

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

CHARLES WEINSTOCK,

Petitioner,

For a judgment pursuant to CPLR Article 78

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION d/b/a EMPIRE STATE  
DEVELOPMENT,

Respondent.

Index No.  
IAS Part

**VERIFIED PETITION**

Petitioner alleges:

1. This is an Article 78 proceeding to challenge the continuing refusal of the New York State Urban Development Corporation, doing business as Empire State Development (“ESD”), to provide petitioner Charles Weinstock with the documents he requested under the Freedom of Information Law (“FOIL”). The requests relate to ESD’s unlawful decision to override New York City’s zoning laws and grant 18 million square feet of development rights to the owners of eight parcels surrounding Penn Station (“Override”) – ostensibly to raise revenue for the rehabilitation of the station.

2. From the time that former Governor Cuomo first announced the Override in 2020, ESD has dedicated itself to concealing how it arrived at this plan, and why it continues to defend it so zealously, despite its legal infirmities and overwhelming public opposition. Even the New York City Planning

Commission and the Independent Budget Office, breaking with a long tradition of deference to ESD, declined to support it. So too did the State's own Comptroller, Thomas DiNapoli. The verdict of Richard Ravitch, the former Lieutenant Governor and chair of both the Urban Development Corporation (*i.e.*, ESD) and the Metropolitan Transportation Authority ("MTA"), was harsh: "[P]erhaps the most outrageous thing about the plan is how little we know about it. . . . That ludicrously low level of transparency is reason enough to postpone the plan."<sup>1</sup>

3. ESD has been particularly zealous in concealing the central role played by Vornado Realty Trust ("Vornado"). Vornado is one of the largest real estate developers in the City, and owns or controls five of the eight parcels that would benefit – extravagantly – from this project.

4. Vornado has also been one of the largest contributors to the political campaigns of both Cuomo and the current Governor. According to an article in *Politico*, this project may be the "biggest windfall to a politically-connected private developer in recent history."<sup>2</sup> The State's refusal to disclose the magnitude of the developer's influence is an affront to open government.

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<sup>1</sup> Richard Ravitch, "Derail this Penn Redevelopment Plan," *New York Daily News* (July 27, 2022), [www.nydailynews.com/opinion/ny-oped-derail-penn-redevelopment-plan-20220727-kaf6fsyhyvflzlvqdnh6d2fi2i-story.html](http://www.nydailynews.com/opinion/ny-oped-derail-penn-redevelopment-plan-20220727-kaf6fsyhyvflzlvqdnh6d2fi2i-story.html).

<sup>2</sup> Danielle Muoio Dunn, "'This Isn't Podunk': A Cuomo-Era Plan to Dramatically Alter Manhattan Meets Resistance," *Politico* (Apr. 10, 2022), [www.politico.com/news/2022/04/10/podunk-cuomo-manhattan-penn-station-00024206](http://www.politico.com/news/2022/04/10/podunk-cuomo-manhattan-penn-station-00024206).

5. Even before Governor Cuomo announced the project, he set the terms of ESD's partnership with Vornado. Indeed, he decreed them. In January 2018, Vornado's senior vice president at the time, Marc Ricks, introduced himself to the heads of ESD and the MTA: "I understand the Governor has *directed* us to sit with you as soon as possible to advance discussions at Penn Station."

Weinstock Aff. Ex. O at 321.

6. The documents ESD has produced thus far establish the continuous involvement of Vornado in the project's development. This was not governmental action; it was collusion between a state agency and the private company that would be the project's primary beneficiary.

7. The terms of the final plan were so favorable to Vornado that Holly Leicht, ESD's former Executive Vice President for Real Estate Development and Planning and the agency's point person on the project, came to worry that they would be difficult to defend. In an email to ESD staff and senior Vornado executives in advance of a public meeting, Ms. Leicht wrote: "We need to coordinate and script this meeting to ensure we're cohesive and have a good story to tell about why we landed on these densities . . . ." *Id.* at 621.

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8. Petitioner filed his first FOIL request on June 13, 2021. For the next twelve months, until June 28, 2022, ESD produced almost nothing — one link to the MTA's website (already well-known to anyone with even a passing interest in the project), and three documents, two of which were on ESD's equally

well-known website. The third was a useless table of rail and transit passenger trips.

9. Although ESD has since provided approximately 2,000 pages of documents, they are diversionary; they consist almost entirely of emails to schedule phone calls and Zoom meetings. None touches on the most critical issues in this case – the scale of the buildings that ESD would allow Vornado and the other property owners to build; the environmental effects of the project; and above all, the project’s questionable funding. The primary value of the documents produced thus far is to paint a picture of the incestuous, day-to-day collaboration between an agency and its beneficiary.

