

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

-against-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

-----X

**July 9, 2026 AFFIRMATION OF GOOD FAITH 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 of good faith 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) 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 unusual spectacle of the two lawyers arguing, not just with Petitioner's counsel, but with each other. At points, the court reporter admonished them to stop this 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 demonstrates it cannot be trusted to police itself, the agency 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.
4. 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)

5. 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)

6. 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.

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

8. 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) Accordingly, this application is necessary and made in good faith.

9. Second, the respondent has refused to respond or even object to a discovery notice served pursuant to Court Order, Petitioner's Notice of Discovery and Inspection dated June 9, 2026 (NYSCEF #77). Accordingly, Court intervention is required to enforce the Court Order.

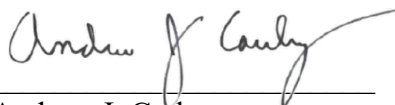
10. Third, with respect to compelling completion of document production, made in response to the underlying FOIL request, Petitioner has made good faith efforts to resolve the matter. These have been futile. We have sought a privilege log and a written acknowledged endpoint of the FOIL document production from DEP since April. (**Exhibit 5:** April 12, 2026 email and draft joint letter seeking exactly these items) DEP ignores us. Again, Court intervention is required.

Conclusion

For the reasons set forth above and in the supporting affirmation and exhibits, Petitioner respectfully requests his cross-motion be granted.

Dated: July 9, 2026

Respectfully submitted,



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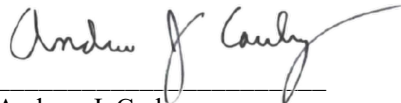
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Uniform Civil Rule 202.8-b word count: I, Andrew Carboy, certify that the word count of this affirmation is 1568 inclusive of the caption, signature block and counsel addresses, a figure ascertained with Word.



Andrew J. Carboy