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OPEN ESD

**Increasing the Transparency
and Accountability of Empire
State Development**



377 Broadway, 9th Floor
New York, NY 10013

OPEN, ACCOUNTABLE, EFFECTIVE GOVERNMENT

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Introduction

Empire State Development (ESD) is the economic development arm of New York State. ESD manages most of the state's billions of dollars in ongoing corporate subsidy programs, like the Excelsior Tax Credit and the film tax credit. At the behest of the Governor, ESD also leads state mega-subsidy deals that involve non-competitive, multi-billion dollar deals with favored businesses, like the Penn Station Redevelopment project with Vornado Realty Trust. In addition, ESD manages the Governor's Regional Economic Development Councils, which despite their prominence, have not been established in law, regulation, or executive order.

Reinvent Albany has been assessing state agencies and authorities for more than a decade. Among New York State entities, we believe ESD is among the most vulnerable to corruption and political abuse. ESD is completely controlled by the Governor and has an amorphous mission that reduces accountability and can be used to rationalize secret, sole-source dealmaking totally at odds with the transparency and competitive bidding practices known to reduce government corruption and waste.

Importantly, many ESD "economic development" contracts, be they subsidy packages supporting non-competitive mega-projects or public-private partnerships, or approving eligibility for billions in off-budget tax expenditures, are not subject to independent review by the State Comptroller or anyone else. Problematically, ESD routinely does not publish the basic details of complicated subsidy deals, including how much public subsidy is being provided, how the number of new or retained jobs was calculated, the marginal cost per job or how the subsidy amount was determined, potential risk to the taxpayer, or why a particular business was selected in the first place.

We understand that the Governor and Legislature use ESD to oversee the misguided and discredited subsidy programs that they concoct. Indeed, we think ESD's Board and staff often have to choose between obeying the Governor's dictates, which can be economically irrational and highly politicized, or fulfilling their duty to the people of New York, including obeying the transparency, accountability, and ethical responsibilities mandated in public authorities and public officers law.

Neither the public nor ESD should have to worry about divided loyalties. The best interest of the people of New York comes first. It's our tax dollars, our votes, our future, our state government.

Acknowledgements

This report was written by Elizabeth Marcello, PhD, Senior Research Analyst, with John Kaehny, Executive Director. Rachael Fauss, Senior Policy Advisor; Tom Speaker, Policy Analyst; and Stephanie Jala-Thorne, Director of Operations, also provided invaluable support. Special thanks to Aidan Feldman for his research assistance with the ESD website.

Reinvent Albany thanks the individuals who spoke with us about their experiences with ESD/UDC. We conducted on- and off-the-record interviews with former senior New York State officials who worked for ESD or the Governor's office and have detailed knowledge about how ESD works. We also spoke with journalists and experts from academia, think tanks, and advocacy groups.

Thanks to:

Anonymous former senior ESD official

Anonymous former Executive Chamber official

Anonymous former senior UDC official

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About Reinvent Albany

Reinvent Albany advocates for transparent and accountable New York State government and increased transparency in New York City. We advocate for more accountable and better-governed state authorities, including the Empire State Development Corporation (ESDC). We work to strengthen the Freedom of Information Law (FOIL) and put government information online, especially spending, contracting and budget information, and we are vocal advocates for open data laws and practices. We also work for transparent business subsidies and economic development spending rooted in facts and careful analysis.

Reinvent Albany seeks to create a state government that is responsible, responsive, and above board, and thus we fight for public integrity measures and against laws and practices that increase the risk of corruption and favor the few and well-connected over the public interest. We strongly support the work of New Yorkers who work to increase public integrity and public trust. We share many of their goals, especially fighting corruption, and we support their work to make elections fair, easy, and clean.

Summary

Watchdog group Reinvent Albany's Open ESD report includes 35 specific actions to improve ESD's transparency, governance, oversight, and ethics. Reinvent Albany wrote the report to encourage the public authority's Board of Directors and staff, the Governor, Legislature, State Comptroller, and Authorities Budget Office to take many big and small steps to increase public confidence that ESD puts the public first, not the Governor or powerful special interests and business clients.

Key Points

1. ESD is among the state authorities and agencies most vulnerable to corruption, pay-to-play, and political abuse. ESD has an amorphous mission that reduces its public accountability, and the Board and senior management are completely controlled by the Governor and show very few signs of acting independently. ESD by design engages in massive, secretive, sole-source deals totally at odds with basic principles of government spending and procurement that emphasize transparency and competitive bidding.
2. ESD is secretive and does not publicly disclose basic information about many subsidy deals, including the size of the subsidy, subsidy cost per job, and the financial assumptions underlying the subsidy. ESD does publish a huge amount of information, but much of it is more akin to a press release than usable data or honest evaluations of ESD activities that make it clear to taxpayers what their money is actually buying.
3. ESD officials must obey the New York State Public Authorities Law and Public Officers Law, which establish clear expectations for ethical and transparent behavior by the Board of Directors and staff. These laws are rooted in the principle that government is the public's business, and the people's right to know is basic to our society and democracy. Rather than embrace this responsibility, ESD officials and staff too often dodge reasonable questions from the public and journalists and game legal exceptions to delay and/or avoid disclosing records under the Freedom of Information Law. Their general secretiveness is so vexing that progressive and conservative watchdog groups and state legislators had to push for years to create a Database of Economic Incentives – something states like Florida, Wisconsin, and Washington have had for years – which still does not reveal the total state subsidies an individual business has received over the last decade.

This report makes 35 recommendations in four areas: Governance, Oversight, Transparency, and Ethics/Conflicts of Interest.

Recommendations

35 Things New York Can Do to Show Empire State Development Puts Its Duty to the Public First

ESD Governance

Empire State Development is an agglomeration of a state agency and two public authorities (one of which, bizarrely, [does business under the name of its own subsidiary](#)). ESD's component units also have dozens of subsidiaries with their own governance structures, and ESD components and subsidiaries have in turn created hundreds of Limited Liability Companies as legal owners of specific ESD projects. One person serves as the chief executive of all three component entities. The big boss, who is appointed by the Governor, is simultaneously a state commissioner and CEO of two component public authorities.

