

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

-against-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.
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**December 21, 2025 REPLY AFFIRMATION OF PETITIONER’S
ATTORNEY IN SUPPORT OF APPLICATION TO TAKE PRE-HEARING
DISCOVERY**

ANDREW J. CARBOY, an attorney duly licensed to practice law before the Courts of the State of New York, affirms that the following assertions are true, under penalties of perjury which may include fines or imprisonment. This affirmation is being filed in this proceeding.

1. I am a member of the Law Offices of Andrew J. Carboy LLC.
2. My firm and Turken Heath & McCauley LLP represent Petitioner Benjamin Chevat, Director of 911 Health Watch, Inc. (“911 Health Watch”), in this Article 78 proceeding. 911 Health Watch is a leading non-profit organization, advocating for patients afflicted by toxic exposures from the September 11th World Trade Center collapse. Respondent is the New York City Department of Environmental Protection (“DEP”).
3. I submit this reply affirmation in support of the motion to take discovery concerning DEP’s response to Petitioner’s Freedom of Information Law request (“FOIL request”). Pursuant to CPLR Sec. 408, Petitioner seeks an Order permitting service of: a deposition notice pursuant to

NYCRR 202.20-d, concerning DEP's search for documents and its earlier positions as to their existence; a deposition notice directed to DEP FOIL Appeal Officer Pecunies; and a Notice of Discovery and Inspection.

4. After denying the existence of responsive records (See, e.g., **NYSCEF #23, 29** and **50**: "*requested records do not exist*"), fighting Petitioner at the administrative level and before this Court for over two years, DEP now concedes possession of 68 boxes worth, some 340,000 pages of documents. This follows DEP's initial disclosure of 800 pages to Petitioner's counsel in October 2025.

5. DEP opposes Petitioner's motion, arguing discovery is needless. Essentially, DEP asserts its "*transparency*" in suddenly producing relevant records warrants *concealment* of DEP's reasons for previously denying their existence. To the contrary, an exploration of the City's grinding resistance to disclosure of its September 11th archive is highly relevant. Not even senior members of Congress (Reps. Nadler and Maloney), along with Representative Goldman, were able to overpower the City's opposition and secure these documents. (See, e.g., **NYSCEF #11** and **35**)

6. 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*")

7. Because of its actions in the administrative and judicial proceedings, the agency's credibility is questionable. DEP demonstrated itself to be a foe of transparency and the Freedom of Information Law, purporting to undertake a diligent search for records and denying their

existence, for years. (See, e.g., NYSCEF #23, 29 and 50: “requested records do not exist”) The agency’s eleventh-hour effort to control the outcome of this application is inappropriate given that DEP rejected the FOIL request and denied the existence of responsive documents, in the first place.

8. DEP’s opposition may be safely disregarded. Allowing DEP to foreclose any inquiry as to its earlier conduct, which subverted the Freedom of Information Law, will further undermine public records access, generally. And nothing could be more relevant to the integrity of *this* proceeding than the discovery Petitioner seeks.

9. In the absence of an Order for deposition testimony and a hearing, we will never know if DEP made complete disclosure of its September 11th records. It is unwise to allow DEP, alone, to dictate its response. Are we now to believe that there are *only* 68 boxes of documents, just as DEP once asked the Court to accept that it had zero responsive records? Or that DEP conducted a diligent search for them and located none? Or that the agency has, today, 340,000 pages of responsive records? If DEP withholds documents on the basis of a purported FOIL exception, will it alert Petitioner and prepare a privilege log or will it say nothing?

10. DEP demonstrated a deep inability to police itself; the agency cannot exercise exclusive control of the disclosure, any longer, at least not without the requested discovery. There will be no end point to this bizarre and frustrating saga without sworn testimony from DEP officials. Until that relief is granted, the DEP remains the sole arbiter of its disclosures. If Petitioner’s past experience is any guide, such a role for the agency poses future problems.

11. Contrary to DEP’s opposition, Petitioner has always sought testimony from DEP officials, *in addition* to seeking documents. Petitioner contends DEP’s document search, resulting in serial denials of his requests, was inadequate, requesting a hearing as to its sufficiency. (NYSCEF #1: Petition at conclusion/relief requested paragraph D) As DEP acknowledged,

Petitioner requested “ a hearing to ascertain ‘the scope and duration of any search previously undertaken’ by Respondent, with live testimony from DEP’s personnel.” (NYSCEF #23 and 50)

12. Given the shifting and contradictory positions taken by DEP concerning the existence of responsive documents and a purportedly “diligent search” for them, Court-ordered depositions of those responsible will be revelatory. On three occasions, DEP represented it had no documents to provide, attesting it complied with the law in seeking them. DEP even attempted to dismiss this proceeding, claiming the documents did not exist.

