

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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**AFFIRMATION OF PETITIONER’S ATTORNEY IN OPPOSITION TO  
CROSS-MOTION OF RESPONDENT NEW YORK CITY DEPARTMENT  
OF ENVIRONMENTAL PROTECTION**

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

1. I am a member of the Law Offices of Andrew J. Carboy LLC.
2. My firm and Turken Heath & McCauley LLP represent the interests of the following individuals: 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.
3. These World Trade Center disaster responders and their families, along with a non-

profit organization advocating for patients afflicted by toxic exposures in the aftermath of September 11<sup>th</sup>, sought documents that should be freely available to all New Yorkers. Pursuant to the Freedom of Information Law (“FOIL”), 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** at NYSCEF# 3: September 8, 2023 Freedom of Information Request) (“FOIL request”) Following denial of the FOIL appeals, Petitioner commenced this Article 78 proceeding.

4. The New York City Law Department, denigrating our Freedom of Information requests as a “fishing expedition,” now seeks to dismiss this proceeding in a cross-motion. The Law Department asks that the Court take, at face value, its assertion that a diligent search for records was conducted. If the Court does so, “the instant Article 78 proceeding has been rendered moot.” (NYSCEF #23: City Memorandum of Law)

5. As detailed below, there is no reason to accept this representation of a diligent search. The evidence demonstrates that the City resists, with maximum effort, disclosure of its September 11<sup>th</sup> archives. It matters not if the record requester is a first responder, surviving family member, member of Congress or member of the City Council. All requests are met with delay and, ultimately, denial.

6. As detailed in our original Petition and supporting exhibits (NYSCEF# 1 through 15), the DEP served as a lead agency for the City’s response to the toxins blanketing lower Manhattan and Brooklyn. Indicia of DEP’s status include: City public statements about the DEP’s role in the September 11<sup>th</sup> response; Court decisions describing the DEP’s role with respect to testing of World Trade Center toxins and the agency’s earlier response to the 1993 World Trade Center

bombing (studies of dust for asbestos, eight years before the World Trade Center collapse); the DEP's open acknowledgement of its leadership position in the aftermath; and DEP's conclusion that the air in lower Manhattan was unsafe when other agencies, including the City Office of Emergency Management, disagreed. (Id.)

7. We oppose the cross-motion to dismiss the Petition. The City's attorneys first delayed this proceeding. They required two adjournments, spanning several months, to file their application. They now accuse the first responders of mounting a baseless "fishing expedition." Such a charge, insulting in the present context, is ordinarily restricted to discovery abuses in civil lawsuits, not efforts to secure public documents through FOIL. This cynical view of FOIL, by the very government charged with preserving public records and making them available upon request, is par for the course.

8. The 2001 World Trade Center disaster is, inarguably, an event without parallel in City history. Why then, decades later, do the City's own records of the collapse, air quality monitoring, and assessments of public health risks from reopening the Financial District and surrounding neighborhoods and schools, remain secret? Why does the City deny the records even exist or claim them to have been "lost"? (See, NYSCEF# 1 and 2: Verified Petition and Supporting Attorney Affirmation)

9. The City has done a remarkable job in keeping its September 11<sup>th</sup> archive hidden from public view, notwithstanding the efforts of the United States Congress and the New York City Council to compel disclosure.

**A. City Fends Off Effort by United States Congress to Obtain Similar Information**

10. Previously, the City beat back efforts by the United States Congress to obtain the same

information Petitioner seeks in the FOIL requests. Submitted as **Exhibit 9** (NYSCEF#11) is 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 11<sup>th</sup> 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.

11. On March 22, 2023, 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.

12. 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 11<sup>th</sup> materials, as evidenced by the pronouncements of Mayor Adams. 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. And yet, the Law Department would have the Court, and Petitioner, simply take its word on faith.

#### **B. City Council Efforts to Open the Secret September 11<sup>th</sup> Archive Meet Resistance**

13. On September 12, 2024, City Council Member Gale A. Brewer announced "*new legislation ... that would finally reveal what city government knew about environmental toxins produced by the September 11, 2001 attacks on the World Trade Center, and when. The binding*

*resolution would require the Department of Investigation to obtain from city agencies and City Hall all documents with information about the types of toxins, the length of time the toxins were expected to remain in the environment, the immediate and long-term health impacts of human exposure, as well as an analysis of the contrast between the knowledge mayoral administrations possessed and the information they conveyed to the public.” (Exhibit 12: Announcement of 9/11 Transparency Legislation) And yet, three months later, the legislation remains unpassed, for reasons unknown to Petitioner.*

14. Petitioner welcomes the involvement of the City Council, the hopeful passage of this important legislation, and the intervention of the Department of Investigation. There is, obviously, deep institutionalized resistance to disclosure of the City’s secret September 11<sup>th</sup> archive. That the City would seek the *quid pro quo* of immunity, other legal protections, and “economic” support for its release of September 11<sup>th</sup> public records, records that should be freely available under FOIL, underscores the limitations of this proceeding.<sup>1</sup>

15. In the absence of a hearing and testimony from DEP record searchers, we are being asked to take the Law Department’s assertion of a diligent search on faith. Given the history, and the disregard shown to elected officials who sought the same information, we respectfully request that the cross-motion be denied until such time as a hearing is held to establish precisely how the DEP went about its records search. The City’s longstanding failure to disclose public records of its September 11<sup>th</sup> response, without condition or benefit to it (such as liability protections), raises

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<sup>1</sup> **Exhibit 9:** Letter of Rep. Nadler and Rep. Goldman, dated February 16, 2023: “ *Corporation Counsel attorneys clearly stated they have a strong incentive to keep any 9/11 aftermath documents privileged because otherwise, the city would be liable for those claims.*” Responding letter of Mayor Adams, dated March 22, 2023: “ *We are happy to work with your offices to determine potential federal funding sources and any necessary federal legislation to make production of documents economically and legally feasible for the City of New York.*”

deep concerns as to the diligence of its search effort in this instance. Accordingly, a hearing is appropriate.

**Conclusion**

For the reasons set forth above, Petitioner demonstrates 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 was actually performed.
- B) An Order directing the DEP to search its archives, again, with diligence for the requested materials, and report, in detail, as to the steps it undertook during the search and provide all materials responsive to the FOIL request.
- C) 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) 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.

Dated: December 9, 2024

Respectfully submitted,



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