Organization

1. The Legislature should pass legislation that merges the Job Development Authority and the Urban Development Corporation into one public authority called Empire State Development. The current, convoluted structure has existed since 1995 and there is no reason it should continue.
2. The Legislature should create a Department of Subsidy Eligibility outside of ESD control that replaces the Department of Economic Development. This new agency should have the sole mission of determining eligibility for the billions of dollars of legislatively-created tax expenditure programs. (It's possible this function could also be moved to Tax and Finance.) It is a conflict of interest for ESD – which helps businesses maximize their state subsidy packages – to also determine eligibility.
3. The Legislature should pass [S989 \(Mattera\) / A1768 \(Colton\)](#) of 2023 which requires legislative approval for the creation of any new public authority subsidiaries.
4. The Legislature should have to approve the creation of any new LLCs for real estate deals.
5. The Legislature should rewrite ESD's mission statement to clearly establish the authority's purpose and core functions.

ESD Board

6. The Legislature should amend the Urban Development Corporation (UDC) Act so that of the nine members of the board of directors, three members total are selected by the State Comptroller and majority leaders of the Assembly and

Senate, who select one appointee each. The remaining members can be appointed by the Governor.

7. The Board should, in practice, be given independence to reject projects and programming; agenda items should be discussed and voted on individually.
8. ESD should amend its bylaws to state that the Board of Directors selects the Chair of the Board.

ESD Accountability

The evaluation and oversight of ESD and its programs is essential to ensuring that public dollars are spent in the most effective and efficient way possible. This is especially important given ESD's vague mission and breadth of mandates. ESD's programs and projects severely lack accountability and do not follow procurement and budgeting best practices. Further, projects and programs are rarely, if ever, independently evaluated. There are many steps that the Legislature and other oversight bodies can take to increase the accountability of ESD. However, we believe the most important step that ESD can take is to shift its allegiance from the Governor and the businesses it serves to the public.

Oversight

9. The State Comptroller should conduct more regular audits of ESD programs and projects. We suggest an audit of ESD compliance with Executive Order 95 of 2013 requiring the publishing of all public data on the New York State Open Data portal, as well as an audit of ESD transparency practices when it comes to megaprojects.
10. The Authorities Budget Office (ABO) should conduct a governance and operational report/review of ESD.
11. The Legislature should pass [S6746 \(Ryan\)](#) of 2023 to expand the powers of the ABO. The ABO should have the power to remove board members who neglect to complete required state training, and to dissolve authorities who act outside of their legal authority.
12. Relevant committees of the State Legislature, such as Corporations, Finance, and Government Operations, should hold regular oversight hearings regarding ESD's activities, including business subsidy programs and megaprojects, outside of the regular budget hearings.

Evaluation

13. The Legislature should pass legislation that adds a sunset date for all tax abatement programs unless there is an evaluation showing clear evidence of a positive return on investment (ROI) provided by an independent evaluator hired by the Comptroller (and not the agency itself).

14. The Legislature should assess whether ESD's current definition of "job" (defined as FTE, or full-time equivalent) is adequate and consistent with best practices.
15. ESD should eliminate the concept of a "retained" job. It is impossible to demonstrate whether a job is retained because of a government subsidy or market conditions.

Transparency

ESD's first loyalty should be to the public, and that includes making information readily available for public consumption. There are many steps the entity can make to increase transparency of its programs to the public.

Open Data

16. ESD should have a fully functional database of deals that allows the public and the Legislature to see and evaluate the effectiveness of ESD programs and projects.
17. ESD should publish a schedule of reporting requirements that includes links to relevant reports. In the long term, the Governor and the Legislature should streamline the reporting process so reports are less onerous to ESD staff.
18. ESD should fully comply with Executive Order 95 of 2013, requiring the publishing of all public data on the New York State Open Data portal. Legislation should be considered in this area if compliance cannot be achieved administratively.
19. The Legislature should pass [S1883 \(Skoufis\)](#) of 2023 which requires economic development entities (like Regional Economic Development Councils) to be subject to Open Meetings and Freedom of Information Laws, and requires members to file financial disclosures.
20. ESD should create and publish on its website an organizational chart like other agencies and authorities, as recommended by the Comptroller's [Standards for Internal Control](#) and the Authorities Budget Office's [Guidance on Public Authority Websites](#). See, for example, the Office of the State Comptroller's [organizational chart](#).
21. When ESD releases large volumes of data regarding any project or initiative, they should release relevant datasets (like those included with an environmental impact assessment or General Project Plan, which can total hundreds of pages in PDF format) in an open data format. If this data is produced by an outside consultant, the contract for the analysis should require provision of open data. Legislation should be considered in this area if compliance cannot be achieved administratively.
22. The Legislature should pass legislation requiring ESD to release all financial documents and analyses related to any project that seizes land (and tax payments) from any locality.

Freedom of Information Law (FOIL)

23. ESD should adopt an Open FOIL “release to one release to all” policy facilitated by enterprise software like New York State’s GovQA. The Port Authority of NY/NJ has been doing this since 2012. Additionally, FOIL requests should be used to prioritize proactive release of information via a “Reading Room,” where documents are publicly available online.
24. The Legislature should pass [S3257 \(Hoylman-Sigal\)](#) of 2023, which ends companies’ ability to indefinitely block public access to records submitted to the state.
25. The Legislature should pass [S3502-A \(Skoufis\)](#) of 2023, which ends the FOIL exemption for consultant reports paid for by the state.