10. ESD continues to withhold an unspecified number of documents, claiming that they fall under various exemptions in the FOIL statute – most significantly, the Intra-Agency Materials Exemption, the Impairing Contracts Exemption, and the Trade Secrets Exemption. *See* Public Officers Law § 87(2)(c), (d), and (g). It has made these claims, however, without even attempting to provide the “particularized and specific justifications” that the Court of Appeals requires. *Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007).

11. Petitioner has filed three appeals with ESD’s Records Access Appeals Officer challenging the agency’s use of the exemptions, and the Officer has denied all three. We ask the Court to step in and overturn the Officer’s two most recent decisions. They are arbitrary and capricious, an abuse of discretion,

and affected by errors of law, and ESD must be ordered to produce the materials it still hides under this cloak of exemption.

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12. The current status of the Override is uncertain. On July 21, 2022, the ESD Directors approved the General Project Plan (“GPP”). But the Public Authorities Control Board (“PACB”), the state agency charged with reviewing the GPP to determine whether the State has made sufficient financing commitments for the project, declined to approve it. At the same time, it also declined to *disapprove* it. Instead, it authorized ESD to proceed with one aspect of the project – negotiating an agreement with the City of New York regarding Payments in Lieu of Taxes (“PILOTs”), a potential revenue source for the Penn Station rehabilitation.

13. But PACB’s well-intentioned compromise is confused. Since it never approved the GPP – in particular, the Override of the City’s zoning laws – those laws remain in effect. But PILOT agreements are allocations of the revenue produced by the increase in property value *from the zoning override*. How can PACB authorize ESD to negotiate a PILOT agreement if the old zoning is still in place?

14. Despite the decision, ESD proceeds with its planning, and PACB could approve the GPP at any time, or authorize ESD to enter into development agreements with the owners of individual sites. For this reason, it remains urgent that ESD turn over the documents. We already know that Vornado and ESD are

dangerously enmeshed. But we will not know the extent of it, and the risks it poses to the Penn project and to the City as a whole, until ESD fully responds to Petitioner's requests.

### **JURISDICTION AND VENUE**

15. This Court has jurisdiction under Article 78 of the Civil Practice Law and Rules.

16. The basis for venue under CPLR § 506(b) is that the material events took place in New York County.

### **PARTIES**

17. Petitioner Charles Weinstock requested the FOIL documents at issue here. He has been active, as both an attorney and a citizen, in challenging the Override.

18. Respondent New York State Urban Development Corporation, doing business as Empire State Development, is a public benefit corporation promoting economic development in the State of New York.

### **FACTS**

#### **1. The Shadow of Vornado**

19. This project has been tainted from the beginning by the State's relationship with Vornado, and two of Petitioner's FOIL requests are attempts to learn more about that role. Again, the backdrop is politics. Vornado's chair, Steven Roth (with his family), contributed at least \$384,000 to the political campaigns of former Governor Cuomo, the project's original shepherd. After

Cuomo resigned, Vornado bestowed similar gifts on Governor Hochul. Over the past year, Roth and two of the company's trustees have each given the maximum \$67,000 to Hochul's reelection campaign.<sup>3</sup>

20. Mr. Roth has gotten his money's worth. Surely it was not a coincidence that ESD drew the boundaries of the project area to include five Vornado properties. Moreover, as the Final Environmental Impact Statement ("FEIS") acknowledges, if ESD's federal partners do not go forward with their still-uncertain plan to extend Penn Station to the block south of 31st Street, the project would excise the three sites that Vornado does *not* own or control. In that event, Vornado would own or control *every* property benefitting from the Override.

21. Even without a complete FOIL response from the agency, it is clear that Vornado has played a dominant role in the development of the project. The documents produced thus far include more than a thousand emails between senior ESD officials and senior Vornado executives, describing innumerable

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<sup>3</sup> Dunn, "This Isn't Podunk," *Politico*. It is clear from the documents already produced that Mr. Roth has been directly involved in this partnership. In December 2020, for example, after the ESD chair, Steven Cohen, proposed a Zoom call with Roth and Janno Lieber, head of the MTA's Construction and Development Division (and now MTA chair), Mr. Roth's executive vice president, Mr. Langer, responded: "My Steve would prefer to do in person with you." Weinstock Aff. Ex. K at 10. Three weeks later, Mr. Langer wrote to Mr. Cohen: "I understand Janno is taking some much deserved time off. My Steve nevertheless wants to sit with you again. Can you please share your availability?" Weinstock Aff. Ex G at 663; *see also, e.g., id.* at 667; Ex K at 4. No doubt there is more here.

meetings and calls. Vornado executives – including Barry Langer, the executive vice president – were on the permanent invitation list for the agency’s recurring “team” meetings. They peppered ESD with agendas for the meetings, attended “dry runs” of ESD presentations to outside groups, gave extensive notes on the Draft Environmental Impact Statement (“DEIS”) and general architectural concepts, and shared the responsibility for political outreach. Weinstock Aff. Ex. O at 79, 113, 213, 268, 271, 308, 422, 550-51.

