

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

Motion Sequence #3

Return date: August 4, 2026

-against-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

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**JULY 9, 2026 AFFIRMATION OF PETITIONER'S ATTORNEY IN
SUPPORT OF CROSS-MOTION FOR RELIEF CONCERNING
OUTSTANDING DISCOVERY, OPEN DEPOSITIONS and UNFINISHED
FREEDOM OF INFORMATION LAW DISCLOSURE and in PARTIAL
OPPOSITION TO RESPONDENT'S ORDER TO SHOW CAUSE**

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, including fines and
imprisonment, understanding this affirmation is being submitted in Court:

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
911 Health Watch, Petitioner in this Article 78 proceeding. Every document served in this action
is signed by both firms. The Law Department's argument that somehow only one of the firms can
participate at deposition lacks basis in law or practice. 911 Health Watch is a leading non-profit
organization, advocating for patients afflicted by toxic exposures resulting from the September
11th attacks. Respondent is New York City Department of Environmental Protection or "DEP."

3. I submit this affirmation in support of Petitioner's cross-motion for Court intervention to ensure DEP's compliance with the Court's May 28, 2026 Order and Decision. (NYSCEF#76) The Court found the DEP acted arbitrarily and capriciously in denying Petitioner's Freedom of Information Law ("FOIL") request and appeal, granting discovery to Petitioner, including depositions of responsible DEP personnel. Id. The Law Department resists our inquiries as to why the DEP maintained, for two (2) years, that it possessed no records of its response to the World Trade Center collapse, rejecting Petitioner's FOIL request, denying his appeal and, then, moving to dismiss this proceeding as a "baseless fishing expedition," when, in reality, it maintained hundreds of thousands of responsive documents. We submit this affirmation in partial opposition to respondent's Order to Show cause, filed by Corporation Counsel Steve Banks, now returnable on August 4, 2026. (NYSCEF#84) Despite its neat organization, the Law Department's motion is a misplaced complaint. At its core, it objects to the fact that Petitioner's counsel challenged defense counsel's misleading and obstructive conduct, as more fully detailed below.

4. We fully embrace supervision of the depositions, not because we reacted sharply to renewed stonewalling by the Law Department, but because the fight against releasing September 11th related materials will not cease without Court intervention. The deposition transcript of my questions reads professionally. (**Exhibit 1**) I did not intimidate the witness or conduct myself improperly, while fielding simultaneous objections from two attorneys for the same witness. The two defense attorneys even argued with each other as to the "best" objections to assert. I will let the record speak to their statements and representations, but I must respond to the personal allegations. The same Law Department which, for years, misrepresented DEP had no responsive documents, wasting hundreds of hours of Petitioner's attorney time, now accuses *me* of being unprofessional. To be clear, both attorney Alfieri and I accused each other of "screaming." I did

not “slam” the table. I do not like conflict. I do not like being misled by opposing counsel either; unfortunately, that has been my experience and that of co-counsel, Matthew McCauley, since filing Petitioner’s FOIL request, as detailed in the NYSCEF docket of this proceeding.

5. It is disappointing that the Mamdani Administration and Corporation Counsel Steve Banks are actively working to thwart release of information that would shed light on the DEP’s multi-year campaign of denying it possessed September 11th-related records. We note, too, that on June 30, 2026, the Mamdani Administration filed a motion to dismiss a parallel proceeding brought by Petitioner for release of Mayor Giuliani’s records, dating from September through December 2001. (NYSCEF# 1-48; Benjamin Chevat v. Office of the Mayor, et al., 153916/2026) On that same day, the Mayor told New Yorkers they no longer needed to fight for September 11th records that “*should have been theirs from the beginning.*” Publicly, the Mayor and Corporation Counsel pledge “transparency.” In legal proceedings, Mayor Mamdani’s attorneys continue to fight disclosure of Giuliani-era archives. The gulf between these public pronouncements and aggressive lawyering is inexplicable.

6. As the Court summarized in its May 28, 2026 Order and Decision:

“In his underlying FOIL request and appeal, Petitioner sought “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...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).” (NYSCEF#76)

7. The Court granted Petitioner the right to conduct discovery:

“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. ..the discovery is to obtain information necessary to establish Petitioner's cause of action... the motion is granted.” (NYSCEF#76)

8. DEP scheduled the first two witnesses for questioning: Russell Pecunies, DEP's FOIL Appeals Officer, who denied Petitioner's FOIL appeal (NYSCEF#4)(**Exhibit 3**: February 29, 2024 DEP FOIL Appeal Denial) on July 1, 2026; and Diana Dellafiora, a DEP FOIL staffer, on July 8, 2026.