Project and Program Transparency

26. ESD should proactively release detailed financial data for all projects undertaken, including revenue and cost projections. ESD should be explicit about standard financial assumptions embedded in its models and make clear degrees of uncertainty, especially for out-years.
27. ESD should allow live public comment at its Board meetings so the public can fully and meaningfully participate in Board actions and decisions.
28. The Legislature should stop using broad and vague appropriation language when it creates new programs within ESD, and stop using lump sum appropriations for economic development spending. Any money set aside for a program should have specific language governing how and when that money should be used.

Website

29. ESD should fix dead links and link misdirects on its website.
30. ESD should redo their [reports page](#). Reports and other materials should be accessible in list/table form and filterable by topic and/or subsidiary releasing the report. See the [Authorities Budget Office](#) website for an example. This would be much easier to navigate than the current system, which involves a lot of clicking through pages and skimming to find specific reports and tabular data.
31. ESD should list all subsidiaries on its website and publish all available subsidiary reports.
32. ESD Board meetings should be made more transparent. ESD should create a database on the New York State Open Data portal that includes Board materials, actions, votes, and recusals.
33. ESD should provide all materials for Board meetings at least three days in advance of Board meetings so the public can meaningfully comment on agenda items. Any budget or tabular data should be provided in an open, machine-readable format.

Ethics and Conflicts of Interest

Ethics disclosures are only useful if they are readily available to the public. Further, ESD Board members should be held to the highest standards, as they are responsible for billions of dollars in public spending.

34. ESD should post on its website the financial disclosure forms of the CEO/President, ESD Board members, and senior management of ESD, including for its subsidiaries.
35. ESD Board members should fully comply with ABO policy on recusal and abstention. Members should be required to provide detailed disclosures of conflicts when members recuse, which should be included in minutes that record specific reasons for recusal.

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ESD Structure and Activities

Empire State Development (ESD) is an amalgamation of the Urban Development Corporation (UDC), the Job Development Authority (JDA), and the Department of Economic Development (DED). Because of UDC and JDA’s public authority status, the entity is governed by the requirements for all state and local authorities under Public Authorities Law §2824. These laws relate to its appointment structure, as well as requirements for committees to be formed to oversee and approve ESD operations, budgets, capital programs, and procurement.

UDC does business as a subsidiary of itself, the Empire State Development Corporation. UDC also has more than 50 active and inactive subsidiaries, and dozens of housing project-related corporations. See Figure 1.

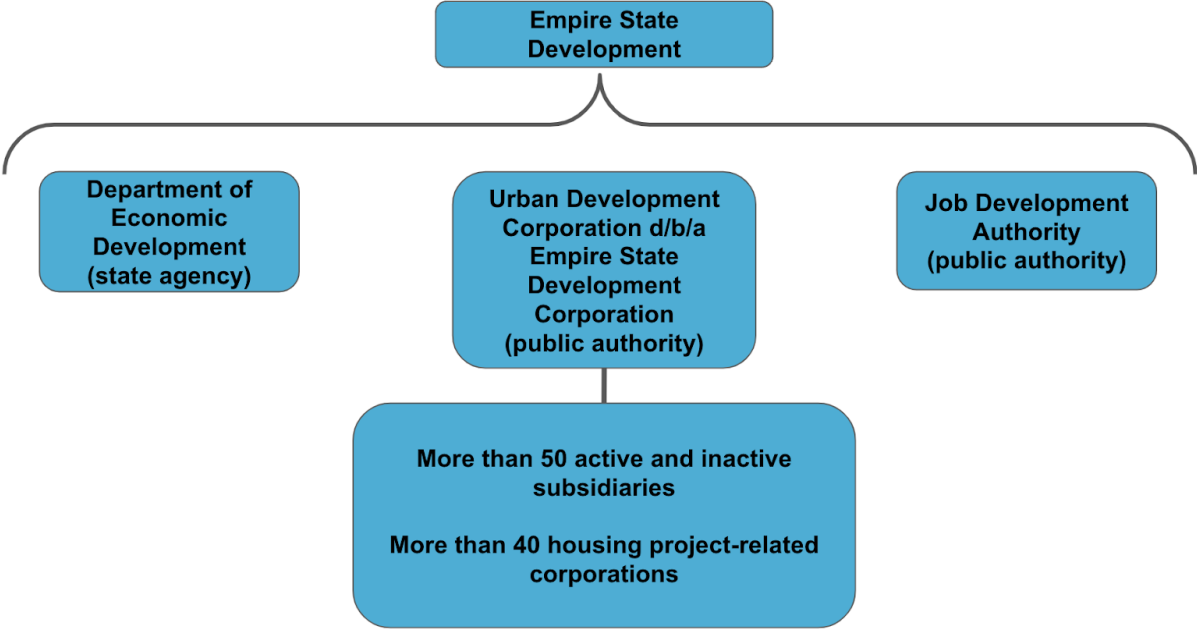


Figure 1: ESD structure

The Governor of New York State has total control over ESD. The Governor hires and fires the person who is the combined Chief Executive Officer (CEO) and President of the Urban Development Corporation doing business as (d/b/a) Empire State Development Corporation; the President, CEO, and Chair of the Job Development Authority; and the Commissioner of the Department of Economic Development. This person also serves as an ex-officio member of the ESD Board and has the ability to hire and fire all ESD staff including the Chief Financial Officer, General Counsel and Executive Vice President of Legal, Chief Operating Officer (who is also the Executive Deputy Commissioner of the Department of Economic Development), the Senior Vice President of Strategic Business

Development, and the Chief of Staff (who is also the Executive Vice President of State Marketing Strategy within the Department of Economic Development). The Board of Directors cannot fire the President and CEO of UDC d/b/a ESDC.

The Governor, with consent of the Senate, appoints a superintendent of financial services, who serves as an ex-officio director on the Board. The Governor also appoints the six other directors on the Board. This Board and executive leadership makeup ensures gubernatorial control over Empire State Development. Figure 2 shows the appointment structure of ESD.