22. Troublingly, Vornado actually split the bills for five of ESD’s outside advisors: (1) Bryan Cave Leighton Paisner, ESD’s land use attorneys (up to \$950,000); (2) Skadden, Arps, Slate, Meagher & Flom LLP, its real estate attorneys (up to \$950,000); (3) AKRF Inc., the environmental firm that drafted the DEIS and FEIS (up to \$4 million); (4) FX Collaborative Architects LLP, the architectural firm that developed plans for the design guidelines and public realm improvements (up to \$590,000); and most relevantly, (5) Ernst & Young (“EY”), ESD’S financial consultants (up to \$900,000), *i.e.*, the firm that would advise the agency as to how much Vornado should pay for its additional development rights, and when it should be required to pay them. Weinstock Aff. Ex. V, W, X.<sup>4</sup>

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<sup>4</sup> ESD’s website has links to videos of the actual voting by the ESD Directors: [www.youtube.com/watch?v=9rte-z8e3eg](http://www.youtube.com/watch?v=9rte-z8e3eg), timecode 57:52 (Feb. 20, 2020 vote), [www.youtube.com/watch?v=XL9eamo4WwQ](http://www.youtube.com/watch?v=XL9eamo4WwQ), timecode 38:38 (March 26, 2020 vote), [www.youtube.com/watch?v=eC0-IegSL2A](http://www.youtube.com/watch?v=eC0-IegSL2A), timecode 1:35:09 (July 15, 2021 vote).



Vornado's agreement to split the costs of these contracts created clear conflicts of interest for both the consultants and their putative client, ESD.<sup>5</sup>

## 2. The Override and Penn Station

23. To understand ESD's response to Petitioner's FOIL requests, it is necessary to provide background on the centerpiece of the GPP – the Override. As we noted, the Override's ostensible purpose was to help pay for the plan to reconstruct and expand the ailing Penn Station ("Master Plan"), a \$22 billion, top-to-bottom overhaul of the busiest transportation hub in North America. And yet ESD cordoned off its review of the Override from a proper review of the Master Plan as a whole. This was illegal "segmentation" under the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law §§ 8-0101 *et seq.*; and the Urban Development Corporation Act ("UDCA"), N.Y. Unconsolidated Laws §§ 6251 *et seq.*

24. From the beginning, ESD's goal has been to prevent the public from learning about the Master Plan until it is too late, because scrutiny of the plan would expose the fragility of the Override's premise – that the rail station's reconstruction could not go forward without a real estate giveaway on this scale. By voting on the Override *before* voting on the rest of the Master Plan, ESD was saved the necessity of proving that point.

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<sup>5</sup> The FOIL requests in this case address the EY contract only; Petitioner did not learn of the other four cost-sharing agreements until later. Petitioner has since filed FOIL requests relating to them as well, and hopes to receive timely and complete responses.

25. There were a remarkable number of unanswered questions. Neither ESD nor its partners – the MTA, New Jersey Transit, and Amtrak – knew what the new station would actually look like, and thus what it would cost. They still do not. Nor did they know what money they could expect from elsewhere – appropriations from the New York and New Jersey Legislatures, and grants from the U.S. Department of Transportation under the Biden Infrastructure Law, to name three – to rehabilitate the station without the necessity of an Override. As to how much the Override might generate, ESD was clueless. To this day, it does not have a revenue plan for the project. The FEIS, for example, listed five hypothetical funding mechanisms that "could" be used in extracting revenue from Vornado and the owners of the other parcels. FEIS at 26-13.

26. ESD was equally in the dark about *when* that revenue would arrive. The agency conceded that, even using its own optimistic construction schedule for the proposed towers, none or almost none of the money would come in until after the Penn work was completed.