9. Discovery has not proceeded, due to the actions of the Law Department.

10. On July 1st, Law Department attorneys walked out of Pecunies' deposition, terminating it without warning and after refusing to call the Court for guidance. (**Exhibit 1**: Pecunies transcript)

11. The walk out occurred *after* the FOIL Appeals Officer admitted: he did not actually research or determine Petitioner's FOIL appeal, although he certified that a “diligent search” for records was performed; conducted no investigation of the underlying search, if one was even undertaken; interviewed no record searchers “face to face” or by phone (Id. at p. 68 and p. 70); did not email any record searchers to pose questions (Id. at p. 71); after asking for their identities, was **denied** the names of record searchers so he could speak with or email them (Id. at pp. 90-91); does not know the names of the record searchers to this day (Id. at p. 91); was instructed to “**stand down**” (Id. at p. 93: “*I should not do anything with regard to this appeal until I heard back*”) and, instead, adopt, wholesale, a text drafted by an attorney named Musa Ali, neither a record searcher nor FOIL Appeals Officer, for the appeal determination. (Id. at p. 79) Pecunies then signed the scripted appeal denial and certification, buttressing DEP's contention that records

responsive to Petitioner's FOIL did not exist. (**Exhibit 3**) This marked the first time in an eighteen-year career, during which Pecunies previously determined 100% of DEP FOIL appeals (Id. at p. 41), that he parroted a line provided him by a superior, as opposed to conducting his own inquiry and reaching independent and substantiated conclusions. (Id. at pp. 83-84) Simply stated, a superior intervened and directed this DEP official to propagate the "position" that DEP had no records, when it actually did. This misconduct violates the public records law, and is obstruction of a legal proceeding.

12. And yet, Pecunies is also credited, in print, with providing "*documents and substantial amounts of time*" in interviews concerning the DEP's response to the World Trade Center collapse conducted by Wayne Barrett and Dan Collins, journalists who wrote the The Grand Illusion. (**Exhibit 2**: Excerpts with credit to Pecunies) The 2006 book, spanning over three hundred pages, investigated the Giuliani administration's response to the September 11th attacks, including management of air quality concerns. Without further questioning, it is impossible to reconcile Pecunies' participation in the writing of the Barrett book, affording the authors information and DEP World Trade Center documents, and Pecunies' role in flatly denying the existence of relevant DEP records in the Ali-drafted appeal determination. (**Exhibit 1**: at pp. 44-59)

13. For different reasons, we agree with the Law Department that Court intervention is needed to ensure the completion of testimony from this unexpectedly controversial witness. Improperly, Musa Ali attended the Pecunies' deposition, although Pecunies identified him as the engineer of the FOIL appeal denial. Ali is witness to and participant in the conduct resulting in the Court's May 28, 2026 Decision and Order. A reasonable person might also conclude that Ali's presence intimidated Pecunies. (See Exhibit 1 at p. 82 in which it takes three questions and answers, with pauses, for the FOIL Appeals Officer to even utter Ali's name) Ali's presence at

deposition, the stage management of the FOIL Appeal denial by a person who is not the designated FOIL Appeals Officer, and the credits in the Barrett book prompted counsel to ask Pecunies if he considered whistle blower protection. (**Exhibit 1** at p. 87)

14. Although Petitioner served a Notice of Discovery and Inspection upon DEP, set returnable in *advance* of the depositions, DEP ignored it. The discovery notice (NYSCEF#77) sought relevant documents pertaining to the underlying FOIL search and appeal, such as the factual bases for the assertion, repeated for years, that responsive records did not exist. Pecunies confirmed that documents, including emails, do exist concerning the FOIL appeal. The Law Department attorneys previously denied this to me, explaining that Pecunies would testify that no such documents concerning the appeal were available. Court intervention is needed to compel disclosure of this appeal information.

15. The DEP lost this Article 78 for its lack of transparency, violation of public records laws, and its arbitrary and capricious conduct. Now, in Court-ordered discovery, we see little evidence that anything has changed. DEP forecloses discovery of the reasons why it elected to deny the existence of responsive World Trade Center documents. Accordingly, Petitioner seeks an Order directing:

- a. Resumption of the deposition of longtime DEP Freedom of Information Appeals Officer Russell Pecunies, which the New York City Law Department terminated, abruptly, on July 1, 2026 after he admitted he did not actually determine the FOIL appeal denial he certified and that the appeal denial was ghostwritten by a senior DEP attorney, Musa Ali, who is neither a FOIL searcher nor a FOIL appeals officer;
- b. Production of Diana Dellafiora for deposition, a DEP FOIL staffer, the Law Department having canceled her July 8, 2026 examination;
- c. Pursuant to CPLR Sec. 3103, exclusion of attorney Musa Ali from observing future depositions as he is a witness to and participant in the subject events, the arbitrary and capricious denial of Petitioner's public record requests and appeal;