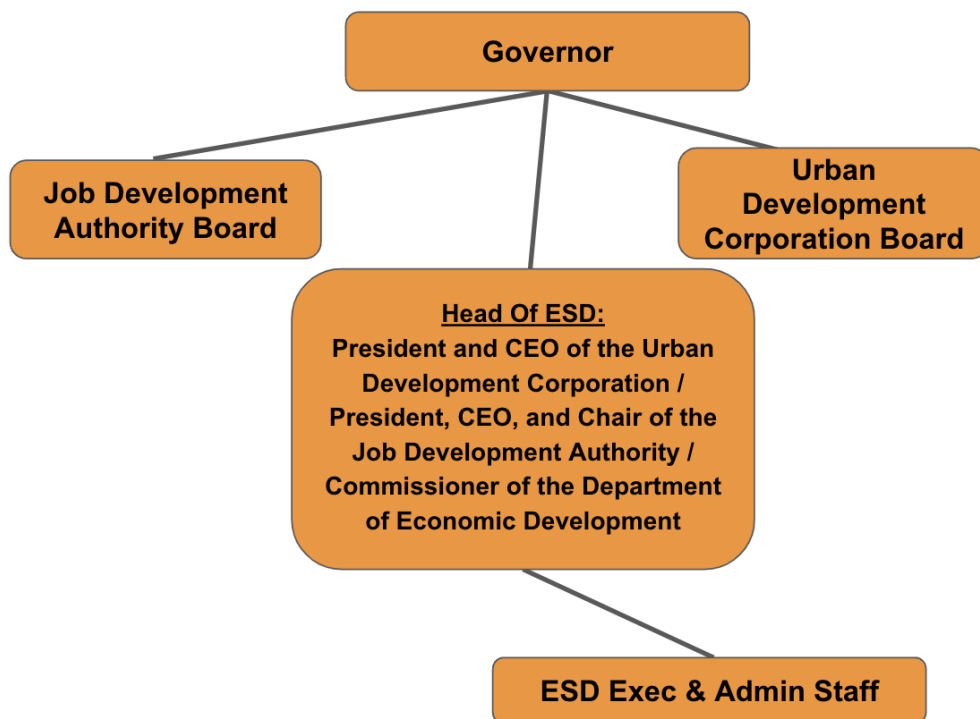


Figure 2: ESD appointment structure

While Public Authorities Law §2824 dictates that board members of state and local authorities “shall execute direct oversight of the authority’s chief executive and other management,” in reality the President & CEO of UDC/JDA is appointed by and serves at the pleasure of the Governor and is thus accountable to the Governor.¹

ESD operates in conjunction with 10 regional offices located throughout the state: Western NY, Finger Lakes, Southern Tier, Central NY, Mohawk Valley, Capital Region, Mid-Hudson, New York City, Long Island, North Country. Each regional office coordinates with a Regional Economic Development Council (REDC). These councils

¹ Public Authorities Law §2824: <https://www.nysenate.gov/legislation/laws/PBA/A9T2>

were created in 2011 by Governor Andrew Cuomo. REDC boards consist of local experts and stakeholders from business, academia, local government, and non-governmental organizations who are appointed by the Governor. Each board creates a specific regional strategy for their region, and assists and advises state officials on specific goals and strategies as it relates to their particular geographic area.

REDCs assist ESD with the disbursement of economic development funding. Each REDC develops its own strategies for identifying and recruiting applicants for funding, and applicants – including local governments, businesses, and non-profit organizations – use a consolidated funding application (CFA) to apply for state funding.²

ESD's formal structure is important to understanding how it behaves. But, the formal structure is just one component. The Governor's control over the Board of Directors and the entire entity work in tandem to produce an agency that operates with little accountability to the public and is simply an extension of the Governor's office.

ESD Board

Per the [Urban Development Corporation Act](#), ESD's Board of Directors, doing business as the Board of Directors of the Urban Development Corporation (a component of ESD), comprises nine members: the superintendent of financial services, the chairperson of the New York State Science and Technology Foundation, and seven others appointed by the Governor with the advice and consent of the Senate. Of the seven directors appointed by the Governor, the Governor names a chairperson of the board. The ESD chairperson serves without a salary and presides at all meetings of ESD. ESD Board members have a fiduciary duty to the Authority and the people of New York, as required by Section 2824 of the Public Authorities Law.³

The Board of Directors votes on the activities of UDC, including business transactions and the exercise of the powers and functions of UDC. For any vote, a majority of directors constitutes a quorum and thus a majority can exercise the power of the corporation.

Many former officials from the executive chamber, ESD, and elsewhere – whose tenures spanned the last three decades – told us that functionally, ESD is an extension of the Governor's office and is highly politicized. ESD is not an independent state authority

² The CFA, introduced in 2011, is used to apply for state funding from all state entities, not just ESD. With the CFA, an individual or an entity has the ability to apply for funding from 30 different programs across 10 different state agencies.

³ See [Appendix 2](#) for the Acknowledgement of Fiduciary Duty that Board Members sign as required by the Authorities Budget Office (ABO).

that makes decisions based on facts and evidence. Rather, ESD is mandated to carry out certain programs and projects by the Governor (and to some extent, the Legislature).

The ESD Board of Directors largely acts as a rubber stamp on ESD projects. ESD directors rarely engage in substantive discussion, ask questions, or reject any projects under consideration at their meetings. Instead, projects and programs are initiated by the Governor's office and presented to the board for a perfunctory and performative vote.

In the case of the Atlantic Yards/Pacific Park project in Brooklyn, an ESD project initially announced in 2003, the ESD Board did zero due diligence when approving the Final Supplemental Environmental Impact Statement (Final SEIS).⁴ Specifically, the Board did not ask questions of staff or of any commentators presenting evidence, nor did they raise concerns as to whether the Final SEIS was complete with respect to scope, content, and adequacy. Instead, the Board simply rubber-stamped the Final SEIS.

