

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, Director of 9/11
Health Watch,

Index No.

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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ATTORNEY’S AFFIRMATION IN SUPPORT OF THE VERIFIED PETITION

ANDREW J. CARBOY, an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am a member of Law Offices of Andrew J. Carboy LLC.

2. Along with Turken Heath & McCauley LLP, we represent the interests of the following: 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; Charlotte Berwind, Executrix of the Estate of volunteer firefighter Charles E. Flickinger, Jr.; and Benjamin Chevat, Director of 9/11 Health Watch, who presents a verified petition in this proceeding.

3. These World Trade Center disaster responders, residents of lower Manhattan, and their families, along with a non-profit organization advocating for patients afflicted by toxic exposures in the aftermath of September 11th, sought documents that should be freely available to them and

all New Yorkers. Pursuant to the Freedom of Information Law, on September 8, 2023, they requested various records from the New York City Department of Environmental Protection (“DEP”) concerning the response of the City of New York (“City”) to the September 11, 2001 collapse of the World Trade Center, along with historical records and disaster preparation materials. (**Exhibit 1**: September 8, 2023 Freedom of Information Request) (“FOIL request”)

4. On January 31, 2024, the DEP denied the FOIL request. (**Exhibit 2**: DEP January 31, 2024 denial of FOIL request #2023-826-03980)

5. Thereafter, on February 13, 2024 (**Exhibit 3**) and February 28, 2024 (**Exhibit 4**), we appealed the denial of the FOIL request. On February 29, 2024, the DEP denied our appeal. (**Exhibit 5**). The DEP denial of appeal is a “final and binding” determination appropriately the subject of this Article 78 proceeding. CPLR Sec. 217(1). This proceeding is commenced within four months of the denial, and is timely.

6. Petitioners seek the following relief:

- A) A declaration that the February 29, 2024 appeal denial (**Exhibit 5**) was arbitrary and capricious as the DEP failed to establish, with any precision or evidence, that a diligent search for the requested materials was actually performed.
- B) An Order directing the DEP to search its archives, again, with diligence for the 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”), and related materials (as more fully set forth in **Exhibit 1**), and report, in detail, as to the steps it undertook during the search and provide all materials responsive to this particular component of the FOIL request.

- C) As Petitioners demonstrate, below, that the requested materials do, in fact, exist, a declaration that the February 29, 2024 appeal denial (**Exhibit 5**) was arbitrary and capricious as the DEP failed to establish, with any precision or evidence, that the requested materials do not exist.
- D) As Petitioners demonstrate that the requested materials do, in fact, exist, a hearing to ascertain the scope and duration of any search previously undertaken by DEP in response to the FOIL request, with live testimony taken from DEP personnel.
- E) An Order directing DEP to provide Petitioners with the anticipated cost of compliance with the FOIL request (**Exhibit 1**) to the extent of locating and producing the Harding memo, *in advance* of DEP incurring such expenses. At this juncture, the City has not provided the Petitioners with any sense or detail of the expected cost of compliance with the request. Petitioners do not commit to pay an uncertain and open-ended bill for this endeavor.

The FOIL Request to DEP

7. Pursuant to the Freedom of Information Law, on September 8, 2023, we requested various records from 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**) To streamline matters, however, Petitioners now seek only the Harding memo, described below from the DEP.

8. Among other items, set forth in **Exhibit 1** in full, we requested the following documents and information:

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")

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.

All documents setting forth the names and titles of recipients of the Harding memo in 2001 and 2002.

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).

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):

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.

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.*

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.

Any memos, communications with respect to the reporting of New York Daily News columnist Juan Gonzalez from September, October, November or December of 2001.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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."

The DEP'S Denial of the FOIL Request

9. On January 31, 2024, without substantive explanation, DEP denied the FOIL request. (**Exhibit 3**) In a conclusory "auto-generated" response, DEP advised:

*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.

10. 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, in its response (**Exhibit 8**) to the same FOIL request (**Exhibit 1**), the Mayor's Office of Emergency Management denies the existence of these materials. ("A diligent search for records responsive to your request did not locate any such records...your request is denied")

DEP's Final and Binding Denial of Petitioners' Administrative Appeal

11. We administratively appealed (**Exhibits 3 and 4: Administrative Appeal and Supplement**) the denial for two reasons. **First**, in its initial denial (**Exhibit 2**) 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 offered a boilerplate response, devoid of detail concerning any search, and lacking certification. The initial denial was improper and conclusory, violative of New York's Public Officers Law. The denial of the administrative appeal is similarly improper, as no firsthand information of any search is provided.