- d. Restriction of witness defense to a single attorney from Steve Banks' office. As detailed herein, the dueling objections from the Law Department staffers caused chaos, interrupted and confused the witness, and resulted in the unusual spectacle of the two City lawyers arguing, not just with Petitioner's counsel, but with each other. The court reporter admonished them to stop this bickering so he could create a clear record;
- e. Production of Musa Ali for deposition as he directed that Petitioner's FOIL appeal be denied, although he is not the DEP's designated FOIL Appeals Officer, and, via email, ordered Russell Pecunies to issue the denial, without Pecunies undertaking any investigation or factfinding, in advance (a stark departure from Pecunies' 18 years of practice as DEP's only Appeals Officer);
- f. Appointment of a Judicial Hearing Officer to monitor and/or supervise all depositions going forward, as the DEP is invoking attorney client privilege to obstruct inquiry into the basic facts of the FOIL denial, and the respondent's conduct in defending examination is otherwise obstructive and improper with multiple attorneys interposing objections, some of which conflict with each other. The Judicial Hearing Officer would, if needed, rule on all objections, including those concerning attorney client privilege, interposed to thwart Petitioner's discovery of the FOIL response and appeals process;
- g. Pursuant to CPLR Sec. 3122, DEP's immediate response to Court-ordered discovery, Petitioner's Notice of Discovery and Inspection dated June 9, 2026 (NYSCEF #77), which DEP has neither responded nor objected to, constituting a waiver of any objection to producing documents concerning the underlying FOIL search and the bases for the denial of Petitioner's appeal;
- h. Production of a privilege log by DEP for any documents withheld from the FOIL responses as the Law Department now concedes, for the first time, it turned over only "non-exempt" documents (NYSCEF #81 at par. 5: referencing production of only "*non-exempt materials*" to Petitioner). Previously, the Law Department denied it withheld any documents, failing to advise Petitioner and the Court it was actually doing so (See, e.g., NYSCEF #39: Law Dept. Letter of September 16, 2025 in which it advises withdrawal of its motion to dismiss and admits location of records: "*Respondent 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 Recently, however, Respondent has located multiple boxes that ...contain... responsive records.*"; NYSCEF#61: Law Dept. Letter of February 2, 2026: "Respondent is producing the requested records on a rolling basis, and to date, two boxes have been produced. Petitioner will conduct a third and **final in-office review to examine the remaining boxes.**")
- i. Submission of any documents, be they FOIL responses or discovery responses, claimed to be privileged by the DEP to the Court for *in camera* inspection. This remedy is requested as the DEP and Law Department demonstrates they cannot be

trusted to police themselves, having previously denied any responsive records existed, rejecting Petitioner's administrative appeal on those grounds, and, then, moving to dismiss this proceeding as a "baseless fishing expedition" before reversing course and "finding" at least sixty-eight (68) boxes worth;

- j. Immediate production of the FOIL documents Petitioner ordered photocopies of, more than three months ago, during the review of March 27, 2026; and
- k. Submission of an official status report to the Court by the Law Department and DEP, advising as to projected completion of the DEP FOIL production and document review as Petitioner has no written reliable information that document production/review is nearing an end point.

A. DEP Ignores Petitioner's June 9, 2026 Notice of Discovery & Inspection

16. In advance of the two depositions, Petitioner served DEP with a detailed Notice of Discovery & Inspection concerning the FOIL denial and appeal. (NYSCEF#77: June 9, 2026 Notice) As of this writing, DEP continues to ignore these requests. There has been no formal response or objection. The requests sought:

For FOIL Appeals Officer Pecunies deposition

- 1. *The record reviewed to reach the February 29, 2024 Determination on Appeal;*
- 2. *All drafts of the February 29, 2024 Determination on Appeal;*
- 3. *All documents, outside of those comprising the record reviewed (Request 1, above), reviewed in connection with the February 29, 2024 Determination on Appeal, including the file or files of record searches (notes, summaries, reports, memoranda, emails);*
- 4. *All documents setting forth the names and titles of individuals interviewed or communicated with concerning the February 29, 2024 Determination on Appeal;*
- 5. *All memoranda, summaries, notes and reports concerning the communications with the individuals identified in documents provided in response to Request 4;*
- 6. *All notes (written: by hand or keyboard) concerning the Determination on Appeal and the process undertaken to complete it;*

7. *All records, documents, time sheets, data entry reflecting the total amount of time Russell Pecunies spent in reaching the February 29, 2024 Determination on Appeal;*
8. *All documents setting forth the names and titles of individuals, employed by the City of New York, who received a copy of the February 29, 2024 Determination on Appeal.*
9. *With respect to this conclusion, set forth in the February 29, 2024 Determination on Appeal:*

“In response to your appeal, I hereby certify that a diligent search was performed in DEP's records in response to your FOIL request, and no responsive records were found.”