The same is true of the Penn Station Redevelopment project. The project was first unveiled by former Governor Cuomo in 2016. After Cuomo resigned, Governor Hochul made the project her own in November 2021. She renamed it, scaled it down, and set out to push the project forward. In making these announcements, it was also revealed that ESD would acquire the land necessary for the project and take control of the planning and development process.

The ESD Board failed to fulfill its fiduciary duty by allowing the ESD staff to draft and send an application regarding Penn Station Redevelopment finances – which could have cost billions of dollars in state spending – to the Public Authorities Control Board (PACB) for its July 27, 2022 meeting. The application itself was never voted on by the ESD board, only the General Project Plan which is a land use document, not a financial plan.⁵ The application to the PACB contained no dollar figures or other final details about costs, budgets, revenues, or expenditures – only a nonbinding “framework” agreement for potential Payments in Lieu of Taxes with the City of New York.⁶ Additionally, the staff failed to provide the ESD Board the full financial analysis conducted by its consultant, Ernst & Young, as admitted in documents submitted by ESD's lawyers in a lawsuit challenging the project.⁷

⁴ “Atlantic Yards kabuki: ESD Board approves final SEIS as ‘complete,’ despite being told of gap,” <https://atlanticyardsreport.blogspot.com/2014/06/atlantic-yards-kabuki-esd-board.html>

⁵ The PACB must approve the financing and construction of projects proposed by UDC d/b/a ESD. For more on the creation and role of the PACB, see [the section on the PACB](#) later in the report.

⁶ Public Authorities Control Board final resolution is available at: <https://reinventalbany.org/wp-content/uploads/2022/08/PACB-Reso-Penn-Station-No.22-UD-1958.pdf>

⁷ Letter from Ira Lipton to Judge Lucy Billings, January 13, 2023, available at: https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId= PLUS_4xlos6aMiuhJtu5b7XQGw==&system=prod

A Reinvent Albany analysis of PACB applications found that the approval of an application with “N/A” provided for the project’s financing was highly unusual.⁸ Other PACB applications from ESD have been specifically approved by the ESD Board Bond Committee, such as those for bond authorizations, so it is notable that the Penn Station project application did not have any dollar figures attached.⁹

The ESD Board voted to approve the Penn Station project at its July 2022 meeting even though the materials ESD staff provided to the ESD Board did not explain the costs, nor the fiscal and financial liabilities to the public.¹⁰ For instance, the materials did not include basic details such as:

- How much would each component of the Penn Station area project cost (Penn Station *refurbishment*, Penn Station *expansion*, Gateway tunnels, and public realm improvements)?
- How much revenue is Vornado real estate development in the form of Payment In Lieu of Taxes (PILOTs) assumed to generate?
- How much will taxpayers have to pay before Vornado development starts generating PILOT revenue?

Despite not having this critical information, the Board rubber-stamped the Penn Station Redevelopment project by voting to approve the General Project Plan (GPP), the stated purpose of which was to fund Penn Station and public realm improvements.

In addition to providing the compulsory rubber stamp for large development projects dreamed up by the Governor, the ESD Board and staff, as directed by the Governor’s office, hides and distorts politically inconvenient facts. Even when it is subject to withering criticism, ESD refuses to release critical information to the public. This reduces confidence in ESD’s overall truthfulness and public accountability.

In the case of the Penn Station Redevelopment project, ESD stated on the record that the authority was not negotiating and had not negotiated with Vornado Realty Trust regarding future development near the Penn site.¹¹ Following the release of documents

⁸ “PACB Vote Approving Pen Redevelopment Plan Completely Abnormal” from Reinvent Albany, <https://reinventalbany.org/2022/12/new-pacb-vote-approving-penn-redevelopment-plan-completely-abnormal/>

⁹ ESD Bond Committee Materials, September 2022, <https://esd.ny.gov/sites/default/files/news-articles/092122-BFC-Board-Materials.pdf>

¹⁰ “Watchdog testimony urges ESD Board of Directors to vote NO on the Penn Station development deal” from Reinvent Albany. <https://reinventalbany.org/2022/07/watchdog-testimony-urges-esd-board-of-directors-to-vote-no-on-the-e-penn-station-development-deal/>

¹¹ Letter from ESD to Senators: <https://esd.ny.gov/sites/default/files/Letter-Response-to-Senators-Penn.pdf>

in the wake of a September 2022 lawsuit, *Weinstock v. N.Y. State Urban Dev. Corp.*, it became clear that negotiations between ESD and Vornado were ongoing throughout the project planning process. As the suit's complaint states: "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 the state agency and the private company that would be the project's primary beneficiary."¹²

ESD Mission Statement

ESD is the perfect agency to handle the Governor's pet projects thanks in part to its broad and vague mission statement. The statement reads:

The mission of Empire State Development is to promote a vigorous and growing state economy, encourage business investment and job creation, and support diverse, prosperous local economies across New York State through the efficient use of loans, grants, tax credits, real estate development, marketing and other forms of assistance.

With such a vague mission statement, the Governor's office is easily able to classify any project as something that could grow the state's economy. And it does! ESD operates an astonishing 57 programs with over 5,000 associated projects, all of which have, in one way or another, been defined as economic development projects. But the question remains: What is ESD's top priority? The mission statement does not clearly define any priorities or central functions.

By contrast, the mission statement of the Federal Reserve provides an example of one that is succinct, and clearly establishes the entity's purpose and functions:¹³

The Federal Reserve System is the central bank of the United States. It performs five general functions to promote the effective operation of the U.S. economy and, more generally, the public interest. The Federal Reserve:

- *conducts the nation's monetary policy to promote maximum employment, stable prices, and moderate long-term interest rates in the U.S. economy;*
- *promotes the stability of the financial system and seeks to minimize and contain systemic risks through active monitoring and engagement in the U.S. and abroad;*

¹² *Weinstock v Urban Development Corporation*:

https://reinvertalbany.org/wp-content/uploads/2022/09/157448_2022_Charles_Weinstock_v_Charles_Weinstock_PETITION_1.pdf

¹³ "About the Fed," <https://www.federalreserve.gov/aboutthefed.htm>

- *promotes the safety and soundness of individual financial institutions and monitors their impact on the financial system as a whole;*
- *fosters payment and settlement system safety and efficiency through services to the banking industry and the U.S. government that facilitate U.S.-dollar transactions and payments; and*
- *promotes consumer protection and community development through consumer-focused supervision and examination, research and analysis of emerging consumer issues and trends, community economic development activities, and the administration of consumer laws and regulations.*

ESD’s amorphous mission, by design, reduces its public accountability. Because anything could be justified as “economic development,” the entity takes on a range of projects as mandated by law instead of those that have been studied and proven to be drivers of economic growth and fiscal health.

