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February 13, 2024

FOIL Appeals Officer

New York City Emergency Management
165 Cadman Plaza East
Brooklyn, NY 11201
foilrequests@oem.nyc.gov

FOIL Appeals Officer

New York City Department of Environmental Protection
59-17 Junction Boulevard
Floor 19
Flushing, New York 11372
foilappeals@dep.nyc.gov

Re: Appeal of Denial of Freedom of Information Request
Date of Incident: Concerning Preparation For/Response to
Collapse of World Trade Center, September 11, 2001
Location: Lower Manhattan
Request Number DEP: FOIL-2023-826-03980
Request Number OEM: FOIL-2023-017-00064

Dear FOIL Appeals Officers of OEM and DEP:

Our law offices represent the interests of the following: Benjamin Chevat, Director of 9/11 Health Watch; Karen Klingon, Executrix of the Estate of Robert Klingon (resident of lower Manhattan); 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.

We appeal the denial of the Office of Emergency Management (“OEM”), dated January 16, 2024, and the denial of the Department of Environmental Protection (“DEP”), dated January 31, 2024, of our Freedom of Information Request dated September 8, 2023 (**Exhibit 1**). The denials are attached as **Exhibit 2** (OEM) and **Exhibit 3** (DEP).

The Subject FOIL Request

Pursuant to the Freedom of Information Law, on September 8, 2023, we requested various records from OEM and DEP concerning the response of the City of New York to the September

11, 2001 collapse of the World Trade Center, along with historical records and disaster preparation materials. (**Exhibit 1**)

A. Appeal of the OEM’s FOIL Denial

On January 16, 2024, OEM denied the subject request (**Exhibit 2**), explaining in an “auto-generated response”:

A diligent search for records responsive to your request did not locate any such records. Accordingly, your request is denied.

You may appeal the decision to deny access to material that was redacted in part or withheld in entirety by contacting the agency's FOIL Appeals Officer: foilrequests@oem.nyc.gov within 30 days.

OEM produced no records whatsoever. The entirety of the denial is reprinted, above.

We appeal the denial for two reasons. **First**, OEM failed to appropriately “*certify that it does not have possession of such record or that such record cannot be found after diligent search.*” N.Y. Pub. Off. Law § 89 (McKinney) Instead, OEM offers a boilerplate response, devoid of detail concerning any search, and lacking certification. The denial is improper and conclusory, violative of New York’s Public Officers Law.

Second, public information and legal decisions are replete with references to the leading role OEM assumed in the aftermath of the September 11th attacks. For OEM to deny the subject FOIL request, entirely, is a repudiation of its well-documented leadership following the World Trade Center collapse. This 2024 denial is wholly at odds with the historical record made over two decades ago.

The Freedom of Information Law request is appropriately directed to OEM in view of OEM’s mandate and responsibilities:

The City created OEM pursuant to Mayor Giuliani's Executive Order No. 30, dated March 19, 1996. See Exec. Order No. 30, dated March 19, 1996. Stating that a primary purpose of the OEM was to oversee and implement the City's “civil defense” and emergency preparedness functions, the Executive Order provided that the City “must be prepared for and be able to coordinate rapid and effective responses to a wide range of emergency situations.” Id. The Order provided further that OEM was to be “headed by a Director who shall serve as the local Director of Civil Defense, with the powers of *514 a local Director of Civil Defense under [the New York Defense Emergency Act].” Id. OEM's functions, among others, were to establish and operate an emergency command center, to respond to

emergencies of any type, whether natural or man-made; to be an on-scene coordinator; to ensure that the City was effective and efficient in using its resources; to manage the moving of resources to emergency scenes more quickly; and to ensure that a good recovery process was in place.

