.[1]

13. Notably, found among the records was 2002 correspondence DEP received from the City Law Department's "World Trade Center Unit, " a special task force addressing September 11th - related issues.[2] (**Exhibit 6**) Without limitation, the World Trade Center Unit directed the DEP to identify and preserve all documents concerning its response to the WTC collapse. This decades-old preservation instruction undercuts DEP's repeated contention, most recently set forth in its application to dismiss this proceeding as a frivolous "fishing expedition," (**NYSCEF #19**), that responsive documents did not exist in its archives. In 2002, DEP was advised, as follows:

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[1] At 5,000 pages per each of the 68 boxes, we estimate total DEP FOIL responses to exceed 340,000 pages. This disclosures follows an earlier October 2025 transmittal of more than eight hundred (800) pages.

[2] At inception, the World Trade Center Unit had twenty-five attorneys, seventeen support members, including private investigators, and a large complement of legal assistants and data entry clerks. The unit operated for more than one decade. **(Exhibit 6** at press release)

> *These original World Trade Center documents have been collected and scanned by the New York City Law Department.* ***DO NOT DISPOSE OF THESE DOCUMENTS:*** *they must be preserved to serve as evidence in the event future WTC-related legal actions are brought against the City.* (Original emphasis)(**Exhibit 6** at 2002 Preservation Letter)

14. These recent developments contrast sharply with DEP's previous representations concerning Petitioner's FOIL request and this Article 78 proceeding. They are, in substantial part, likely the result of law enforcement activity (DOI Investigation).

15. The "evolution" of the DEP's position warrants discovery, including depositions of record searchers and the DEP Freedom of Information Officer who certified, as an attorney, that a diligent search was conducted and responsive records did not exist. A summary of the ever-shifting DEP position is set forth, below:

A. **January 31, 2024 Denial of Petitioner's FOIL Request by Nameless Staffer at DEP**

> "*Your request under the Freedom of Information Law (FOIL) is being closed because this agency does not have the records requested.*" **(Exhibit 1)**

B. **February 29, 2024 Certification by DEP Legal Counsel, an officer of the New York Courts**

> "*I certify that a diligent search was performed in DEP's response to your FOIL request, and no responsive records were found*" **(Exhibit 2)**

C. **November 7, 2024 Memorandum of Law to Dismiss the Article 78, Submitted by Asst. Corporation Counsel as an officer of the New York Courts**

> *"DEP already certified that the records do not exist"*
>
> *"The petition* (of 9/11 Health Watch) *is moot"*
>
> *"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."*
>
> *"A party cannot be compelled to [produce] documents that it does not possess"*
>
> *"[A] fishing expedition"*

*"Unsupported speculation that records have been withheld"*

(All at **Exhibit 3** and **NYSCEF#23**)

**D. November 7, 2024 DEP Employee Certification, Sworn to under penalties of perjury, Submitted to Honorable James Clynes**

*"the DEP responded to Petitioner's appeal and reasserted that there were no responsive records found. This response also included a certification from FOIL Appeals Officer Russell Pecunies that a diligent search was performed of DEP's records"* **(Exhibit 4)**

***versus***

E. **September 16, 2025 City Law Department letter to the Honorable James Clynes, Justice of New York Supreme Court**

*"Respondent (*CITY DEP) *previously filed a cross-motion to dismiss on the grounds that the agency had conducted a diligent search for responsive records and reported that none were located at that time. Recently, however, Respondent has located multiple boxes that are believed to contain at least some responsive records"* **(Exhibit 5)**

16. Frankly, in advance of these shocking developments, it is pure happenstance that this Article 78 proceeding was not dismissed, at respondent's request, based upon DEP's representation of a diligent record search. As the Court of Appeals held in Rattley v. N.Y.C. Police Dep't., 96 NY2d 873 (2001), a decision governing FOIL responses, unsubstantiated assertions of a diligent search by a municipal entity warrant dismissal of any challenge to the quality or duration of the search. But for its recent and belated disclosures, under Rattley DEP would have *"satisfied the certification requirement by averring ...that it had conducted a diligent search for the documents it could not locate."* Id. at p. 875 *"Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required for the certification to be valid."* Madrid v. Mazur, 2025 N.Y. Slip Op. 06284, 2025 WL 3209973, at *1 (1st Dept., Nov. 18, 2025)(citing Rattley)

17. Rattley is criticized as impeding government transparency. (See, for example, "Shining a Light on *Rattley*: The Troublesome Diligent Search Standard Undercutting New York's Freedom of Information Law," Fordham Law Review, November 1, 2022, Krier, Isaac) As Krier wrote, *"despite FOIL's promise of transparency and disclosure, an agency's ability to deny a records request under Rattley without explaining its search efforts leaves requesters without their requested records and without meaningful recourse to challenge the agency's alleged search in court."*

18. That exact grim scenario almost played out in this proceeding. DEP produced no documents and, then, misused Rattley as a ***"Get out of FOIL, free"*** card, citing the decision as a basis for dismissal. (**Exhibit 3** and **NYSCEF #23** at p. 8) But for DEP's recent "about face," and its stunning production of hundreds of thousands of pages, most likely the result of close law enforcement attention (DOI investigation), the Court could have simply accepted the City's representation of a diligent search at face value, dismissing this Article 78 petition, citing Rattley.