ESD is an Extension of the Governor’s Office

Reinvent Albany’s interviews with former senior officials at ESD confirm that the agency is an extension of the Governor’s office and does not act independently in the best interest of the public.

As dictated by the Governor, ESD serves businesses before it serves the public. This has been documented by Arana Hankin, who served as Project Director for the Atlantic Yards/Pacific Park project for ESD.¹⁴

Once Hankin left ESD, she spoke truthfully about ESD’s practices. Hankin stated in a public lecture that project agreements at ESD were “purposely drafted to be as complicated and obtuse as possible, to allow for multiple interpretations and maximum flexibility.”¹⁵ This flexibility allows ESD to escape public scrutiny and even public understanding of projects and activities.

ESD gave itself latitude again when planning the Penn Station project. Under Hochul’s plan, ESD planned to bypass New York City’s land use and zoning process, seize eight sites around Penn Station, and allow private developers to build greater density than current city zoning permits. Property tax revenues and fees from new development would then be used to repay the debt funding the Penn Station improvement, in

¹⁴ “When former state overseer of Atlantic Yards came clean: ‘there really is no accountability’” from Atlantic Yards/Pacific Park Report,

<https://atlanticyardsreport.blogspot.com/2016/09/when-former-state-overseer-of-atlantic.html>

¹⁵ “Meet the Loeb Fellows: City for the 21st Century – Arana Hankin,”

<https://www.youtube.com/watch?v=KwmqhraXjj4>

addition to upgrades to public space. ESD estimates that the project would cost about \$7 billion.

Since the project was announced, ESD has failed to provide the public with critical information concerning project funding and financing. For instance, ESD is required to form Community Advisory Committees (CACs) for its economic development projects.¹⁶ Unfortunately, there was no requirement that CACs operate under the state's Open Meetings Law, and ESD did not proactively release information shared with members of the CAC. Instead, CACs met privately, and members of the CAC were instructed to treat discussions and materials provided as confidential. Subsequently, the Legislature passed a bill that the Governor signed requiring CACs to meet in public.¹⁷

It was not until Reinvent Albany filed a FOIL request for CAC materials that they were made available on the ESD website, and ESD only posted a portion of the materials provided to the CAC months after the information was first made available to CAC members. This means that ESD had provided information regarding the potential spending of billions of taxpayer dollars to a small group of individuals who in theory represent the community, but did not proactively share this information with the public at large.¹⁸

There was more information outside of the CAC materials that ESD refused to release to the public. At a hearing to discuss the Penn Station Project's General Project Plan (GPP), Reinvent Albany noted that the GPP did not provide sufficient detail or evidence to support ESD's claim that revenue from the development is "essential" to funding Penn Station upgrades, nor that it will be a good return on the public investment for the potential massive subsidies to Vornado Realty Trust, a real estate company that owns more than half of the proposed development sites around Penn Station.¹⁹

One of the stated goals of the GPP was to "establish a financial framework to generate revenue to help fund the reconstruction and expansion of Penn Station and other improvements." Echoing the maximum flexibility cited by Hankin, the GPP has never shown basic details or fundamental assumptions about how Vornado's developments or other commercial developments will generate this revenue. For instance, what

¹⁶ [Per subdivision 7 of section 4 of section 1 of chapter 174 of the Urban Development Corporation Act](#), UDC establishes one or more community advisory committees to advise UDC on its economic development projects. Committee members serve at the pleasure of UDC and are typically made up of community members and other stakeholders.

¹⁷ [S8419-B/A9622-C of 2022](#)

¹⁸ CAC materials must now be posted publicly thanks to the passage of [S8419-B/A9622-C of 2022](#).

¹⁹ "Hochul's ESD has still not explained why New Yorkers should give massive subsidies to Vornado to finance a new Penn Station," Reinvent Albany, <https://reinventalbany.org/2021/12/watchdog-testimony-penn-station-gpp-doesnt-support-need-for-massive-developer-subsidies-more-transparency-needed/>

occupancy rates does ESD assume for the redevelopment sites? What is the rent per square foot? What is the cost per square foot? There are also questions about how this development squares with the massive commuting changes that resulted from the COVID-19 pandemic and the experience of the nearby Hudson Yards development, which failed to generate sufficient funds for the 7 train extension, resulting in payments needing to be made by the city instead despite (or perhaps because of) very generous tax abatements.

The lack of information provided by ESD was so glaring that the city's Independent Budget Office, a publicly funded nonpartisan agency tasked with providing information on the city's budget and economy, released a report in May 2022 on the Penn Station Redevelopment that said the GPP "lacks many of the basic and important details needed for a robust analysis, and leaves many open questions about the impact on state and city finances."²⁰

The information ESD provided was vague and did not address the structure of the financing scheme, projections of how much revenue is expected to be generated from the development, and how much the state is expected to pay to finance the project, or could pay if the development doesn't generate the expected revenue.