13. Now, DEP has “found” 340,000 pages of responsive records, filling 68 boxes. The Court is respectfully requested to address this wild and unexplained shift in position by granting Petitioner’s motion.

14. Sworn testimony will provide or lead to relevant information concerning these troubling actions. CPLR Sec. 408 is construed identically to CPLR Sec. 3101(a), and disclosure in civil actions must include “*all matter material and necessary in the prosecution or defense of an action.*” Matter of Giuliana M., 220 A.D.3d 864, 867 (2023) As the Court of Appeals instructs, “[m]ateriality and necessity must be interpreted liberally to require disclosure ... of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” Kapon v. Koch, 23 N.Y.3d 32 (2014)

15. Pursuant to CPLR Sec. 408, a hearing, and deposition testimony in advance, is appropriate where, as here, the record is not sufficient “*to determine the issues presented.*” See, e.g. Chen v. City of New York, 236 A.D.3d 583,584 (1st Dept. 2025). The Petitioner has long raised the quality, duration, scope and sufficiency of DEP’s initial search as issues warranting discovery. Today, the record consists of a litany of verified and/or sworn denials by DEP of the documents’ existence, agency declarations that it conducted a diligent search for them, and its

stunning and unexplained “about face” in “finding” 340,000 pages of responsive material. Simply stated, the record remains insufficient.

16. Among other questions, the record still does not answer:

Who were the decision-makers approving the earlier, serial denials of the existence of responsive documents?

What was the motivation of these officials for the denials?

What search, if any, was undertaken at all?

Where were the hundreds of thousands of DEP documents located?

Why were the documents found only after the Department of Investigation began its inquiry concerning the refusal of City agencies to release their September 11th archives?

How exactly does DEP, lead agency in the September 11th response, “overlook” more than 340,000 pages of documents concerning the most significant event in New York City history?

How did DEP ascertain that there are only 68 boxes of documents to disclose?

Does a search for other responsive records continue?

If DEP is now withholding responsive documents, will it provide a privilege log?

How will Petitioner know that a diligent search will continue and that document production is not deemed completed, arbitrarily?

17. Notably, the December 19, 2025 affirmation of DEP staff counsel, Musa Ali, at NYSCEF #59, fails to address any of these questions, even indirectly. These omissions should guide the Court. Taking sworn testimony from the responsible DEP officials¹ is now the only route to securing answers that neither the record nor the Ali affirmation provides.

¹ Petitioner does not know whether other agencies and/or the Mayor’s Office participated in DEP’s decision to withhold responsive documents, but will seek the identity of all City departments involved. Also, we have no reason to believe that Asst. Corporation Counsel Saarah Dhinsa or DEP staff counsel Musa Ali participated in any earlier decision to withhold responsive information. They work professionally and courteously in arranging the document review.

18. Separately, 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.

19. The actions of the DEP in fighting the FOIL request, for years, threaten the integrity of the courts and the enforcement of public access laws. The agency saw fit to “*undermine the truth-seeking function of the judicial system,*” the precise harm described by the Court of Appeals. Id.

20. For reasons known only to DEP’s decision-makers, the agency repeatedly denied the existence of responsive records while swearing it conducted a diligent search for them. (See, e.g., **NYSCEF #23, 29** and **50**: “requested records do not exist”) Neither of these assertions, formally made by attorneys and by DEP staffers, under oath, is true. DEP, which also sought to dismiss this proceeding as frivolous (**NYSCEF #22-24** and **29**), is now producing more than 340,000 pages of September 11th related documents to Petitioner.

21. This is a shocking course of action by trusted government officials. We request the opportunity to identify the decision-makers, question them and explore the reasons for their earlier, contrary, positions. Given the FOIL request’s subject matter, assessment of the public health consequences of the World Trade Center collapse, it is unlikely that DEP line staffers, the “faces” of the response, had the authority to chart such a disturbing and potentially unlawful course of action by themselves.

22. The September 11th attacks and the collapse of the World Trade Center are the most significant events in City history. That a government agency's "diligent search" for related documents fails so stunningly that hundreds of thousands of records are belatedly "discovered" by it, and only under the duress of a law enforcement investigation (City Department of Investigation or "DOI", more fully described, below), underscores the necessity of testimony.

23. Overlooking sixty-eight (68) boxes in even a cursory or careless search is unlikely. This is not a matter of DEP belatedly discovering a single folder of records, misfiled in a cabinet. The Court must address earlier DEP's representations as to its "diligent" search and the non-existence of responsive documents.