- A. *Documentary bases for the certification of a diligent search;*
 - B. *Documents reflecting any other bases (interviews; memories) for the certification of diligent search.*
10. *All documents setting forth the actions/activities of Russell Pecunies in reaching the February 29, 2024 Determination on Appeal (record searching; inspections; visits to offices; interviews; review of emails; drafting of emails/communications; phone calls; meetings; etc.);*
 11. *A copy of Russell Pecunies' c.v. or resume;*
 12. *All legal research, if any, completed concerning the February 29, 2024 Determination on Appeal;*
 13. *To the extent not provided in response to the requests above:*
 - A. *All communications between Russell Pecunies and DEP attorneys concerning the February 29, 2024 Determination on Appeal;*
 - B. *All communications between Russell Pecunies and record searchers concerning the February 29, 2024 Determination on Appeal;*
 - C. *All communications between Russell Pecunies and record custodians concerning the February 29, 204 Determination on Appeal.*
 14. *DEP's job description of FOIL Appeals Officer, as the title existed in 2024.*
 15. *DEP's policies, procedures, manuals, memoranda, guidelines and other written materials concerning FOIL Determinations on Appeal (For FOIL requests made to DEP) in effect in 2024, whether issued by the DEP itself or issued by another agency/department of the City of New York.*

There are other requests pertaining to Dellafiora and other relevant topics in the same notice. (NYSCEF#77) We have no responses to these either.

17. Before the Pecunies' deposition began, I asked Law Department attorneys Dhinsa and Alfieri as to the status of their response to the discovery notice. They advised that Pecunies had no file concerning the FOIL appeal and that there were no documents, a point they assured me he would confirm during questioning. At no time between the service of the discovery notice on June 9, 2026 and the July 1st deposition appearance did the Law Department provide any response or request an extension of time to respond. The Law Department staffers simply took it upon themselves to ignore these demands. Moreover, the Law Department never prepared a privilege log or provided indication that would assert attorney-client privilege to block any questions about why the DEP misrepresented it had no documents. Petitioner had no reason to believe or anticipate that any of these developments would occur.

18. To my surprise, Pecunies testified to the existence of responsive emails, concerning the preparation of the appeal determination. (**Exhibit 1** at pp. 92-93) One of those emails contained the instruction for Pecunies to ***"not do anything with regard to this appeal."*** (Id., emphasis added) I immediately put a statement on the record that the June 2026 discovery notice encompassed emails. (Id. at p. 93: *"We don't have them. We were told no files existed. We were told could ask Mr. Pecunies about his file because it doesn't exist. Now, I am learning, yet again, that a file does exist."*) This latest discovery abuse echoes DEP misrepresentation that hundreds of thousands of World Trade Center documents did not exist.) Counsel then asserted that attorney-client privilege protected the materials sought, after first denying they existed, at all. We intended to question Mr. Pecunies about each category of documents requested in Petitioner's discovery notice, but the Law Department terminated the deposition. Our repeated and good faith follow ups to secure discovery responses, after the deposition, were, of course ignored by the Law Department. (**Exhibit 4:** Emails concerning discovery notice responses)

B. The DEP Seeks to Hide its Reasons for Denying the Existence of its World Trade Center Files with Attorney-Client Privilege Protection that Should Not Apply

19. There are multiple problems with DEP's belated assertion of attorney-client privilege.

20. First, the Law Department should not have denied the existence of responsive documents concerning the FOIL appeal. The appropriate action would have been to acknowledge their existence, but assert, formally, protection by the attorney-client privilege with disclosure of a privilege log. Petitioner would then have challenged the assertions in Court. The Law Department did not "bother" with this first necessary step.

21. Second, in failing to respond formally to the June 2026 discovery notice, the Law Department has waived its ability to assert other objections. The failure to "*move within 10 days after service of the notice for a protective order pursuant to CPLR 3122 foreclose[d] all inquiry concerning the propriety of the notice of discovery and inspection and the information sought.*" Cecunjanin v. Rock McGraw Inc., 209 A.D.2d 571, 572 (1994)(citing Dalley v. LaGuardia Hosp., 130 A.D.2d 543, 544–545 and Caveny v. Sorrano, 84 A.D.2d 557). See also, Khatskevich v. Victor, 184 A.D.3d 504–05 (1st Dept. 2020)(Untimely assertion of objection to discovery is a waiver of objections)

22. Third, if the Law Department seeks to cloak the administrative process governing DEP's final determination of FOIL administrative appeals with "attorney-client privilege," it bears an insurmountable burden. The Law Department cannot, in casual conversation, invoke the privilege, do nothing and, then, thwart questioning or ignore discovery notices. The DEP attorneys should have sought Court intervention in the form of a protective order or, at minimum, formally advised they intended to do so.