In re Sept. 11 Prop. Damage & Bus. Loss Litig., 468 F. Supp. 2d 508, 513–14, 2006 WL 62019 (S.D.N.Y. 2006), *aff'd sub nom. Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 2013 WL 6246275 (2d Cir. 2013)

More specifically, and consistent with OEM's official function, with respect to the World Trade Center collapse and resulting conditions in lower Manhattan, "*the rescue and recovery efforts...were thereafter coordinated through the City Office of Emergency Management.*" In re World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 528, 2006 WL 2948819 (S.D.N.Y. 2006), *aff'd in part, appeal dismissed in part*, 521 F.3d 169, 2008 WL 783386 (2d Cir. 2008)

As the National Commission on Terrorist Attacks concluded in its 2004 9/11 Commission Report: "*OEM would play a crucial role in managing the city's overall response to an incident*" and "*designated the 'On Scene Interagency Coordinator.'*" (9/11 Commission Report at pp. 283-285)

A City study, entitled Addressing the Health Impacts of 9/11: Report/Recommendation to Mayor Bloomberg, confirmed that OEM was "*responsible for studying and maintaining public health,*" along with other agencies.

Federal officials involved in the response, too, confirmed OEM's lead role. Army Corps of Engineer Area Engineer/Supervisor David Leach testified, in U.S. District Court proceedings: "*the removal of debris from lower Manhattan, this was under the direction of the City's Office of Emergency Management.*" (Leach 2005 deposition transcript at p. 23)

In the same District Court action, U.S. EPA "On Scene Coordinator" Stephen Touw testified that the federal agency "reported" to the OEM.

A: I reported to the Office of Emergency Management.

Q. That's a New York City agency; correct?

A. New York City, correct. (Touw 2005 deposition transcript at p. 17)

Similarly, Bruce Sprague, Chief of EPA's Response and Prevention branch, testified that the City dominated the management of lower Manhattan following the collapse. He agreed that "*the New York City Mayor's Office of Emergency Management (was) responsible for overall coordination of the WTC project.*" (Sprague 2004 deposition transcript at p. 206) The OEM was at the very top of the organizational structure of government agencies managing the site. (*Id.* at p. 40) Similarly, too, the World Trade Center Environmental Health & Safety Plan, taking effect on October 15, 2001, was circulated and signed by Calvin Drayton of OEM.

Another FEMA official, Deputy Federal Coordinating Officer Mike Byrne, explained to the news media in October 2001: “*OEM is in charge...gives the marching orders. So far, we’re blown away by OEM’s performance.*”(New York Magazine, “Man Behind the Mirror,” October 15, 2001)

We also dispute OEM’s implied contention that the materials we request do not exist. As Jerome Hauer, Director of OEM in the Giuliani administration until 2000, confirmed, OEM engaged in dozens of disaster-preparedness simulations and exercises in the years before the September 11th attacks. “ *We started out in 1996 by taking the few emergency plans that the city had and began rewriting them with an inclusive planning process. Once a plan was completed we did tabletop exercises to test the plan and modified them based on the outcomes of the exercise. We attempted to do a tabletop, or field exercise every eight to twelve weeks.*” (Hauer 2004 testimony before the National Commission on Terrorist Attacks)

B. Appeal of the DEP’s FOIL Denial

On January 31, 2024, DEP denied the subject request (**Exhibit 3**). Like its sibling agency, OEM, DEP provided an “auto-generated response”:

*The Department of Environmental Protection (DEP) has **closed** your FOIL request [FOIL-2023-826-03980](#) for the following reasons:*

- *Your request under the Freedom of Information Law (FOIL) is being closed because this agency does not have the records requested. You should direct your request to a different agency.*

Please contact the Mayor's Office for this request.

DEP produced no records whatsoever. The entirety of the denial is reprinted, above. Frustratingly, DEP refers the requesting parties to the Mayor’s Office for the responsive documents; however, as detailed above, the Mayor’s Office of Emergency Management denies the existence of these same materials.