19. Government transparency and the integrity of judicial proceedings are jeopardized by such conduct. It is far too easy for an agency receiving a FOIL request, and not wanting to address it in any meaningful way, to assert the performance of a "diligent search," and produce no responsive documents. Perhaps the time has come to revisit the Rattley holding, but that is a matter for another litigation.

20. Here, in Chevat, there are clear indicia that a diligent search was never performed. The Petitioner and his counsel spent hours of uncompensated time in what we envisioned to be a simple request for government records. Instead, we met the grinding opposition of City Hall. The City's actions raise disturbing questions that cannot be answered from the record, alone. Who were the decisionmakers approving the earlier, serial denials of the existence of responsive

records? What was their motivation? What search, if any, was undertaken at all? Where were the hundreds of thousands of documents located? How does a bureaucrat "overlook" more than 340,000 pages of documents concerning the most significant event in New York City history? To get answers, discovery is now necessary. Taking sworn testimony from the officials responsible is paramount.

21. We request the opportunity to serve notices of discovery and inspection for materials relevant to the DEP's earlier position and searches, along with deposition notices. We will seek the sworn pre-hearing testimony of the DEP's chief Freedom of Information Appeals Officer, Russell Pecunies. (**Exhibit 2**) We will also serve a notice for deposition, pursuant to NYCRR 202.20-d, concerning the search and the DEP's mercurial and conflicting narrative.

22. At this juncture, based upon the record consisting of NYSCEF filings, there is insufficient information for the Court to determine whether a diligent search was conducted in the first instance, a central contention in our petition. To the extent there were misrepresentations made by the DEP and other decisionmakers, the Petitioner, the public and, most of all, the Court, are entitled to learn of them.

23. Pursuant to CPLR Sec. 408, the Court may order discovery in this Article 78 proceeding. The Court's power is discretionary, and should be used where the information sought, as here, is *"material to the action and unavailable by other means."* Roth v. Rakstis, 13 A.D.3d 194, 195 (1st Dept. 2004); see also, Goldstein v. McGuire, 84 A.D.2d 697, 698 (1st Dept. 1981)(same).

24. In Chevat, Petitioner has long contended that the DEP search was inadequate, requesting a hearing on the search sufficiency as part of the relief sought. (**NYSCEF#1**) Recent developments, detailed in this application, support this contention. As the City itself

acknowledged in its application to dismiss this proceeding, part of the relief sought by Petitioner is " *a hearing to ascertain 'the scope and duration of any search previously undertaken' by Respondent, with live testimony from DEP's personnel.*" (**Exhibit 3**) This relief has become far more significant than originally anticipated, given the shifting and contradictory positions taken by DEP concerning the existence of responsive documents and its "diligent search" for them.

25. In a summary proceeding, CPLR Sec. 408 entitles a petitioner to discovery upon satisfaction of the following criteria:

> (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice
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> Lonray, Inc. v. Newhouse, 229 A.D.2d 440, 440–41, 644 N.Y.S.2d 900, 1996 WL 387709 (1996)

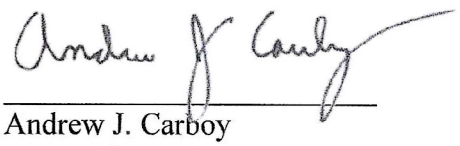
26. Petitioner fulfills these requirements. First, he demonstrates that his application is meritorious. Not only is his petition (**NYSCEF#1** et seq.) copiously detailed, with citations to exhibits, recent events so demonstrate the merit of his position that the City was forced to withdraw its motion to dismiss. (**Exhibit 5**) Second, there is clear need to obtain information concerning the duration, scope and quality of the purported DEP "searches" and the integrity and bases of its previous assertions that no responsive records existed or could be located. Third, Petitioner will serve a total of two (2) deposition notices and one (1) discovery notice concerning these topics; discovery will be narrowly tailored to address the "about face" of the DEP. Fourth, there is no prejudice the City of New York will suffer from this Court-supervised exploration of its contradictory positions and disclosures. It is Petitioner, the September 11th community and the public at large that are prejudiced by the apparent abuse of the FOIL statute; there must be

accountability. With respect to the last criterion, Petitioner defers to the Court to fashion any order it sees fit so that a program of discovery may proceed

27. Wherefore, Petitioner respectfully requests an Order permitting pre-hearing discovery, with such discovery to include the service of two (2) deposition notices, including one pursuant to NYCRR 202.20-d, concerning the search and the DEP's earlier positions, and a second directed to DEP FOIL Appeal Officer Pecunies, and the service of Notice of Discovery and Inspection.

Dated: November 24, 2025

Respectfully submitted,



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