

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,

Respondent.

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

**RESPONDENT'S MEMORANDUM OF LAW IN
OPPOSITION TO PETITIONER'S MOTION TO
TAKE PRE-HEARING DISCOVERY**

MURIEL GOODE-TRUFANT

Corporation Counsel of the City of New York

Attorney for Respondent

100 Church Street

New York, N.Y. 10007

Of Counsel: Saarah S. Dhinsa

Tel: (212) 356-0872

Matter #: 2024-055088

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IAS Part 39

(Clynes, J.)

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**RESPONDENT’S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER’S
MOTION FOR PERMISSION TO TAKE PRE-HEARING DISCOVERY**

PRELIMINARY STATEMENT

The Court should deny Petitioner’s motion for permission to take pre-hearing discovery as it is neither material nor necessary to the prosecution of this Article 78 proceeding concerning Petitioner’s request pursuant to the Freedom of Information Law (“FOIL”), New York Public Officers Law §§ 84, *et seq.* DEP has already identified and are in the process of producing approximately 68 boxes of potentially responsive records. In fact, DEP has been working diligently with the Petitioner to provide an expedited production of responsive records.

Petitioner seeks to serve two deposition notices: one regarding the document search, and the DEP’s earlier positions about record existence, and a second directed to DEP FOIL Appeal Officer Pecunies, along with the service of a Notice of Discovery. Petitioner, however, fails to explain how this discovery would advance the prosecution of this matter or lead to the production of additional records responsive to the September 8, 2023, FOIL request.

Instead, the motion merely recites the procedural history of this litigation. The only justification Petitioner offers is a generalized “need to obtain information concerning the duration, scope, and quality” of past searches and the bases for prior statements regarding the existence of records. This argument focuses solely on DEP’s historical search efforts, despite DEP’s extraordinary transparency in allowing Petitioner to review records at DEP offices prior to their production. Discovery in this proceeding will not yield any additional responsive records and goes against the purpose of Article 78 proceedings – to allow an expedited and efficient process to seek judicial review of an administrative decision and allow Petitioner access to the records they seek – which DEP is already in the process of furnishing.

Accordingly, Petitioner’s motion for permission to take pre-hearing discovery should be denied.

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.”) at NYSCEF No. 1; Exhibit 1 of the Pet. at NYSCEF No. 3. In the January 31, 2024, email communication, DEP advised Petitioner that his FOIL request was closed. *See* Pet. at NYSCEF No. 1; Exhibit 2 of the Pet. at NYSCEF No. 4. DEP further advised Petitioner that DEP “does not have the records requested” and he “should direct [the] request to a different agency.” *See* Pet. at NYSCEF No. 1; Exhibit 2 of the Pet. at NYSCEF No. 4. On February 13, 2024, and February 28, 2024, Petitioner appealed the DEP’s denial. *See* Exhibits 3, 4 of the Pet. at NYSCEF Nos. 5, 6. DEP denied this appeal. *See* Exhibit 5 of the Pet. at NYSCEF No. 7. On June 20, 2024, Petitioner filed the instant Article 78 proceeding seeking only the “Harding memo”, and related materials. *See* Pet.

On November 7, 2024, Respondent filed a cross-motion to dismiss the Verified Petition on the grounds that after a diligent search, no responsive records had been found. *See* Notice of Cross-motion dated November 7, 2024 at NYSCEF No. 22. On September 16, 2025, however, Respondent filed a letter withdrawing said cross-motion and informing the Court and Petitioner that responsive records had just been found. *See* Letter dated September 16, 2025, at NYSCEF No. 39.