27. And it is a certainty that the real schedule will be slower. The GPP does not require Vornado and the other owners to pay for their new development rights until they are ready to begin construction, and there is no deadline for that. They are free *never* to build. In this uncertain commercial market, with evolving workplace practices and a glut of Midtown office space, it could be decades before they move ahead with construction and the money begins flowing to ESD. In other words, Vornado and the other property owners will enjoy the benefits of

the Override immediately – a massive increase in the value of their properties – without any corresponding obligations.<sup>6</sup>

### 3. The Ruse of “Blight”

28. Recognizing the weakness of its argument that the Override would contribute significantly to rehabilitating Penn Station, ESD attempted a second justification for the plan – that the neighborhood is blighted and must be leveled to make way for new Class A buildings. It was a risible argument. It is the station itself that is blighted.

29. The area features (1) the celebrated new Moynihan Train Hall; (2) Madison Square Garden, whose owners recently completed a \$1 billion renovation of the arena; (3) the James A. Farley Building and two Class A office towers – Vornado towers – that are midway through a \$2.4 billion modernization; and (4) seven buildings that are either listed or eligible for listing in the National and State Registers of Historic Places. The Vornado chair, Steven Roth, stated:

Day and night, the Penn District is teeming with activity. Our assets sit literally on top of Penn Station, the region’s major

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<sup>6</sup> It was these uncertainties that led the City Planning Commission and Independent Budget Office to decline support for the GPP: Letter of Anita Laremont, chair of City Planning Commission, to Hope Knight, President and CEO of ESD (Jan. 27, 2022), [www1.nyc.gov/assets/planning/download/pdf/about/commission/gpp/pennsylvania-station-area-civic-land-use.pdf](http://www1.nyc.gov/assets/planning/download/pdf/about/commission/gpp/pennsylvania-station-area-civic-land-use.pdf), at 2; Independent Budget Office, “On Track or Off the Rails? New York State’s Plan to Use New Development to Fund Penn Station Improvements Leaves Many Open Questions for New York City and State (May 2022), [ibo.nyc.ny.us/iboreports/on-track-or-off-the-rails-new-york-states-plan-to-use-new-development-to-fund-penn-station-improvements-leaves-many-open-questions-for-new-york-city-and-state-may-2022.pdf](http://ibo.nyc.ny.us/iboreports/on-track-or-off-the-rails-new-york-states-plan-to-use-new-development-to-fund-penn-station-improvements-leaves-many-open-questions-for-new-york-city-and-state-may-2022.pdf), at 18.

transportation hub, adjacent to Macy's and Madison Square Garden. . . The Penn District is our moonshot, the highest growth opportunity in our portfolio. . . In the Penn District, we are creating a campus, a city within a city, which will become the beating heart of the NEW New York.<sup>7</sup>

This is not blight. According to the final draft of ESD's own Neighborhood Conditions Study, only eight of the project area's 61 lots are in "poor" or "critical" condition. And the *only* building deemed to be in "critical" condition, the Penn Station Service Building, is owned by ESD's partner Amtrak. Weinstock Aff. Ex. CC, Figure E-3, Addendum at A-5.<sup>8</sup>

#### 4. The History of the FOIL Requests

30. Petitioner filed his original FOIL request (No. 21-06-019) on June 13, 2021 ("First Request"). Weinstock Aff. Ex. A. For the next five months, the only response from ESD was a series of emails explaining that it was continuing to search for the documents.

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<sup>7</sup> Steven Roth, Chairman's Letter (2020), [books.vno.com/books/qybn/-p=16](https://books.vno.com/books/qybn/-p=16), at 14.

<sup>8</sup> When it has served his purposes, Mr. Roth has endeavored to *create* blight, hoping that it would buttress the claim that the neighborhood is irredeemable and needs to be overhauled. This was what he did with the historic Hotel Pennsylvania on one of Vornado's sites here, allowing it to fall into disrepair to prevent its designation as a protected landmark. And this is consistent with his past practices. In a 2010 speech at Columbia's School of Architecture, Roth proudly reported that, after buying the Alexander's department store on Lexington Avenue, he deliberately let it sit vacant for years in order for it to become more "decrepit." Indeed, his own mother called to complain about the homeless sleeping in front of the building. He explained to his Columbia audience: "And what did I do? Nothing. Why did I do nothing? Because I was thinking in my own awkward way, that the more the building was a blight, the more the governments would want this to be redeveloped; the more they would give us when the time came. And they did." Dunn, "This Isn't Podunk," *Politico*.

31. Finally, on November 8, 2021, ESD sent him (1) a link to the MTA's website; (2) two documents already on ESD's website – a chapter of the DEIS, and the Draft Design Guidelines for the project; and (3) a four-page table of projected rail passenger trips to Penn Station – of no utility to anyone. Weinstock Aff. Ex. D, E.