At the time of writing, ESD is only releasing public records due to an ongoing lawsuit. Regarding the Penn Station redevelopment plan itself, it remains to be seen what upgrades will actually take place at Penn Station and in the surrounding area. The Metropolitan Transportation Authority (MTA) released a plan for Penn redevelopment, but an alternative plan by a private firm, ASTM North America, was also released.²¹

Vornado backed out of the redevelopment of Penn Station, citing "headwinds in the current [real estate] environment."²² Interestingly, the plan's GPP remains in place. The Hochul administration claims they will use the existing GPP for another project.²³ However, as critics have noted, "GPPs aren't fungible. The State isn't allowed to enact a plan for one purpose then use it for another."²⁴ If the GPP remains in place, it will

²⁰ "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" from the Independent Budget Office, <https://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>

²¹ Chen, S. and Rubinstein, D. (2023, June 28). Private Firm Announces Competing Vision for Penn Station Design. *The New York Times*.

²² Nessen, S. (2022, November 4). Penn Station Developer Backs Off \$22 billion Project After Years Working Behind the Scenes with NY Governor. *Gothamist*.

²³ Emery, R. and Weinstock, C. (2023, July 11). Kill Penn Station's Zombie General Project Plan: State Proposal is a Giveaway that Doesn't Repair the Rail Depot. *Daily News*.

²⁴ Emery and Weinstock, 2023.

provide a free license for Vornado to do what it wants at the sites surrounding Penn Station as long as they are in accordance with the GPP, including eminent domain proceedings and other land development outside of the regular land use and zoning processes that exists in New York City. That ESD would provide a private entity with a free license to develop with no obvious public benefit further destroys ESD's credibility and again proves that ESD aims to give itself maximum flexibility by creating planning and development documents that allow for multiple interpretations and scenarios.

Even REDCs are coordinated by the Governor's office. Despite their prominence, REDCs have not been established by law, regulation, or executive order. While REDCs act as official government bodies, and most people believe they are, they are not. Decisions made by REDCs are actually made by state agencies coordinated by ESD and the Governor. In each REDC, ESD manages the review of Consolidated Funding Applications (CFAs). The CFAs are rated by state agencies and REDC members, all of whom are appointed by the Governor. Agencies provide 80% of the score of each CFA, and appointed REDC members provide 20%. However, the scores are not binding, and final determinations are made by agencies and ESD in consultation with the Governor's office.

ESD Projects and Spending

As of 2021 (the last year for which complete data is available), ESD's total investment portfolio consisted of 4,717 loan, grant, and tax credit projects.²⁵ Unfortunately, the entity does not publicly disclose basic information about many of these projects, including the size of the subsidy, subsidy cost per job, and the financial assumptions underlying the subsidy. In addition, much of ESD's spending is largely off-budget. The deals the entity enters into are negotiations between ESD and a single business done outside of a competitive process.

ESD Projects

In October 2022, Governor Hochul, U.S. Senator Schumer, and Onondaga County Executive McMahon announced that Micron, a U.S.-based memory and storage manufacturer, will build up to four chip plants, also known as fabs, in Central New York. In exchange, New York State, via ESD, offered up to \$5.5 billion in subsidies.²⁶

²⁵ "Annual Jobs Report Loan and Grant Programs" from ESD, <https://esd.ny.gov/sites/default/files/ESD-2021-Annual-Jobs-Report.pdf>. See also [Appendix 4](#) for a list of programs.

²⁶ Press release from ESD: <https://esd.ny.gov/esd-media-center/press-releases/governor-hochul--schumer-mcmahon-announce-micron-coming-onondaga-county-100-billion-investment>

The initial press release and public remarks by the Governor and Micron were vague and did not offer answers to very basic questions. Namely:

- The new “megafab” will create nearly 50,000 jobs according to the press release. Where do these numbers come from and how were these numbers estimated?
- What is the return on the taxpayer’s investment of \$5.5 billion? How do we know this is a good deal for the public?

Following questions raised by watchdogs, ESD released more information about the deal scattered in several places on its website.²⁷

Among the documents released was a non-binding “term sheet” signed by ESD, Micron, the Onondaga Industrial Development Agency, and Onondaga County that establishes terms and conditions for the development of a Micron facility.²⁸ ESD also released an economic impact study by REMI, Inc. that details the estimated economic and fiscal impacts of Micron locating in New York. Interestingly, the REMI study is dated *after* the term sheet, suggesting that the study was a *post hoc* rationalization for the terms already agreed to by the aforementioned parties.²⁹

According to the term sheet, Micron will spend \$100 billion to construct and outfit a “Fab Complex” consisting of four memory fabs in two phases. Phase 1 of the project will last 10 years: 2025-2034. During that time, Micron will construct and outfit two 1.8-million-square-foot memory fabs that will contain extreme ultraviolet lithography machines at a cost of \$48 billion. Phase 2 is also projected to last 10 years, from 2035-2044, and will result in two more memory fabs of the same size at a cost of \$52 billion.

The REMI model, which leverages a “New York-specific multi-regional Tax-PI model,” finds:

- For every Micron hire, there would be about 5.5 other jobs created in the state.
- By 2055, the facility would create 50,911 jobs at the state level (44,943 of which would be based in Central New York), including 9,005 of the facility’s direct hires and 9,431 indirect and 32,474 induced jobs (indirect and induced = 41,905).

²⁷ For example, “Hochul not showing her work on Micron claims,” Empire Center, <https://www.empirecenter.org/publications/hochul-not-showing-her-work-on-micron-claims/>; See the various pages on ESD’s site where Micron information is posted: <https://esd.ny.gov/micron>; <https://esd.ny.gov/micron-green-chips-sustainability-requirements>; and <https://esd.ny.gov/micron-faq>

²⁸ The term sheet is posted on ESD’s website: <https://esd.ny.gov/sites/default/files/Micron-Term-Sheet-Fully-Executed.pdf>

²⁹ REMI (Regional Economic Models, Inc.) is a widely-used model for economic impact analyses.

- The Fab Complex will add an annual average of \$16.7 billion in real economic output and \$9.6 billion in real Gross Domestic Product (GDP) over the time period 2025-2055.