24. Having waged a years-long campaign to deny the existence of responsive records, the DEP is now releasing documents to Petitioner. This is a case of "too little and too late." Petitioner afforded DEP three opportunities to disclose the documents: the initial FOIL request; the FOIL administrative appeal; and this Article 78 proceeding. DEP chose other options: denying the request; rejecting the appeal; and seeking dismissal of this proceeding.

25. DEP now makes disclosure under the duress of a DOI investigation as to its earlier stance. (See **NYSCEF #30-38**) DOI, one of the country's premier investigative agencies, is currently conducting "*an investigation to ascertain the knowledge possessed by mayoral administrations on environmental toxins produced by the September 11, 2001 terrorist attacks on the World Trade Center and to submit a report to the Council thereon.*" Id. Indeed, just weeks after DOI initiated its probe, DEP wrote to the Court that it, inexplicably, "found" responsive records. (**NYSCEF #39**: Letter dated September 16, 2025) What conclusion should be drawn, here?

26. As recited in our moving papers (**NYSCEF # 45-53**) and previously filed submissions

(NYSCEF #1-15; 27-38), for more than two (2) years, the DEP resisted Petitioner's request for information concerning its response to the September 11th collapse of the World Trade Center, along with historical documents and disaster preparation materials. (NYSCEF #3) These public records pertained to risk assessments made by DEP for the reopening of lower Manhattan in September 2001 and airborne toxic hazards, generally. Why did the City assure first responders, recovery workers, returning residents, students and office personnel of safe air quality while simultaneously lobbying for federal "liability protection" against thousands of toxic exposure claims it anticipated? What did the City know and when did it know it?

DEP's Denial of Responsive Records Conflicted with its Post-September 11th Activities

27. DEP should have never disavowed its undisputed role in assessing September 11th toxic hazards by denying Petitioner's FOIL request. Given the agency's participation in air quality monitoring and risk assessment, DEP's serial denials summarized below, suggest a considered decision to evade candid, accurate and legally compliant FOIL responses.

28. 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. (See, discussion of Charter Section 1403(i), below)

29. 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,

30. Second, as the Mayor's Office confirmed, "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; Petition at Exhibit 10)

31. 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)(emphasis added)

32. Fourth, DEP itself has publicized its role. (See, e.g., **NYSCEF #9**: Exhibit 7 to Petition: DEP's own statement about its extensive involvement in September 11th response)

The DEP Officially Denies the Existence of Responsive Records

33. Notwithstanding its mandate to assess the risks posed by reopening lower Manhattan after the World Trade Center collapse, DEP met Petitioner's FOIL request with a mixture of arrogance and disregard for its legal obligations. Petitioner, contended DEP in moving to dismiss this action, lacked any "credible" basis to challenge the agency's assertion that documents did not exist. (NYSCEF #29) (See also, NYSCEF #23 and 50: "requested records do not exist") This aggressive and unjustified government reaction to a simple request for public records (that actually do exist, at least 340,000 of them) is horrifying.

34. In denying access to its September 11th archive, DEP also violated City Charter Section 1403(i), requiring the agency to share its records with the public:

i. *Community right-to-know. The commissioner shall have the power to collect, compile and manage information concerning the amount, location and nature of hazardous substances present in the city.* This information shall be made available to city personnel responsible for responding to emergencies involving hazardous substances *and the public.*

35. However, DEP is seemingly unconstrained by the City Charter or public record access laws in "responding" to FOIL requests. The DEP's response, at least until confronted with a DOI investigation, is whatever the agency would like it to be, even when the subject matter is September 11th health hazards. After all, DEP can just represent to the public and to this Court that its own "records do not exist," and walk away, carefree. (NYSCEF #23, 29 and 50)

The DEP's representations, over the past two years, are set forth below:

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

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

B. **February 29, 2024 Certification by DEP Legal Counsel, an officer of the New York Courts**

"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, Submitted by Asst. Corporation Counsel as an officer of the New York Courts**

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

"The petition (of 911 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 #23 and 50)

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)

E. **December 12, 2024 Affirmation by Asst. Corporation Counsel**

DEP "did not have the records requested"

DEP "already certified to Petitioner that **the requested records do not exist**, and Petitioner has not put forth any credible evidence to call into question Respondent's certification." (NYSCEF# 29)

versus

F. **September 16, 2025 City Law Department letter to the Honorable James Clynnes, Justice of New York Supreme Court**

“Respondent (CITY DEP) 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 at that time. Recently, however, Respondent has located multiple boxes that are believed to contain at least some responsive records” (NYSCEF #52)

36. After two years of denying the existence of its own files, while professing to have conducted a diligent, yet fruitless, search for them, the DEP now admits “finding” records, at least sixty-eight (68) boxes, in total.