23. As the Court of Appeals advises, the CPLR directs that there shall be “*full disclosure of all evidence material and necessary in the prosecution or defense of an action.*” (CPLR 3101 [a].) *The burden of establishing protection by the attorney-client privilege “is on the party asserting it; the protection must be narrowly construed.”* Spectrum Sys. Int’l Corp. v. Chem. Bank, 78 N.Y.2d 371, 376 (1991) “[W]hether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review.” New York C.L. Union v. New York State Off. of Ct. Admin., 45 N.Y.3d 226, 235 (2025)

24. Problematically for DEP, the attorney- client privilege does not extend to underlying facts, such as the factual bases for the certification contained in the FOIL appeal denial that “*a diligent search was performed.*” (**Exhibit 3**) Petitioner’s discovery notice seeks these factual bases. As the Court of Appeals instructs, the attorney-client “*privilege is of course limited to communications--not underlying facts.*” Spectrum, 78 N.Y.2d 371, 377 citing Upjohn Co. v. United States, 449 U.S. 383, 395(1981)(“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts”) Respondent cannot “hide” relevant details as to why it denied the existence of World Trade Center records by including such factual recitations in communications with an attorney. 449 U.S. 383, 395 citing Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831. The privilege “*does not apply to...underlying factual information.*” Morgan v. New York State Dep’t of Env’t Conservation, 9 A.D.3d 586, 588 (2004)(internal citations omitted)

25. The Pecunies FOIL appeal determination is a final administrative action by the DEP, and the subject of this Article 78 proceeding. N.Y. Pub. Off. Law § 87 does not shield final agency determinations and their bases from disclosure. To the contrary, the public records law allows an

agency to “*withhold records that are intra-agency materials which are **not**...iii. Final agency determinations.*” (emphasis added) Discovery is appropriate and not subject to privilege.

26. Accordingly, Petitioner respectfully seeks an Order directing DEP to provide documents responsive to the discovery notice, in advance of future depositions.

C. The Pecunies Deposition

27. FOIL Appeals Officer Pecunies has worked, exclusively, for DEP since 1984. (**Exhibit 1** at p. 10) He is an attorney, admitted to practice in 1985. (Id.) He is Senior Enforcement Counsel, today. (Id. at p. 11) Pecunies detailed DEP’s role after the collapse of the World Trade Center: two DEP bureaus, HAZMAT and Bureau of Police/Security responded, and the agency conducted “air monitoring.” (Id. at pp. 14 and 26-27)

28. Pecunies is credited, in print, with providing “*documents and substantial amounts of time*” in interviews concerning the DEP and September 11th conducted by Wayne Barrett and Dan Collins, journalists who wrote the The Grand Illusion. (**Exhibit 2**: Excerpts with credit to Pecunies) The 2006 book, spanning over three hundred pages, investigated the Giuliani administration’s response to the World Trade Center collapse, including management of air quality concerns. (**Exhibit 1**: at pp. 44-59)

29. Yet, years later, Pecunies would bolster the unfounded representation that DEP had no documents concerning its response to the World Trade Center collapse, doing so in his 2024 FOIL appeal determination. (NYSCEF#5 and **Exhibit 3**)

30. During this proceeding, Petitioner obtained 2002 correspondence DEP received from the City Law Department’s “World Trade Center Unit,” a special task force addressing September 11th-related issues. (NYSCEF#53) 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, including Pecunies' FOIL appeal determination (NYSCEF#5 and **Exhibit 3**), that responsive documents did not exist in its archives. In 2002, DEP was advised, as follows:

*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)(NYSECF#53)

31. In 2008, eighteen (18) years ago, Pecunies became DEP's FOIL Appeals Officer. (**Exhibit 1** at p. 20) Pursuant to NYCRR 21 Sec. 1401: (a) *The governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.*

32. Over the past two decades, Pecunies functioned exclusively and solely as DEP's FOIL Appeals Officer. (*Id.* at pp. 40-41) During these years, there have been no other DEP employees who determine FOIL appeals. (*Id.* at p. 41)

33. During this long tenure, and after careful investigation, he has decided fully one hundred (100%) percent of FOIL appeals (*Id.* at p. 41) with a single exception: the FOIL request and appeal of Petitioner.