We appeal the denial for two reasons. **First**, DEP failed to appropriately “*certify that it does not have possession of such record or that such record cannot be found after diligent search.*” N.Y. Pub. Off. Law § 89 (McKinney) Instead, DEP offers a boilerplate response, devoid of detail concerning any search, and lacking certification. The denial is improper and conclusory, violative of New York’s Public Officers Law.

Second, the public record demonstrates that DEP maintains the requested materials.

To date, the City’s public information website boasts of DEP’s leading role in lower Manhattan. “*By the evening of September 11th, the City’s Department of...Environmental Protection began to assess environmental conditions and what protections would be necessary.*”

(<https://www.nyc.gov/site/911health/about/historical-context.page>) Obviously, those assessments included the test results sought in the Freedom of Information request.

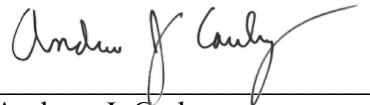
On September 14, 2001, DEP “issued a letter to owners of buildings affected by the collapse of the World Trade Center towers. That letter indicated that the dust and debris should be ... assumed to be asbestos-containing material.” In re World Trade Ctr. Lower Manhattan Disaster Site Litig., 44 F. Supp. 3d 409, 417, 2014 WL 4446153 (S.D.N.Y. 2014) September 9 2014. To date, the DEP has not provided documents underlying this “assumption” in response to our FOIL request.

Finally, with respect to historical data we assert DEP maintains concerning the 1993 World Trade Center attacks, it is a matter of record that it does so.

On March 26, 1993, “Department of Environmental Protection advised ‘The World Trade Center Community’ that, based on its testing and monitoring that began ‘within one hour of the blast,’ ‘all data we have reviewed indicate that the air in the World Trade Center Complex is safe.’” Port Auth. of New York and New Jersey v Affiliated FM Ins. Co., 245 F Supp 2d 563, 576 [DNJ 2001], *affd*, 311 F3d 226 [3d Cir 2002]

We respectfully request that the FOIL denials be reversed in their entirety and the subject FOIL request be granted, immediately and in full.

Very truly yours,



Andrew J. Carboy

Matthew McCauley

Matthew McCauley

EXHIBIT 1

Law Offices of Andrew J. Carboy LLC

One Liberty Plaza, Floor 23
New York, New York 10006
(212) 520-7565

Turken Heath & McCauley LLP

84 Business Park Drive, Suite 307
Armonk, New York 10504
(914) 363-6355

September 8, 2023

FREEDOM OF INFORMATION LAW REQUEST TO CITY OF NEW YORK

By FOIL Portal:

New York City Department of Design and Construction;
New York City Department of Environmental Protection;
New York City Department of Health;
Office of the Mayor;
New York City Law Department;
New York City Office of Emergency Management; and
New York City Council

By U.S. Mail and Fax/Email:

New York City Federal Affairs Office
Attn: Crystal Price, Director
601 New Jersey Avenue, Suite 410
Washington D.C. 20001
Fax: 202-624-5926

Mayor's Office of Intergovernmental Affairs
Attn: Roberto Perez, Director
City Hall, 2nd Floor
New York, New York 10007
Fax: 212-788-9711

City Council
Danielle Barbato, FOIL Officer
Office of the General Counsel
250 Broadway, 15th Floor
New York, New York 10007
dbarbato@council.nyc.gov

We, Benjamin Chevat, Director of 9/11 Health Watch; Karen Klingon, Executrix of the Estate of Robert Klingon (resident of lower Manhattan); 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. .

through our attorneys, Law Offices of Andrew J. Carboy LLC and Turken Heath & McCauley LLP, seek immediate release of the following public information through the New York Freedom of Information Law:

1. October 2001 memorandum from Deputy Mayor Robert M. Harding referenced in May 14, 2017 New York Times article entitled, “*Ground Zero Illnesses Clouding Giuliani’s Legacy.*” (“Harding memo”)
2. Underlying documents, studies, reports, assessments, memoranda, factual bases and other written information that informed the Harding memo’s estimate or projection of anticipated future claims from WTC toxic exposure.
3. All documents setting forth the names and titles of recipients of the Harding memo in 2001 and 2002.
4. All documents setting forth the manner in which the Harding memo was communicated and the reasons for its communication in 2001 and 2002 (e.g., litigation; lobbying; inter-government communication; intra-government communication; Freedom of Information request).
5. With respect to the following provision of the *Air Transportation Safety and System Stabilization Act of 2001*, Pub. L. No. 107-42, 115 Stat. 230 (2001):

(3) Limitations on liability for New York City.--Liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity arising from the terrorist-related aircraft crashes of September 11, 2001, against the City of New York shall not exceed the greater of the city's insurance coverage or \$350,000,000. 49 U.S.C.A. § 40101

- a. Written communications, dating from September, October and November 2001, such as correspondence, email, and memoranda, with all attachments, concerning limitations on liability for the City of New York (“City”), to the following individuals and offices:
 - i. The White House and the Office of the Executive;
 - ii. Any United States Senator and their office;
 - iii. Any Committee of the United States Senate and/or its staff;

- iv. Any member of the U.S. House of Representatives or their staff;
 - v. The United States Justice Department; and
 - vi. United States Environmental Protection Agency.
- b. All background and briefing materials, including assessments, surveys, studies, projections, risk projections, environmental testing data, and toxicological data, including from City agencies provided to Mayor Rudolph W. Giuliani in September, October and November 2001, and Mayor-elect Michael R. Bloomberg, in November 2001, with respect to proposed limitations on liability for the City in connection with efforts to secure such limitations.
 - c. Documents setting forth the names of consultants and consulting firms, lobbyists and lobbying firms, that worked with the City in the effort to secure the limitations on liability, referenced above.
 - d. Documents setting forth the amount of compensation issued/paid by the City to the consultants and consulting firms, lobbyists and lobbying firms identified in response to request c., above.
 - e. Documents setting forth: the number of meetings (taking place in September, October and November 2001), dates of meetings, location of meetings, identity of those in attendance, concerning the efforts to secure the limitations on liability, set forth above, along with summaries of meetings and copies of the written materials reviewed at each meeting.
6. With respect to daily public briefings held by Mayor Rudolph W. Giuliani (“Mayor”) in September, October and November 2001:
- a. Written materials for the substance of all of the briefings, provided in advance to the Mayor, such as texts, talking points, slide decks, graphs, and charts;
 - b. All draft briefings; and
 - c. All commentary provided to the Mayor about proposed briefings, and identifying the sender and/or commentator.
7. With respect to discussions, deliberations and/or debate concerning recent (2018-2023) requests for release of all City September 11th/World Trade Center disaster records to the public (e.g., February 16, 2023 letter request of Reps. Nadler and Goldman):
- a. All writings setting forth reasons as to why the records should not be released;