37. As detailed in our moving papers (NYSCEF #45-53), on November 17, 2025, we reviewed twenty-four (24) boxes of responsive documents at DEP headquarters. Uniform in construction and labeling, the boxes contained approximately 5,000 pages of records, each, concerning DEP’s response to the September 11th attacks. We returned on December 15, 2025 to review additional records.

38. Highly organized and placed in yellowing folders, the DEP records appear in their original 2001 condition. They remain meticulously catalogued and organized.

39. Notably, found among the records was 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. The DEP delivered all of its September 11th documents for scanning by the Law Department, which, then, returned them. This decades-old preservation instruction further undercuts DEP’s repeated contention that responsive documents did not exist. (NYSCEF #23, 29 and 50)

40. Although DEP now discloses air and dust testing records, as respondent emphasizes

in its opposition (NYSCEF #58 and 59), boasting of providing bulk test data misses the mark.

41. What is truly significant about the test records, now surfacing, is that DEP previously denied that even this lab data existed.

42. At the same time, what is *particularly* responsive to Petitioner's FOIL request is yet to be disclosed.

43. Petitioner sought the risk assessments performed by DEP, back in September 2001, upon the agency's receipt of such testing records. (NYSCEF#3) To date, DEP has failed to produce any memorandum, report or study reasonably described as a risk assessment of reopening lower Manhattan. We have none of the conclusions of DEP Commissioner Miele or his staff, reached after a review of the tests. We see no conclusions, at all. We see no communications between DEP and the Mayor's Office concerning risk assessment, notwithstanding the known disagreement between Commissioner Miele and City Hall as to persistent environmental hazards. (NYSCEF #13: October 6, 2001 City Department of Health Memorandum) To date, DEP has failed to provide any recommendations it made concerning air quality in lower Manhattan.

44. In a summary proceeding, CPLR Sec. 408 entitles a petitioner to discovery upon satisfaction of the following criteria:

(1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice

Lonray, Inc. v. Newhouse, 229 A.D.2d 440, 440-41, 644 N.Y.S.2d 900, 1996 WL 387709 (1996)

45. Petitioner fulfills these requirements, as detailed in his moving papers. First, he demonstrates his application is meritorious. Not only is his petition (NYSCEF #1 et seq.) copiously detailed, with citations to exhibits, recent events so demonstrate the merit of his position

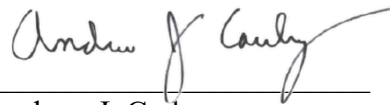
that DEP withdrew its motion to dismiss. Second, there is clear need for information concerning the duration, scope and quality of the purported DEP “searches” and the integrity and bases of its previous assertions that no responsive records existed or could be located. Third, Petitioner will serve a total of two (2) deposition notices and one (1) discovery notice concerning these topics; discovery will be narrowly tailored to address the “about face” of the DEP. Fourth, there is no prejudice respondent will suffer from this Court-supervised exploration of its contradictory positions and disclosures. It is Petitioner, the September 11th community and the public at large that are prejudiced by the apparent abuse of the FOIL statute; there must be accountability. With respect to the last criterion, Petitioner defers to the Court to fashion any order it sees fit so that a program of discovery may proceed.

46. In this Article 78 proceeding, the Court exercises “broad discretion in directing the disclosure of material and necessary information.” Puig v. New York State Police, 80 Misc. 3d 383, 388 , aff’d 233 A.D.3d 1121 (2024). For the reasons set forth above, Petitioner respectfully requests that the Court do so. As an independent basis for the relief sought, the Court may also invoke its powers, pursuant to CDR Creanees, S.A.S., 23 N.Y.3d 307, and direct pre-hearing discovery.

47. Wherefore, Petitioner respectfully requests an Order permitting pre-hearing discovery, with such discovery to include the service of two (2) deposition notices, including one pursuant to NYCRR 202.20-d, concerning the search and the DEP's earlier positions, and a second directed to DEP FOIL Appeal Officer Pecunies, and the service of Notice of Discovery and Inspection.

Dated: December 21, 2025

Respectfully submitted,



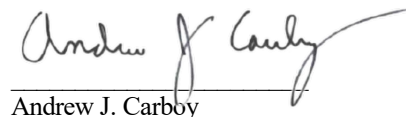
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Andrew J. Carboy