32. It was hardly sufficient. But rather than challenge the adequacy of the response generally, Petitioner elected to focus on two particularly critical requests – those relating to Vornado and Madison Square Garden (“MSG”), the owner of the arena directly above Penn Station. MSG had refused, and continues to refuse, the pleas of both the City and the State to relocate, thereby preventing the State from building an above-ground station.

33. ESD had denied those requests on the grounds that they were not “reasonably described.” Although the agency's position was unsound, Petitioner chose the less confrontational path, and on November 16, 2021, submitted a revised set of requests (No. 21-11-008) identifying specific individuals at Vornado, MSG, and ESD (“Second Request”). Weinstock Aff. Ex. B. The new request for Vornado documents read:

Any communications between (1) any of the following individuals associated with Vornado Realty – Steven Roth, Michael Franco, and Barry Langer – and (2) any of the following current or former ESD executives and board members – Steven Cohen, Eric Gertler, Patrick Foye, Kevin Younis, Jeff Janiszewski, and Holly Leicht.

The new MSG request read:

Any communications between (1) any of the following individuals associated with Madison Square Garden Entertainment – James Dolan, Andrew Lustgarten, and Richard Constable – and (2) any of the following current or former ESD executives and board members – Steven Cohen, Eric Gertler, Patrick Foye, Kevin Younis, Jeff Janiszewski, and Holly Leicht.

34. Soon after Petitioner sent these revised requests, he learned that other individuals may have been involved in the discussions between ESD and Vornado, so he made an additional FOIL request (No. 21-11-014) on November 26, 2021 (“Third Request”), adding more names to the previous Vornado questions:

All documents relating to communications from January 1, 2016 to the present between either Steve Roth, Marc Ricks, or Barry Langer of Vornado Realty and any of the following individuals regarding the Empire Station Complex Project (aka Penn Station Area Redevelopment Project), including all documents relating to the funding of EY's work for ESD: Howard Zemsky, Linda Lovewell, Steve Cohen, Holly Leicht, and Philip Maguire.

Weinstock Aff. Ex. C. In addition, the November 26, 2021 request sought information about EY for the first time:

All documents relating to communications from January 1, 2019 to September 31, 2021 between either Tom Rousakis or Matthew Tester of EY and any of the following individuals regarding the Empire Station Complex Project (aka Penn Station Area Redevelopment Project): Howard Zemsky, Linda Lovewell, Steve Cohen, Holly Leicht, and Philip Maguire.

All documents prepared from 2019 to the present by EY relating to the Empire Station Complex Project (aka Penn Station Area Redevelopment Project).

*Id.*<sup>9</sup>

35. Seven months passed without any documents, only more assurances that ESD was continuing to search for them.

36. On June 3, 2022, Petitioner filed an appeal with ESD's Records Access Appeals Officer pursuant to Public Officers Law § 89(4), setting out the facts described above and alleging that ESD's failure to produce was "constructive denial" ("First Appeal"). Weinstock Aff. Ex. P.

37. The Officer denied the appeal in a letter to Petitioner on June 17, 2022 ("First Decision"). Weinstock Aff. Ex. S. The letter stated that the agency had determined that the delay was "reasonable in view of attendant circumstances," including staff turnover and the availability of only one Records Access Officer to conduct the reviews. *Id.* at 3. The letter did, however, state that the agency would begin providing responsive records as they became available within 10 business days – July 5, 2022 – and would provide a "final response" no later than July 19, 2022. *Id.*

38. On June 28, 2022, ESD issued its "final response." As to Vornado, it sent a tranche of roughly 750 pages of emails between ESD and Vornado executives to schedule calls and meetings. As to EY, ESD produced three one-line emails trying to set up a single Zoom call. There were eight pages of MSG emails,

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<sup>9</sup> The November 16 requests also sought documents relating to the meetings between ESD and the Community Advisory Committee Working Group on the project, but ESD has since published the requested documents on its website at <https://esd.ny.gov/penn-station-area-gpp-and-related-documents>.

also just to set meetings. Last, ESD sent a PowerPoint already available on its website. Weinstock Aff. Ex. G, I.