Since then, Respondent has reviewed, scanned, and produced 123 documents to Petitioner. *See* Affirmation of Musa Ali ¶ 3 (“Ali Affirmation”) Additionally, Petitioner has invited and accommodated Petitioner, Petitioner’s attorney, as well six other individuals to visit the DEP office in Queens on November 17, 2025. *See* Ali Affirmation ¶ 4. During this visit the eight individuals reviewed twenty (20) boxes. *Id.* Under FOIL, Petitioner has always been aware that they are entitled to any documents contained within the 20 boxes. Petitioner elected to request the scanning and production of only 2 of those 20 boxes, as well as a single memorandum. *See* Ali Affirmation ¶ 5. Petitioner returned to the DEP office on December 15, 2025, for a second on-site review, and requested production of additional boxes. *See* Affirmation ¶ 7.

ARGUMENT

POINT I

PETITIONER HAS FAILED TO ALLEGE THAT DISCOVERY IN THIS PROCEEDING IS LIKELY TO PRODUCE ADDITIONAL RESPONSIVE RECORDS.

Discovery is generally inconsistent with the summary nature of Article 78 proceedings, which are intended to provide expedited judicial review of administrative actions. As such, “[l]eave of court shall be required for disclosure [in an Article 78 special proceeding] except for a notice [to admit] under section 3123.” CPLR 408. *See, e.g., Town of Pleasant Valley v. N.Y. State*

Bd. of Real Prop. Servs., 253 A.D.2d 8, 15-16 (2d Dep’t 1999) (“Under CPLR article 78, a petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CPLR 408. 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.”) It is clear that a petitioner seeking to compel discovery must show that discovery is material and necessary to the prosecution or defense of their proceeding. *See Stapleton Studios, LLC v. City of New York*, 7 A.D.3d 273, 274-75 (1st Dep’t 2004) (reversing IAS court’s order granting petitioner leave to conduct discovery in Article 78 proceeding, and holding that petitioner “should not have been granted leave to conduct discovery absent a showing that the discovery sought was likely to be material and necessary to the prosecution or defense of this proceeding”); *Matter of Town of Pleasant Val. v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8 (2d Dep’t 1999)); *Matter of Lally v. Johnson City Cent. Sch. Dist.*, 105 A.D.3d 1129 (3rd Dep’t 2013); *Bliss v. Jaffin*, 176 A.D.2d 106 (1st Dep’t 1991) (quoting *Liberty Imports v. Phillipe Bourget*, 146 A.D.2d 535) (1st Dep’t 1989) (“The law is well-settled that pre-action disclosure pursuant to CPLR 3102(c) ‘is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong.’”).

Petitioner fails to articulate a basis for why discovery is material or necessary to the prosecution of this case—namely, to obtain documents responsive to their September 8, 2023 FOIL request. The closest Petitioner comes to offering such an argument of this sort, is their assertion, in response to Second Department precedent, that “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...”. *See* Petitioner’s Affidavit in Support of Motion ¶

26 at NYSCEF No. 47. This argument focuses entirely on past searches rather than on whether any additional responsive records exist.

The sole relief available in an Article 78 proceeding concerning FOIL is the production of records responsive to the request. Petitioner has already received that relief and offered no explanation as to how the requested discovery could produce additional responsive documents. *See Aron Law, PPLC v. N.Y. City Law Dept.*, 2021 N.Y. Misc. LEXIS 6773 (1st Dep’t 2021). Providing discovery in this case would only unduly delay resolution of the Article 78 proceeding.

Respondent has been transparent during this process —promptly notifying Petitioner when potentially responsive records were located, offering them the opportunity to review the documents in person, and agreeing to produce all records identified during that visit. It remains unclear how depositing a DEP FOIL Appeal Officer or obtaining testimony concerning the search for documents, and the DEP’s earlier positions pertaining to their existence, in response to Petitioner’s request could in any way lead to the identification of any further responsive materials.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Court deny Petitioner’s motion for permission to take discovery in its entirety due to their failure to allege how discovery is material and necessary to the prosecution of their case, and denying the relief requested therein in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York

December 19, 2025

By: /s/
Saarah S. Dhinsa
Assistant Corporation Counsel