12. The DEP appeal determination is as follows:

Determination

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. In light of the above, your appeal is denied. This letter is DEP's final determination with respect to your appeal. (Exhibit 5)

13. With respect to its denial of the appeal (**Exhibit 5**), DEP again failed to establish its personnel conducted any search. Indeed, DEP's final denial speaks vaguely of a "diligent search" being "performed." (**Exhibit 5**) Significantly, we cannot tell from the statement of DEP's FOIL Appeals Officer, Russell Pecunies, whether this assertion is based upon hearsay or whether he, in fact, actually performed a search. Without such foundation, this determination was

arbitrary and capricious. Its shortcoming also entitles the Petitioners to an evidentiary hearing under Article 78 and FOIL.

14. **Second**, the public record demonstrates that DEP maintains the requested materials, as more fully detailed below. Such indicia of the records' existence now entitle the Petitioners to an evidentiary hearing in this Article 78 proceeding. To deny Petitioners these materials was, again, arbitrary and capricious. To streamline matters, however, Petitioners now seek only the Harding memo, described above, from the DEP.

Indicia that Requested Documents Exist and Remain in Control of DEP

15. The DEP's interim and final administrative denials of the FOIL request (**Exhibit 2** and **5**) provide no detail of the search it claims to have undertaken for the information and documents sought. It is not even clear who, if anyone, at the agency made the search. The FOIL Appeal Officer does not claim to have done so, but asserts, without foundation, that such a search was made. (**Exhibit 5**)

16. The DEP's assertions that it "*does not have the records requested*" (**Exhibit 2**) and "*no responsive records were found*" (**Exhibit 5**) are undercut by the public record and admissions made by New York City officials, including the Mayor himself and DEP managers. For this reason, Petitioners "*articulate a demonstrable factual basis to support (the) contention that the requested documents*" exists and "*were within...the control*" of the DEP. Gould v. New York City Police Dept., 89 N.Y.2d 267, 279 (Ct. Appl 1996) (Reciting standard for evidentiary hearing in Article 78 proceeding where agency denies existence of documents responsive to FOIL request)

City Public Statements about DEP Role in September 11th Response

17. To date, the City's public information website makes clear DEP's leading role in lower Manhattan following the collapse of the World Trade Center. "*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>) This narrative description is also available in an official City publication (**Exhibit 10: Assessing the Health Impacts of 9/11, Report and Recommendation to Mayor Bloomberg**) The DEP assessments included the air quality and other test results sought in the Freedom of Information request.

Court Decisions Recite DEP Role in September 11th Response and Earlier Response to 1993 World Trade Center Bombing

18. The DEP's role in responding to toxic releases from the World Trade Center attacks of September 11, 2001 and from the 1993 World Trade Center bombing cannot be reasonably disputed. So instrumental to the responses was the DEP, its participation is described in published court decisions.

19. 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 identified or produced documents underlying this "assumption" in response to our FOIL request.

20. With respect to historical data we requested that DEP maintains concerning the 1993 World Trade Center attacks (**Exhibit 1**), it is a matter of record that it did so.

21. 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]

DEP Admits its Leading Role in Assessment of Air Quality after September 11th

22. DEP also describes its efforts to assess air quality in the aftermath of the September 11th attacks in NYC Water, an internal DEP publication. Certainly, this important information is responsive to our FOIL requests.

**Exhibit 7: NY City Water, September 11, 2017:
#NeverForget: A Look Back at DEP’s 9/11Response**

Meanwhile, *DEP’s Hazardous Materials Specialists arrived on the scene, establishing a command post at Reade Street* after taking shelter from the collapse in the World Financial Center parking garage. *The specialists took bulk samples of asbestos-containing materials from the surrounding area and had them analyzed by our asbestos lab. Through this sampling, a perimeter was established with a comprehensive asbestos air-monitoring program of 38 monitoring stations in the downtown area. DEP specialists would remain onsite for months*, overseeing operations over 16–18 hour shifts. Among DEP’s Environmental Compliance staff on scene was Chief of Enforcement Joe Scafidi, an integral part of emergency operations throughout the recovery effort.