39. The cover letters – one for the Second and one for the Third Request – explained that ESD withheld an unspecified number of documents based on four statutory exemptions. Weinstock Aff. Ex. F, H. First, it withheld “some” relating to Vornado and EY based on the Public Officers Law 87(2)(c) exemption for records containing information that “if disclosed would impair present or imminent contract awards.” *Id.* Ex. F at 1, Ex. H at 1. Second, it withheld documents relating to communications between ESD and EY based on the Section 87(2)(g) exemption for “inter-agency or intra-agency materials” (treating the agency’s communications with the outside consultant as “intra-agency” communications). *Id.* Ex. H at 1. Third, it asserted that it was continuing to process the remainder of Vornado and EY records and might withhold some after it completed a “trade secrets” review under Section 89(5)(d).<sup>10</sup> *Id.* Ex. F at 1, Ex. H at 2. Finally, it invoked the Section 87(2)(i) exemption for

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<sup>10</sup> On June 16, 2022, pursuant to Public Officers Law § 89(5), ESD sent Vornado’s executive vice-president, Mr. Langer, copies of Vornado-related documents that the company might request to be withheld based on the Trade Secrets exemption. Weinstock Aff. Ex. Y. Langer responded that Vornado did want them – or at least some of them – withheld, and on June 29, 2022, ESD granted his request – at least for some of them. Weinstock Aff. Ex. Z. Petitioner does not know any more than that. ESD has not identified which documents ESD sent to Langer, which Vornado asked to withhold, and which ESD agreed to withhold. As to any trade secret claims for EY, ESD has provided *no* information. We have no idea whether the agency invited the company to request the exemption as to certain documents, or whether EY requested it on its own – as it is permitted to do under the statute – or either way, whether the agency withheld any documents on that basis.



documents that, if disclosed, would jeopardize the agency's capacity "to guarantee the security of its information technology." *Id.* Ex. F at 1, Ex. H at 1. In no instance did ESD offer a "particularized and specific justification" for asserting an exemption. Instead, it simply quoted the language of the statute.

40. On July 1, 2022, Petitioner filed a second appeal, arguing that ESD failed to certify that ESD had conducted a "diligent search," as Public Officers Law § 89(3)(a) requires, and failed to provide "particularized and specific justifications" for asserting the four statutory exemptions ("Second Appeal"). Weinstock Aff. Ex. Q.

41. In particular, the appeal noted that, although the Intra-Agency Materials Exemption could in certain cases apply to communications with outside consultants, it could *not* apply if, as here, the consultant's fees were paid by a party that would benefit from the proposed plan. *Id.* at 2-4. The appeal also noted that ESD's Impairing Contracts Exemption claim failed to establish that disclosure would "impair" ESD's prospects in those negotiations. *Id.* at 4-5.

42. In addition, the appeal challenged the Trade Secrets claim based on the agency's failure to provide any persuasive evidence that Vornado might suffer "competitive injury." *Id.* at 5. As to ESD's invocation of the Information Technology Exemption, Petitioner professed confusion and asked the agency to clarify the claim. *Id.* at 6.

43. On July 19, 2022, ESD issued a decision denying Petitioner's Second Appeal ("Second Decision"). Weinstock Aff. Ex. T. In response to

Petitioner's argument that the Intra-Agency Materials Exemption did not apply if the outside consultant's fees were paid by a party that would benefit from the proposed plan, ESD claimed that Vornado had not, in fact, paid the fees. It cited a 2020 general cost-sharing agreement between Vornado and ESD that did not include reference to the EY agreement, inferring from that omission that Vornado did not pay for EY. *Id.* at 4.

44. In defense of invoking the Impairing Contracts Exemption, ESD wrote that it had had to engage in "preliminary negotiations" with Vornado "as it relates" to the EIS, GPP, and Design Guidelines and that those were "intrinsically connected to what would *eventually* be one or more contracts for site development." *Id.* at 5 (emphasis added). As to the Trade Secrets Exemption, ESD concluded that Petitioner's challenge was not "ripe" and would have to await the agency's final decision on Mr. Langer's exemption claims. With respect to the Information Technology Exemption, ESD represented that it invoked it only to protect "conference code numbers and passwords." *Id.* at 6. ESD also represented that it had, in fact, conducted a "diligent search." *Id.* at 3.

45. The next day, on July 20, 2022, ESD produced a revised version of the PowerPoint presentation, and roughly 250 more pages of scheduling emails. Weinstock Aff. Ex. K, M. The cover letters reiterated the agency's exemption claims and added a new one – that, as to the Vornado requests, disclosure of some documents would constitute "an unwarranted invasion of personal privacy"

under Public Officers Law § 87(2)(b). Weinstock Aff. Ex. J, L. The letters made no attempt to explain that assertion either.

46. Two weeks later, on August 2, 2022, ESD produced a final tranche of 950 pages. Weinstock Aff. Ex. O. Nearly all were scheduling emails, as before, but a few touched lightly on substantive matters. The agency's cover letter stated that it was still withholding documents based on the Information Technology, Impairing Contracts, Trade Secrets, and Personal Privacy Exemptions. Again, the letter provided no explanation for why these exemptions applied. Weinstock Aff. Ex. N.