- b. All writings setting forth reasons as to why the records should be released; and
 - c. All assessments as to the “litigation risks” posed by release of some or all of the records.
8. Any memos, communications with respect to the reporting of New York Daily News columnist Juan Gonzalez from September, October, November or December of 2001.
 9. Inventories, pre-dating September 11, 2001, of hazardous substances contained in WTC buildings, including but not limited to materials found in x-ray equipment, materials found in radiation oncology equipment, diesel fuel stored under WTC 7, polychlorinated biphenyls, asbestos, other radioactive materials, carcinogens, and materials known to have neurotoxic effects if released and/or subject to burning.
 10. All exercises, projections, estimates, simulations, analyses, studies and reports, whether obtained by, created by or created at the direction of your agency/department from February 26, 1993 through September 10, 2001 concerning: a terrorist attack or potential terrorist attack on the World Trade Center Complex, disaster and/or rescue responses to such an attack; hazards resulting from such an attack, including release of contaminants/toxins from such an attack, including those resulting from structure collapses; mitigation measures considered to reduce hazards posed by release of contaminants/toxins from such an attack, including those resulting from structure collapses; evacuation protocol for surrounding neighborhoods and other geographic locations potentially or actually affected by the release of contaminants; and air quality issues and potential problems resulting from such an attack, including those resulting from structure collapses.
 11. From February 26, 1993 through September 10, 2001: all exercises, simulations, directives, memoranda, reports and analyses concerning the aftermath of a potential terrorist attack on the World Trade Center, whether obtained by, created by or created at the direction of your agency/department.
 12. All communications to and from the Port Authority of New York and New Jersey, such as letters, memoranda, reports, status updates and other writings (be they paper or electronic) dating from February 26, 1993 through September 10, 2001, concerning: A) the removal of asbestos containing materials (“ACM”) from the World Trade Center; B) recommendations for removal of ACM from the World Trade Center; C) hazards posed by the presence of ACM in the World Trade Center in the event of a disaster, such as a terrorist attack; and D) the significance of the February 26, 1993 World Trade Center bombing with respect to efforts to remove ACM.
 13. All notes, memoranda and other writings created by the City Department of Design and Construction concerning information conveyed by the Port Authority of New York and New Jersey that subsequent to the 1993 World Trade Center bombing, a program to remove ACM

was initiated.

14. All notes, memoranda and other writings created by your agency/department concerning information conveyed by the Port Authority of New York and New Jersey that subsequent to the 1993 World Trade Center bombing, a program to remove ACM was initiated.
15. Documents setting forth the progress of efforts to remove ACM from the World Trade Center for the time period beginning February 26, 1993 and concluding on September 10, 2001.
16. Results of dust and air testing conducted outdoors and indoors at the World Trade Center between February 26, 1993 and August 1, 1993 whether conducted at the direction of your agency/department or obtained by your agency/department.
17. All communications, draft plans, draft directives, evaluations and assessments concerning the potential evacuation and duration of evacuation of neighborhoods in Brooklyn, New York following the collapse of the World Trade Center on September 11, 2001.
18. All communications, draft plans, draft directives, evaluations and assessments concerning the potential evacuation and duration of evacuation of neighborhoods in New York, New York following the collapse of the World Trade Center on September 11, 2001.
19. All communications between the City of New York, including the Law Department, the Mayor's Office, and other offices, and the World Trade Center Captive Insurance Company from 2017 to date, concerning:
 - a. Winding down and/or dissolution of the World Trade Center Captive Insurance Company;
 - b. The transfer of the funds held/invested by the World Trade Center Captive Insurance Company to the World Trade Center Health Program; and
 - c. Recommendations concerning possible dissolution of the World Trade Center Captive Insurance Company, whether supportive of dissolution or opposed to dissolution.
20. All communications to and from the Mayor's Office concerning future plans for the use of funds held/invested by the World Trade Center Captive Insurance Company in the event of a winding down or dissolution of the World Trade Center Captive Insurance Company.
21. All communications to and from the Law Department of the City of New York concerning future plans for the use of funds held/invested by the World Trade Center Captive Insurance

Company.

22. Draft legislation for additional federal protection of the City of New York from September 11th and World Trade Center-exposure related lawsuits, as referenced in the September 10, 2022 New York Post article entitled, “*NYC Refusing to Release 9/11 Records without Lawsuit Immunity.*”
23. From September 12, 2001 through April 2002, all communications to and from the City Department of Education from: A. The Mayor’s Office; and B. The Law Department of the City of New York concerning the reopening of public schools below Houston Street.
24. From September 12, 2001 through April 2002, all communications from the City of New York to the United States Department of Education concerning the reopening of public schools below Houston Street.
25. All records of protocols for testing and cleaning as well as clearance for occupation of each school below Houston Street from September 12, 2001 through April 2002.
26. As shared with, sent or delivered to the Mayor’s Office from September 11, 2001 through April 2002: all projections, estimates, and assessments as to the number of expected injuries resulting from exposure to toxins and products of combustion released from the World Trade Center Site.
27. As shared with, sent or delivered to the Law Department of the City of New York from September 11, 2001 through April 2002: all projections, estimates, and assessments as to the number of expected injuries resulting from exposure to toxins and products of combustion released from the World Trade Center Site.
28. As referenced in the letter of Mayor Eric Adams of March 22 , 2023 to the Hon. Jerrold Nadler and the Hon. Daniel Goldman, United States House of Representatives, documents, ***not publicly disclosed to date*** by the City of New York, concerning the collapse of the World Trade Center on September 11, 2001, including the release of toxins, and air or dust testing and reopening of schools. By letter to Mayor Adams, dated February 16, 2023, Representatives Nadler and Goldman sought