DEP Concluded that Air in Lower Manhattan was Unsafe when Other Agencies, including the Office of Emergency Management Disagreed

23. Further supporting Petitioner’s position is **Exhibit 11**, an October 6, 2001 memorandum from the City Department of Health, discussing DEP’s activities and positions concerning the air quality in lower Manhattan. As CNN reported, the “City allowed people to return to Manhattan after the collapse of the World Trade Center towers even though officials were told the air was not yet safe, according to an internal memo from a New York City Health Department official. *The October 6, 2001, memo states that the city Office of Emergency Management -- called OEM -- and the Department of Environmental Protection -- referred to as DEP-- disagreed over the air quality following the September 11, 2001 terror attacks.* CNN

coverage, September 7, 2006 Memos: NYC told Ground Zero air was Unsafe. [https:// www.cnn.com /2006/US/09/07/nyc.air/index.html](https://www.cnn.com/2006/US/09/07/nyc.air/index.html)

Kelly McKinney, associate commissioner of the health department described: *"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."* (Exhibit 11)

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."* (Exhibit 11)

Mayor Adams' Letter of March 22, 2023

24. Annexed as **Exhibit 9** are a series of letters between Honorable Jerrold Nadler, Honorable Dan Goldman, and Honorable Caroline Maloney, United States House of Representatives, and the Office of the Mayor. Since 2021, the Representatives have sought previously unreleased documents, from City agencies, concerning the response to the September 11th attacks, writing and meeting with the Mayor's Office in this effort. To date, the City has not responded in any meaningful way to these requests from the elected officials.

25. On March 22, 2023 (**Exhibit 9**), Mayor Adams wrote to the members of Congress, acknowledging that such previously unreleased documents existed, but advising that they would not be disclosed. The Mayor cited "litigation risks" as a barrier. The Mayor requested both federal funding and additional federal protections for the City before the documents would be released. Id. At no point in the correspondence to the Congressional delegation did City Hall cite a specific FOIL exemption enabling it to withhold the documents. Further, "litigation risks" are not recognized as a basis to deny Petitioners' FOIL request or those of members of Congress.

26. Although DEP did not cite such risks in denying Petitioners' request, it is clear that such concern now guides the City's response to any request for September 11th materials, as evidenced by the pronouncements of Mayor Adams. (**Exhibit 9**) This prioritization, improper and at odds with the broad purposes of FOIL, is a further basis to deem the DEP's denial arbitrary and capricious. The Harding memo and related materials should be disclosed, at once.

ARGUMENT

I. The City's Litigation Risk Concern Does not Preclude a Meaningful FOIL Response

27. The City's concern about future litigation, arising from disclosure of the Harding memo sought by Petitioners and the Congressional delegation, is no basis to deny the FOIL request.

28. The Freedom of Information Law "imposes a broad duty on government to make its records available to the public. (Public Officers Law Sec. 84 [legislative declaration]) Moreover, access to government records does not depend on the purpose for which the records are sought." Gould v. New York City Police Dep't, 89 N.Y.2d 267, 274 (Ct App. 1996) New York Courts have long held that "all government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law Sec. 87(2)." Fappiano v. New York City Police Department, 95 N.Y.2d 738, 746 (Ct. App., 2001). Under FOIL, City "records are presumptively open to public inspection, without regard to need or purpose of the applicant." Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 440-41 (Ct. App. 2005)

29. In Petitioner's matter, DEP denies that the requested materials exist, including the Harding memo, notwithstanding evidence of their creation and retention by DEP, described above, and asserts, without demonstrable basis, that a "diligent search" for them was performed. Putting

these facts in the context of declarations from the Mayor's Office that no records concerning the response to September 11th will be released in the absence of additional federal protections (immunity), the DEP denial is arbitrary and capricious. That the release of the DEP records may pose, as the Mayor describes, "litigation risks," is no reason to withhold them. Although FOIL does exempt from disclosure communications between government agencies, such exemption does not apply to "instructions to staff that affect the public." All of the material Petitioners seek concern matters affecting the public. (Public Officers Law Sec. 87(2)(g))

II. Having Established that the Materials Requested Exist, Petitioners are Entitled to an Evidentiary Hearing

30. The DEP fails to establish the nonexistence of the materials requested by Petitioners, including the Harding memo. The Petitioners "articulate a demonstrable factual basis to support (their) contention that the requested documents existed" and "were within the...Department's control." This standard, articulated by the Court of Appeals in Gould v. New York City Police Dep't, 89 N.Y.2d 267, 279 (Ct. App 1996) should govern the outcome of this Article 78 proceeding. See also, Jewish Press, Inc. v. New York State Police, 207 A.D.3d 971, 973 (3rd Dept 2022) Court decisions and materials from the DEP and City Department of Health, detailed above, demonstrate factual questions as to the existence of the requested information.