47. Five days later, on August 7, 2022, Petitioner filed his third administrative appeal, challenging ESD's latest defense ("Third Appeal"). Weinstock Aff. Ex. R. ESD had still failed to provide "particularized and specific justifications" for any of its exemption claims. Moreover, regarding the Intra-Agency Exemption and ESD's reference to the 2020 cost-sharing agreement between Vornado and ESD, the appeal pointed out that the EY agreement was entered into *after* the 2020 general agreement, and that Petitioner's own supporting evidence was dispositive – two resolutions passed by the ESD Directors authorizing the EY contracts, which expressly identified Vornado as one of the two "funding sources."

48. The appeal identified three errors in ESD's argument for invoking the Impairing Contracts Exemption: (1) the negotiations it cited – relating to the EIS and GPP – were not contract negotiations, but an intrusion by Vornado on

what should have been independent governmental decision-making; (2) any contracts the company might later enter into are far from “imminent,” given the pace of the project and the state of the Midtown commercial real estate market; and (3) even if the contracts are imminent, ESD never established that producing the documents would “impair” the contracts. As to the Trade Secrets claim, ESD’s entire defense consisted of stating the elements of the claim.<sup>11</sup>

49. On August 22, 2022, the agency issued a decision rejecting this third appeal as well (“Third Decision”). Weinstock Aff. Ex. U. The decision made no attempt to respond to Petitioner’s arguments with respect to two of the exemptions: “To the extent that the instant appeal was meant to appeal the inter/intra-agency and imminent contract exemptions for the August Determination, ESD reiterates and incorporates by reference its arguments made in the July 19, 2022 appeal response.” *Id.* at 3.

50. As to the Trade Secrets Exemption, ESD cited case law construing the general meaning of the statute, but made no attempt to apply it to this case.

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<sup>11</sup> Petitioner withdrew his challenge to ESD’s use of the Information Technology Exemption, based on the agency’s representation that it was used only to protect “conference code numbers and passwords.” Weinstock Aff. Ex. R at 1 n.1. To the extent that this representation is inaccurate, he renews the challenge. Petitioner also accepted ESD’s representation that it had conducted a “diligent search” for the requested documents (even if it was not properly forthcoming with the documents that it *did* find). To the extent that the representation is inaccurate, he renews that challenge as well.

And finally, as to the Personal Privacy Exemption, the decision cited “personal health” and “personal cell numbers.”<sup>12</sup>

51. Attached to Petitioner’s affirmation is a chronology of the above FOIL history. Weinstock Aff. Ex. DD.

## 5. The Current Status of the Project

52. As we noted, the current status of the Override is unclear. On July 21, 2022, the ESD Directors approved the GPP, but PACB was unable to make the required finding that there are “commitments of funds sufficient to finance the acquisition and construction of such project.” Public Authorities Law § 51(3).

53. Rather than vote to disapprove, however, PACB simply authorized ESD to proceed with the negotiation of a PILOT agreement with the City, as long as the agreement was consistent with the terms set out in a July 18, 2022 City/State memorandum of understanding.<sup>13</sup> PACB’s resolution read: “NOW

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<sup>12</sup> Based on those representations, Petitioner now withdraws his challenge relating to the Personal Privacy Exemption. To the extent that the representations are inaccurate, he renews the challenge.

<sup>13</sup> Letter of Mutual Agreement between City of New York, State of New York, and Empire State Development, July 18, 2022, [esd.ny.gov/sites/default/files/State-City-Penn-Letter-of-Mutual-Agreement-Signed-Final-071822.pdf](https://esd.ny.gov/sites/default/files/State-City-Penn-Letter-of-Mutual-Agreement-Signed-Final-071822.pdf). This was clearly a memorandum of understanding, not an agreement: “It is expressly agreed that this Letter does not create or give rise to any contractual or other legally enforceable rights, obligations or liabilities of any kind on the part of any Party; it being the intent of the Parties that only subsequently formalized definitive agreements, if executed and delivered, shall obligate all Parties on the matters set forth herein, it being understood that execution and delivery of said definitive agreements is subject to all applicable governmental reviews and approvals.”

THEREFORE BE IT RESOLVED, that the PACB approves UDC [ESD] entering into the PILOT Agreement with the City in accordance with section 51 of the Public Authorities Law.”<sup>14</sup> The resolution added:

Prior to the development of each Development Site or group of Sites, UDC will, subject to required governmental reviews and approvals, including without limitation approval by the PACB, enter into a development agreement with the designated developer, acquire title to the Development Site(s), and ground lease the Development Site(s) to the developer in order to among other things obligate the developer to make payments to UDC, including payments of PILOT Revenues that will be used by UDC in accordance with the PILOT Agreement, between UDC and the City, summarized above in the PACB Resolution for the Project. At this juncture, UDC only seeks PACB approval of the PILOT Agreement with the City.