34. Ordinarily, when an appeal is taken because no responsive records were located, Appeals Office Pecunies contacts the record searchers involved, initially. He always determines the identity of the searchers, requesting their names. (*Id.* at p. 90: "I ask them to let me know who worked on this response") He then directs the identified staffers to "do another search." (*Id.* at p. 73)

35. Typically, Appeals Officer Pecunies will interview the searchers to make his

determination. He will reach “*out to the searchers...to find out what it was they did and conducting the underlying search before*” he reaches a decision. (Id. at p. 69, l. 4-11) He conducts the interviews by phone, in person or by email. (Id. at p. 70)

36. With respect to Petitioner’s FOIL request, Pecunies certified DEP conducted a “*diligent search*” and “*does not possess responsive records.*” “*Your appeal is denied.*” He then denied Petitioner’s appeal. (**Exhibit 3**) However, in a stark departure from his practice, he conducted zero investigation of the underlying records search before making this questionable certification.

37. Pecunies interviewed no record searchers “face to face” (Id. at p. 68 and p. 70); spoke to no record searchers by phone (Id. at p. 70); and did not email any record searchers to pose questions (Id. at p. 71). This was not for lack of trying to comply with his customary and thorough appeal determination practices.

38. For the first time in his entire career, the DEP’s FOIL Appeals Officer requested, but was **denied**, the names of knowledgeable record searchers so he could speak with or email them (Id. at pp. 90-91). Pecunies does not know the names of the record searchers to this day (Id. at p. 91).

39. In an email that the Law Department prevented Petitioner’s counsel from viewing or asking about, Appeals Officer Pecunies was instructed to “stand down” (Id. at p. 93: “***I should not do anything with regard to this appeal until I heard back***”) and not complete his customary investigation. The email is fully discoverable, authored by DEP’s Dellafiora, a non-attorney and FOIL staffer. The instruction is not legal advice or counsel; it is a directive to abandon his duties as the FOIL Appeals Officer for the Petitioner’s request. Transparency and this Court’s Order and Decision dictate that this disturbing directive be explored, fully.

40. Pecunies was then instructed, again by email, to adopt, wholesale, a text drafted by an attorney named Musa Ali, neither a record searcher nor FOIL Appeals Officer, for the appeal determination. (Id. at p. 79) Pecunies then signed the scripted appeal denial and certification, buttressing the DEP's position that records responsive to Petitioner's FOIL did not exist. (**Exhibit 3**)

41. This marked the first time in an eighteen-year career, during which Pecunies previously determined 100% of DEP FOIL appeals (Id. at p. 41), that he parroted a line provided him by a superior, as opposed to conducting his own inquiry and reaching independent, substantiated conclusions. (Id. at pp. 83-84) Simply stated, a superior intervened and directed this DEP official to propagate the "position" that DEP had no records without any basis for the assertion.

42. The sole basis of his appeal denial certification was "*advice of counsel*" given by Ali. (Id. at 79) No independent inquiry or anything else "*informed (his) conclusion that a diligent search was undertaken, again, for this appeal, this FOIL request that is at issue in this article 78 proceeding.*" (Id. at p. 81) "*It's not typical*" for the Appeals Officer to have "*his substantive conclusions of a FOIL appeal directed...by another attorney.*" (Id. at pp. 82-83) We certainly hope not, and expect such conduct extends only to requests concerning the City's September 11th response.

43. Notably, Ali never served as a FOIL searcher or Appeals Officer. (Id. at p. 87)

44. The "advice" given by Ali, and the circumstances under which it was given, are now cloaked by the Corporation Counsel, invoking attorney-client privilege. (Id. at p. 80 "*Privilege. Don't answer.*") Counsel also blocked (Id. at p. 31-33) any questions concerning Pecunies' understanding of his duties, responsibilities and role as FOIL Officer, under New York law, claiming these inquiries required "expert" knowledge and opinion. Of course, Pecunies has

worked as a FOIL Appeals Officer for nearly two decades and is a licensed New York attorney. He admitted knowing and understanding “the law as it concerns Freedom of Information.” (Id. at p. 33) The Law Department should be directed to allow these questions.

45. As a result of the Ali directive, not only was there no investigation undertaken by Pecunies, the FOIL Appeals Officer did not even need to “*take any notes...by hand or on a computer or tablet.*” (Id. at p. 61) Pecunies spent “*less than a half hour*” completing the denial. (Id. at p. 67)

46. Court intervention is needed to ensure that this unexpectedly controversial witness completes his testimony. Improperly, Musa Ali attended the Pecunies’ deposition, although Pecunies identified him as a participant, if not the architect, of the FOIL denials. A reasonable person might also conclude that Ali’s presence intimidated Pecunies. (Id. at p. 82 in which it takes three questions and answers, with pauses, for the FOIL Appeals Officer to even provide Ali’s name) Ali’s presence at deposition, the stage management of the FOIL Appeal denial by a person who is not the FOIL Appeals Officer, and the credits in the Barrett book prompted counsel to ask Pecunies if he considered seeking whistle blower protection. (Id. at p. 87) Accordingly, Mr. Ali should be barred from attending further depositions. Mr. Ali also improperly joined in counsel comments and argument during the deposition, even though he is an active participant in the FOIL debacle. (See, e.g., Id. at p. 40 and p. 96) Given his expansive “behind the scenes” role in denying the FOIL appeal and, possibly, the underlying FOIL request, Petitioner now requests a deposition of Mr. Ali.

