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February 16, 2026

Hon. James G. Clynes, J.S.C.  
Supreme Court of the State of New York  
80 Centre Street, Room 136  
New York, N.Y. 10013

**By NYSCEF**

**Re:** *Chevat v. New York City*  
*Department of Environmental Protection*  
Index No. 155678/2024

Honorable Sir:

Our law firms represent Petitioner Benjamin Chevat, Director of 911 Health Watch, Inc. This Article 78 proceeding concerns his 2023 Freedom of Information Law (“FOIL”) request to the New York City Department of Environmental Protection (“DEP”).

We respond to the Law Department’s February 13, 2026 letter (NYSCEF#69), seeking preclusion of the October 2001 memorandum to Deputy Mayor Robert Harding (“Harding memo”) (NYSCEF#63). Notably, the Law Department does not challenge the genuineness and authenticity of the Harding memo.

The Court should consider the Harding memo. Further, no amount of DEP document production (currently estimated at 340,000 pages) moots Petitioner’s requested discovery. The discovery targets the diligence of the agency’s initial document searches and the bases for its repeated certifications, in the FOIL denial/appeal and a motion to dismiss, that no responsive records existed.

The Law Department communication marks renewed suppression of September 11<sup>th</sup>-related records, with such effort now extending even to Court filings.

The City withheld the Harding memo from the New York Congressional delegation (since 2021; NYSCEF#64) and Petitioner (since 2023; NYSCEF#3). Petitioner obtained it, independently, from an archive in Austin, Texas, filing the Harding memo on February 3. (NYSCEF#62-68)

The absurdity is striking. The City withheld a critical September 11<sup>th</sup>-related document for years. With the Harding memo surfacing in the proceeding brought to compel its release, the City now writes the Court to prevent its consideration.

The Law Department letter underscores the necessity of sworn testimony from DEP decision-makers.

The Law Department cannot distract by pledging future disclosure of responsive records. Petitioner awaits review of the remainder at DEP headquarters. That review remains unscheduled, three months after our first examination. Perhaps DEP has located far more than the 68 boxes it identified, to date.

For two years, DEP represented that responsive records did not exist, conducting itself accordingly.

Recent production of newly revealed documents does not moot the discovery application. The requested discovery targets the past actions of the DEP, not its future document production.

Here are the past representations at issue:

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

*"Your request under the Freedom of Information Law is being closed because this agency does not have the records requested." (NYSCEF#48)*

**B. February 29, 2024 Certification by DEP Counsel**

*"I certify that a diligent search was performed in DEP's response to your FOIL request, and no responsive records were found" (NYSCEF#49)*

**C. November 7, 2024 Memorandum of Law to Dismiss the Article 78**

*"DEP already certified that the records do not exist"*

*"The petition (of 9/11 Health Watch) is moot"*

*"Compelling an additional search in this case, where DEP has repeatedly certified that it has no responsive records, will have no practical effect on the parties."*

*"A party cannot be compelled to [produce] documents that it does not possess"*

*"[A] fishing expedition"*

*"Unsupported speculation that records have been withheld"*

**(NYSCEF#50 and #23)**

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

*“the DEP responded to Petitioner’s appeal and reasserted that there were no responsive records found. This response also included a certification from FOIL Appeals Officer Russell Pecunies that a diligent search was performed of DEP’s records.”*  
(NYSCEF#51)

After two years, the DEP reversed course, doing so just after the Department of Investigation commenced an inquiry concerning the failure of City agencies to disclose September 11<sup>th</sup>-related records. On September 16, 2025, the Law Department advised that DEP *“located multiple boxes that are believed to contain at least some responsive records.”* (NYSCEF#52)

The Law Department’s February 13<sup>th</sup> letter highlights a recent leadership change. The arrival of a new Corporation Counsel, Steven Banks, neither explains nor justifies the *past* actions of career DEP officials, detailed above.

We hope that Mr. Banks ensures disclosure of September 11<sup>th</sup>-related records from all City agencies. That is a *future* endeavor, however, and not the focus of the pending motion.

Through our application, we seek answers from the DEP staff who, in the *past*, swore responsive documents did not exist and sought to dismiss this proceeding as baseless. We spent considerable time fighting the denials and dispositive motion before DEP’s reversal and concession. Accountability for this waste of judicial resources and attorney hours remains highly relevant.

This Court wields the *“inherent power to address actions which. . .undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice.”* CDR Creances S.A.S. v. Cohen, 23 N.Y.3d 307, 318 (2014) This independent authority, confirmed by the Court of Appeals, extends to ordering sworn testimony of DEP officials responsible for: **A)** repeatedly denying Petitioner’s FOIL request; **B)** asserting DEP had no responsive documents; **C)** affirming a diligent search was undertaken; **D)** seeking dismissal of this proceeding on these bases; and **E)** “finding” 68 boxes of responsive records.

Further, the Court may accept Petitioner’s February 3<sup>rd</sup> submission, pursuant to 22 NYCRR 202.8(c). We first obtained the Harding memo on January 29<sup>th</sup>, and submitted it promptly. The Law Department has long known of the existence of the Harding memo, by virtue of Petitioner’s original FOIL request, Petitioner’s Article 78 proceeding, media references to its existence (in 2007), and its 2002 instruction to City agencies to preserve all “World Trade Center documents.”<sup>1</sup> See, e.g., Zyskowski v. Chelsea-Warren Corp., 238 A.D.3d 498, 499, 234 N.Y.S.3d 466, 469, 2025 N.Y. Slip Op. 02860, 2025 WL 1335644 (1<sup>st</sup> Dept. 2025)(In the absence of willful omission,

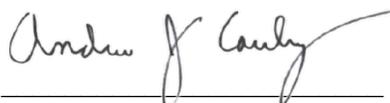
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<sup>1</sup> “These original World Trade Center documents have been collected and scanned by the New York City Law Department. **DO NOT DISPOSE OF THESE DOCUMENTS:** they must be preserved to serve as evidence in the event future WTC-related legal actions are brought against the City.” (Original emphasis)(NYSCEF#53 at 2002 Law Department Preservation Letter to DEP and all City agencies)

the Court has discretion to consider submissions made after service of reply papers where adverse party placed on notice of the subject matters addressed); Gee v. Becton, Dickinson & Co., 84 Misc. 3d 1218(A) (N.Y. Sup. Ct. 2024)(Court exercised its discretion to consider what was deemed a “sur-reply”) and Astor 207 Props. Corp. v. Monfried, 76 Misc. 3d 1210(A).

We thank the Court for its consideration of this submission, and respectfully request that Petitioner’s motion be granted.

Respectfully submitted,



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