54. PACB’s refusal to approve the GPP – in particular, the Override of the City’s zoning laws – means that those laws are still in effect. But the purpose of PILOT agreements is to divert from the City’s coffers the additional tax revenues *produced by the Override’s more generous zoning*. If the old zoning remains in place, there will not be the additional revenues.

55. Still, PACB could approve the GPP at any time, or approve individual development agreements with Vornado or the other property owners. Moreover, there is sufficient confusion about the meaning of the decision that ESD might attempt to argue – incorrectly – that PACB *did* implicitly approve

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<sup>14</sup> Public Authorities Control Board, Resolution No. 22-UD-1958, July 27, 2022, [www.budget.ny.gov/boards/pacb/072722/No.22-UD-1958.pdf](http://www.budget.ny.gov/boards/pacb/072722/No.22-UD-1958.pdf).

the Override, even if it also required ESD to later return to PACB to review any individual development agreements.

56. Either way, a number of civic organizations are planning to challenge ESD's approval of the FEIS and the GPP. Petitioner himself may be involved. But they will not be able to fully present their case unless these critical materials are produced. It violates both the spirit and letter of the Freedom of Information Law for the agency to hide these materials until it is too late for the public to learn just how this unsavory project came to be, and to bring a proceeding to stop it.

**CAUSE OF ACTION:  
FREEDOM OF INFORMATION LAW**

57. FOIL provides that all government agencies "shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that fall within certain exemptions specified in the statute." Public Officers Law § 87(2).

58. The burden is on the agency to establish that the exemption applies. Public Officers Law § 89(4)(b). It cannot meet this burden with "conclusory characterizations" or a merely "plausible" justification; it must provide "a particularized and specific justification." *Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007).

59. If only a portion of a document is exempt, the agency must disclose all portions that are not. *Schenectady County Society for Prevention of Cruelty to Animals v. Mills*, 18 N.Y.3d 42, 46 (2011).

60. In the Second and Third Decisions, ESD failed to provide a particularized and specific justification for withholding any documents under the Intra-Agency Exemption, the Impairing Contracts Exemption, or the Trade Secrets Exemption.

61. The two decisions were therefore arbitrary and capricious, an abuse of discretion, and affected by errors of law, and are therefore null and void.

#### ATTORNEYS' FEES

62. FOIL also provides that, in an Article 78 proceeding challenging an agency's refusal to turn over documents, the Court "*shall* assess against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred" by the petitioner if (1) the petitioner has "substantially prevailed" and (2) the agency had "no reasonable basis for denying access." Public Officers Law § 89(4)(c)(ii) (emphasis added).

63. Petitioner will substantially prevail here, whether because ESD recognizes that its position is untenable and voluntarily turns over the documents or because this Court orders it to do so.

64. ESD had no reasonable basis for withholding the documents.

#### PRAYER FOR RELIEF

WHEREFORE, Petitioner requests that the Court grant the following:

1. An order directing ESD to produce within seven business days all documents requested by Petitioner in FOIL Requests 21-11-008 and 21-11-014 but

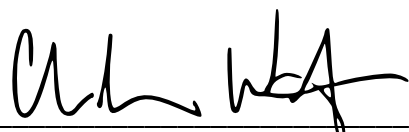


withheld by ESD on the grounds that they are exempt from disclosure under Public Officers Law § 87(2)(c), (d), or (g);

2. An award to Petitioner of his costs, disbursements, and expenses, including reasonable attorneys' fees; and

3. Any other relief that this Court deems just and proper.

New York, New York  
August 31, 2022



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*Attorney for Petitioner*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

CHARLES WEINSTOCK,

Petitioner,

For a judgment pursuant to CPLR Article 78

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION d/b/a EMPIRE STATE  
DEVELOPMENT,

Respondent.

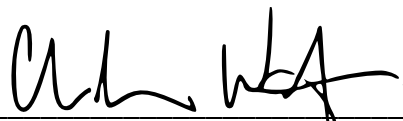
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IAS Part

**VERIFICATION**

CHARLES WEINSTOCK, an attorney admitted to practice before the  
courts of the State of New York, affirms under penalty of perjury:

I am the Petitioner in this proceeding. I have read the attached Petition  
and know its contents to be true except for matters alleged upon information and  
belief. As to those matters, I believe them to be true.

New York, New York  
August 31, 2022



CHARLES WEINSTOCK