information in the City’s records pertaining to the earliest analyses of the toxins, dust, and fumes blanketing lower Manhattan and Brooklyn;

the Harding memo and “any correspondence that led to his writing and drafting of this memo”

internal notes or memos regarding the Department of Education’s decision to move kids and teachers back into schools in the frozen zone below Houston. We know that there were parents who expressed strong concerns and even protested this move. What were the deliberations in the DOE? What testing was done to determine the safety of the schools?

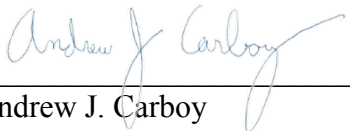
Any records, communications, or memos from the New York City Departments of Health and the Environmental Protection that address the scope and toxicity of the WTC plume and the dust, and the exposures New Yorkers experienced

Mayor Adams responded, in his letter of March 22, 2003, that the City would not release this information absent “*necessary federal legislation to make production of documents...legally feasible.*”

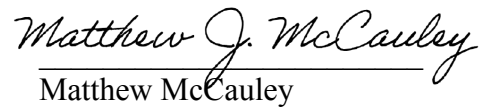
Apparently, notwithstanding its obligations under the Freedom of Information Law, the City will not produce these materials absent desired and undefined “protection” from future liability claims it apparently fears the documents will substantiate.

All of the materials requested in this letter are subject to production under the Freedom of Information Law regardless of whether the City obtains such additional federal protection. Fear of wrongdoing being exposed does not shield public documents from disclosure under New York State law. After more than two decades shrouded in secrecy, this public information must be released, now.

Very truly yours,



Andrew J. Carboy



Matthew McCauley

EXHIBIT 2

From: donotreply@records.nyc.gov <donotreply@records.nyc.gov>

Sent: Tuesday, January 16, 2024 10:49 AM

To: Andrew Carboy <acarboy@carboylaw.com>

Subject: [OpenRecords] Request FOIL-2023-017-00064 Closed

The NYC Office of Emergency Management (OEM) has **closed** your FOIL request [FOIL-2023-017-00064](#) for the following reasons:

- A diligent search for records responsive to your request did not locate any such records. Accordingly, your request is denied.

You may appeal the decision to deny access to material that was redacted in part or withheld in entirety by contacting the agency's FOIL Appeals

Officer: foilrequests@oem.nyc.gov within 30 days.

EXHIBIT 3

From: donotreply@records.nyc.gov <donotreply@records.nyc.gov>
Sent: Wednesday, January 31, 2024 11:57 AM
To: Andrew Carboy <acarboy@carboylaw.com>
Subject: [OpenRecords] Request FOIL-2023-826-03980 Closed

The Department of Environmental Protection (DEP) has **closed** your FOIL request [FOIL-2023-826-03980](#) for the following reasons:

- Your request under the Freedom of Information Law (FOIL) is being closed because this agency does not have the records requested. You should direct your request to a different agency.

Please contact the Mayor's Office for this request.

You may appeal the decision to deny access to material that was redacted in part or withheld in entirety by contacting the agency's FOIL Appeals Officer: foilappeals@dep.nyc.gov within 30 days.