D. DEP Has Not Concluded Production of Documents Responsive to Petitioner’s FOIL Request

47. As Petitioner advised the Court in a submission dated December 21, 2025:

The requested deposition will also help ensure the document production concludes as a result of a truly diligent search, as the Freedom of Information Law requires. It will be otherwise impossible to determine if DEP makes all records available to Petitioner, given the ever-shifting narrative from respondent (*"no responsive records could be found"* to *"no records exist"* and, now, *"340,000 pages are available"*). (See, e.g., NYSCEF #23, 29 and 50: "requested records do not exist")

48. In the past seven (7) months, little has changed. We still do not know if DEP has made all records available. We do not know if a search continues. Although DEP has made some documents available for review, the last scheduled review took place on March 27, 2026. At that review, Petitioner requested copies of certain documents, no more than a few hundred pages. To date, we have not even received these copies from DEP.

49. Significantly, at no point has DEP disclosed any emails; risk assessments; DEP reports; and its own analyses of air/dust testing data. Given DEP's lead role in responding to the collapse of the World Trade Center, we expect that these records exist, as substantiated earlier.¹

50. Petitioner asked this question in December 2025: *"If DEP withholds documents on the*

¹ **First**, the New York City Charter mandates DEP to respond to toxic releases threatening air quality and "protect public health from a release." (New York City Charter at Chapter 57: Department of Environmental Protection) This obligation necessitates public record-keeping. Specifically, Charter Section 1403 (Powers and Duties of DEP Commissioner) provides: The DEP is "authorized to respond to emergencies caused by releases or threatened releases of hazardous substances and to collect and manage information concerning the amount, location and nature of hazardous substances." h. Emergency response. The commissioner shall have the power to respond to emergencies caused by releases or threatened releases of hazardous substances into the environment. The commissioner may (1) implement any response measures deemed to be necessary to protect the public health or welfare or the environment from a release or threat of release, **Second**, "by the evening of September 11th," the City's Department of "Environmental Protection...began to assess environmental conditions and what protections would be necessary." (NYSCEF #12: Report of Deputy Mayor Gibbs and Skyler) **Third, the DEP opposed the Mayor's push to reopen lower Manhattan:** "According to OEM, some city blocks north and south of Ground Zero are suitable for re-occupancy. DEP believes the air quality is not yet suitable for re-occupancy. I was told the mayor's office was directing OEM to open the target areas next week. On October 5, 2001, U.S. Environmental Protection Agency told the city's health department that there were concerns about worker safety at the World Trade Center site." In addition to standard construction/demolition site safety concerns, this site also poses threats to workers related to potential exposure to hazardous substances. Further, then **DEP commissioner Miele acknowledged that his agency remained "uncomfortable in opening the target areas."** (NYSCEF #13 October 6, 2001 City Department of Health Memorandum) **Fourth**, DEP itself has publicized its role. (See, e.g., NYSCEF #9 DEP's own statement about its extensive involvement)

basis of a purported FOIL exception, will it alert Petitioner and prepare a privilege log or will it say nothing?" (NYSCEF#60) We do not have an answer, still

51. Since September 2025, I have repeatedly asked the Law Department whether any documents are being withheld for any reason of privilege. I was told repeatedly that the answer was "no." Indeed, we have never received any written objections or assertions of privilege with respect to the FOIL responses. There is no privilege log.

52. Now, in July 2026, we are learning for the first time that the Law Department and DEP *withheld* responsive documents. The Law Department now concedes it turned over only "non-exempt" documents (NYSCEF #81 at par. 5: referencing production of only "*non-exempt materials*" to Petitioner).

53. Previously, the Law Department denied it withheld any documents, failing to advise Petitioner and the Court it was actually doing so (See, e.g., NYSCEF #39: Law Dept. Letter of September 16, 2025 in which it advises withdrawal of its motion to dismiss and admits location of records: "*Respondent 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 Recently, however, Respondent has located multiple boxes that ...contain... responsive records.*"; NYSCEF#61: Law Dept. Letter of February 2, 2026: "Respondent is producing the requested records on a rolling basis, and to date, two boxes have been produced. Petitioner will conduct a third and **final in-office review to examine the remaining boxes.**") We have sought a privilege log and a written acknowledged endpoint of the FOIL document production from DEP since April. (**Exhibit 5**: April 12, 2026 email and draft joint letter seeking exactly these items and **Exhibit 4**) DEP never agreed to the draft letter, and ignores Petitioner.