31. The City's decision to make September 11th-related materials, such as the Harding memo, available to the public only upon condition of further federal funding and protection (**Exhibit 9**) is another factor to consider, making it even more likely that these materials exist and were simply not "located" and disclosed. These unusual issues may only be resolved at an evidentiary hearing. See, e.g., Binghamton Precast & Supply Corp. v. New York State Thruway Auth., 196 A.D.3d 944, 946 (3d Dept. 2021)(granting such a hearing); and Oddone v. Suffolk Cnty. Police Dep't, 96 A.D.3d 758, 760-62 (2nd Dept. 2012) (Improper to dismiss Article 78 FOIL

proceeding where “allegations in petition, if proven, would provide a factual basis to support the petitioner’s contention that additional documents relating to the...investigation...exist and are within the Police Department’s control.”)

III. The Description of the “Search” Undertaken by DEP is Deficient

32. Although the Court of Appeals does not require a responding agency to provide a “detailed description of the search” or “specify the manner in which an agency must certify that the documents cannot be located,” [See, Rattley v. New York City Police Department, 96 N.Y.2d 873, 875 (Ct. App. 2001)], in this instance, the details provided by the DEP remain insufficient. The denial remains arbitrary and capricious. The initial denial (**Exhibit 2**) does not even reference a diligent search. The denial of the administrative appeal (**Exhibit 5**) merely certifies, for the first time that a search was performed. The author of the appeal denial, DEP’s Russell Pecunies, does not indicate how he knows such a search was performed. He does not attest to having performed it, himself. We do not know whether he relies upon hearsay. These facts are akin to those in Oddone, 96 A.D.3d 758, 760–62. The respondents failed to establish that their “determination,” a denial, “was not arbitrary and capricious” as the Appeal Officer provided no evidence that such a search was actually done. As in Oddone, the “determination of the Appeals Officer (of the DEP) was not based on any evidence in the record.” Accordingly, the Petitioners are entitled to a determination that the denial was arbitrary and capricious and a hearing. “Even where an entity,” as here, “certifies that it was unable to locate requested documents after performing a diligent search, the person requesting the documents may nevertheless be entitled to a hearing on the issue” by articulating “a demonstrable factual basis” that the documents exist and that the “search” is not substantiated. Id. citing Gould, 89 N.Y.2d 267, 279.

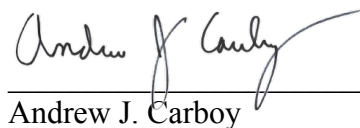
Conclusion

33. For the reasons set forth above, Petitioners demonstrate their entitlement to the following relief:

- A) A declaration that the February 29, 2024 appeal denial (**Exhibit 5**) was arbitrary and capricious as the DEP failed to establish, with any precision or evidence, that a diligent search for the requested materials, including the Harding memo, was actually performed.
- B) A declaration that the February 29, 2024 appeal denial (**Exhibit 5**) was arbitrary and capricious as the DEP failed to establish, with any precision or evidence, that a diligent search for the requested materials was actually performed.
- C) An Order directing the DEP to search its archives, again, with diligence for the 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”), and related materials (as more fully set forth in **Exhibit 1**), and report, in detail, as to the steps it undertook during the search and provide all materials responsive to this particular component of the FOIL request.
- D) As Petitioners demonstrated that the requested materials do, in fact, exist, a declaration that the February 29, 2024 appeal denial (**Exhibit 5**) was arbitrary and capricious as the DEP failed to establish, with any precision or evidence, that the requested materials do not exist.

- E) As Petitioners demonstrate that the requested materials do, in fact, exist, a hearing to ascertain the scope and duration of any search previously undertaken by DEP in response to the FOIL request, with live testimony taken from DEP personnel.
- F) An Order directing DEP to provide Petitioners with the anticipated cost of compliance with the FOIL request with respect to fulfilling the FOIL request (**Exhibit 1**) to the extent of locating and producing the Harding memo, in advance of DEP incurring such expenses. At this juncture, the City has not provided the Petitioners with any sense or detail of the expected cost of compliance with the request. Petitioners do not commit to pay an uncertain and open-ended bill for this endeavor.

Dated: June 20, 2024



Andrew J. Carboy