54. Given these development, the DEP and Law Department should be ordered to produce

a privilege log, immediately. In addition, the DEP and Law Department should submit any documents, be they FOIL responses or discovery responses, claimed to be privileged to the Court for *in camera* inspection. This remedy is requested as the DEP and Law Department have demonstrated, in this case, that they cannot be trusted to police themselves, the agency having previously denied any responsive records existed, rejecting Petitioner's administrative appeal on those grounds, and, then, through the Law Department, moving to dismiss this proceeding as a "baseless fishing expedition" before reversing course and "finding" at least sixty-eight (68) boxes worth. The Law Department cannot assert documents do not exist, such as the Pecunies' emails described above, simply because it would "like them" to be privileged. The proper procedure is to flag the documents at issue, and prepare a privilege log. The games need to stop, now. Only the preparation of privilege logs and in camera inspection will ensure this.

E. The Law Department Must Defend Depositions with a Single Attorney

55. Attorney Alfieri (identified as "Mr. Alfieri" in the transcript) appears to be the supervisor of the assigned Law Department attorney, Dhinsa. Alfieri had nothing to do with this matter until she attended the deposition. Her name does not appear in the docket. She entered the conference room, made brief introductions, and explained there was no written discovery to produce. Alfieri proceeded to "manage" the regularly assigned attorney, Dhinsa. Alfieri attempted to "tag team" multiple questions, interposing objections as her subordinate did as well. Their objections often differed and their directions "not to answer" conflicted. In other instances, the two attorneys appeared to argue with each other as to the "right" objection, with Alfieri "correcting" her colleague on the record. The duo ignored my request (**Exhibit 1** at p. 37) for a single attorney to defendant Pecunies. The pair's objecting, quibbling with each other, and interrupting my questions, was highly unprofessional. Their conduct was highly distracting,

interfered with the flow of witness answers, and resulted in a “slow motion” obstruction of a straightforward examination.

56. For example, the two attorneys could not even wait for a completed question to assert their dueling objections:

Q: How often is it the case that you, an attorney for decades and the only FOIA Appeals Officer at DEP --

MR. ALFIERI: Objection.

MR. CARBOY: -- has your substantive conclusions of a FOIA appeal directed to you by another attorney?

MS. DHINSA: Objection. Attorney-client privilege (**Exhibit 1**: p. 82, l. 14)

57. We request that attorney Alfieri be ordered not to participate in any future depositions.

Here are additional examples of this misconduct, all from **Exhibit 1**, the transcript:

p. 51, l. 9 et seq.

MR. ALFIERI: Asked and answered.

MS. DHINSA: Objection. He already answered that question. Don't answer.

MR. CARBOY: You're directing him not to answer?

MR. ALFIERI: No, we're not directing him not to answer. You asked --

MR. CARBOY: She just said, "Don't answer."

p. 74, l. 4

MS. DHINSA: Um.

MR. ALFIERI: Just let him answer, let him answer.

MS. DHINSA: I just want to clarify, because I think there may be --

MR. ALFIERI: No, no. Let him answer that question.

Even the court reporter had to advise them several times to stop arguing with each other and talking over themselves:

p. 37, l. 23 – p.38

THE REPORTER: Everyone. Should we go off the record for a minute?

MS. DHINSA: Yes.

MR. ALFIERI: No, I don't want to go off the record.

THE REPORTER: Okay. But we got to go one at a time because I can't –

p. 80, l. 7-19

MR. CARBOY: So basically what you're telling me is a lawyer told you something, you adopted what the lawyer told you --

MR. ALFIERI: No.

MR. CARBOY: -- and that's what ended up in your appeal?

MR. ALFIERI: Objection --

MS. DHINSA: Objection, attorney-client privilege.

THE REPORTER: I'm sorry. I'm getting both of your objections at the same time, so just can we avoid speaking of each other?

MS. DHINSA: Sure. Objection – over the objection.

MR. ALFIERI: Don't answer.

MS. DHINSA: Attorney-client -- don't answer.

MR. ALFIERI: Attorney-client privilege.

MS. DHINSA: Attorney-client privilege.

(Other examples appear at p. 44, l. 18-19; p. 45, l.17-18; p. 48, l. 23; p. 57, l. 4 and l.14; p. 58, l.14; p. 80, l.2, l.13 and l.20)

Conclusion

For the reasons set forth above, Petitioner respectfully requests his cross-motion be granted.

Dated: July 9, 2026

Respectfully submitted,



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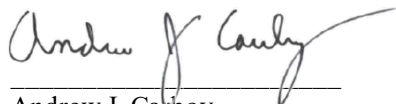
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Andrew J. Carboy