What are the assumptions underlying the REMI analysis? Why isn't the model used to project employment numbers transparent? Further, the conclusions derived from the analysis are taken as fact, even though it is impossible for economists and other experts to account for all the factors that influence economic choice and outcomes.

To justify its projects, ESD often cites such economic impact models that show why specific projects will produce certain outcomes. These models, however, are opaque and easily manipulated. The studies rarely state their upfront assumptions.

In a lecture, Arana Hankin, cited above, asserted that the results of REMI models are "sold" to community members during the public approval process to "convince the community why [a project] is good for them."³⁰ But, she notes, the methodology is complicated and difficult to understand, and they "inflate expectations." Once construction starts, she notes, "reality sets in." She said:

We make projections for jobs created and revenue raised, but no one actually counts the number of jobs created. No one actually tracks the amount of revenue that was raised. There is no accountability, and the methodology is super complicated.

She goes on to say that the jobs projected by REMI analyses are actually job-years, which is just one job for one year, and not actually the number of people who are employed as a result of a project.

The opacity concerning total subsidies, subsidy cost per job, and the financial assumptions underlying the subsidies is not limited to the Micron and the Atlantic Yards/Pacific Park project. The programs administered by the Department of Economic Development also lack basic transparency.

Off-Budget Spending

The Department of Economic Development, the state agency component of ESD, is responsible for administering off-budget tax abatements and tax credits. For example, via this component agency, ESD manages the state's \$700-million-a-year film tax credit. ESD determines which production companies are eligible for the tax credit in addition

³⁰ "When former state overseer of Atlantic Yards came clean: 'there really is no accountability,'" Atlantic Yards/Pacific Park Report, <https://atlanticyardsreport.blogspot.com/2016/09/when-former-state-overseer-of-atlantic.html>

to verifying the data individual productions submit showing how many jobs were created and hours worked and M/WBE certification. ESD (via DED) also oversees billions of off-budget public expenditures made via Excelsior, Green CHIPS, and Brownfield tax credits.

A New York State [tax credit](#) is a reimbursement of expenses incurred to a business or investor for money they spent making a TV show or developing polluted land. Tax credit payments made by the state of New York are taken from state tax revenue accounts before that revenue is transferred to the General Fund or another on-budget fund.

Importantly, ESD's decisions to authorize tax credits to a business and payments made to those businesses are done outside of the State's procurement process and are not subject to independent "pre-audit" approval by the Office of the State Comptroller. In contrast, most state contracts are subject to pre-audit review. The absence of independent scrutiny makes the ESD's administration of these tax credits vulnerable to waste, fraud, and abuse. ESD aggravates the potential risk by publishing information on tax expenditures in a PDF format that is not machine-readable. Despite being directed to by Executive Order 95 (2013), ESD still does not publish most of its tabular tax credit data on the Open NY open data platform.³¹

Sole-Source Dealmaking

According to the New York State Office of General Services (OGS), New York State's procurement policy is designed to: ensure fair and open competition; guard against favoritism, improvidence, extravagance, fraud, and corruption; ensure that the results meet agency needs; provide for checks and balances to regulate and oversee procurement activities; and protect the interests of the State and its taxpayers.³²

ESD engages in sole-source bidding, a non-competitive purchasing or procurement process that favors a particular company, in conflict with these guidelines. The authority consistently selects grant and subsidy recipients based on other criteria that are unknown to the public. Further, private companies are not asked to make public why they need subsidies.

In July 2023, Menlo Micro announced plans to locate in upstate New York, in exchange for \$6.5 million in Excelsior Jobs Tax Credits provided by ESD. According to the press release announcing the deal, Senator Schumer personally called the CEO of the

³¹ For more on this point, see the section on [Open Data](#).

³² "New York State Procurement Guidelines," Office of General Services, <https://ogs.ny.gov/system/files/documents/2018/08/psnys-procurement-guidelines.pdf>

company to ask him to invest in New York.³³ But why Menlo Micro? Why weren't other firms given the opportunity to bid? How do we know that this company can provide the greatest return on the taxpayer's dollar?

Not only do ESD practices conflict with state procurement guidelines, they also are not consistent with best practices. Research shows that more bidders will more likely result in lower bid prices. In one study, the author develops a regression model to analyze the bid price and its deviation from the pre-bid estimate, which is measured as a percentage of the project's low, responsible, and awarded bid price.³⁴

The author shows that prices dropped slowly at first with an increase in bidders. (Moving from a single bid to a second bid, there was a 4% price drop). As the number of bidders increased, the rate of price reductions also increased. Once the regression gets to four and five bidders, an additional 6% reduction in price with each bidder was seen. The sixth bidder yielded another 4% drop. This totaled a 24% reduction from receiving only one bid. The seventh bidder added another 2% reduction, while the eighth bidder added only 1%, at which time the curve flattened. Figures 3 and 4 below summarize these findings.

Increase in Bidders	Percentage Price Change	TOTAL Percentage Price Change
1 -> 2	-4%	-4%
2 -> 3	-4%	-8%
3 -> 4	-6%	-14%
4 -> 5	-6%	-20%
5 -> 6	-4%	-24%
6 -> 7	-2%	-26%
7 -> 8	-1%	-27%
8 -> 9	0%	-27%

Figure 3: Data Source: Carr, 2005

The study “demonstrates that free, open, and unfettered competition will have the highest probability to achieve the goals of competitive bidding to ‘guard against

³³ Micron press release, Empire State Development, <https://esd.ny.gov/esd-media-center/press-releases/governor-hochul-senate-majority-leader-schumer-announce-menlo-microsystems-invest-50-million-fab-tompkins-county>

³⁴ Carr, P. (2005). Investigation of Bid Price Competition Measured through Prebid Project Estimates, Actual Bid Prices, and Number of Bidders. *Journal of Construction Engineering and Management*. 1165-1172.

favoritism, extravagance, fraud and corruption, to prevent the waste of public funds; to obtain the best economic result for the public...”³⁵

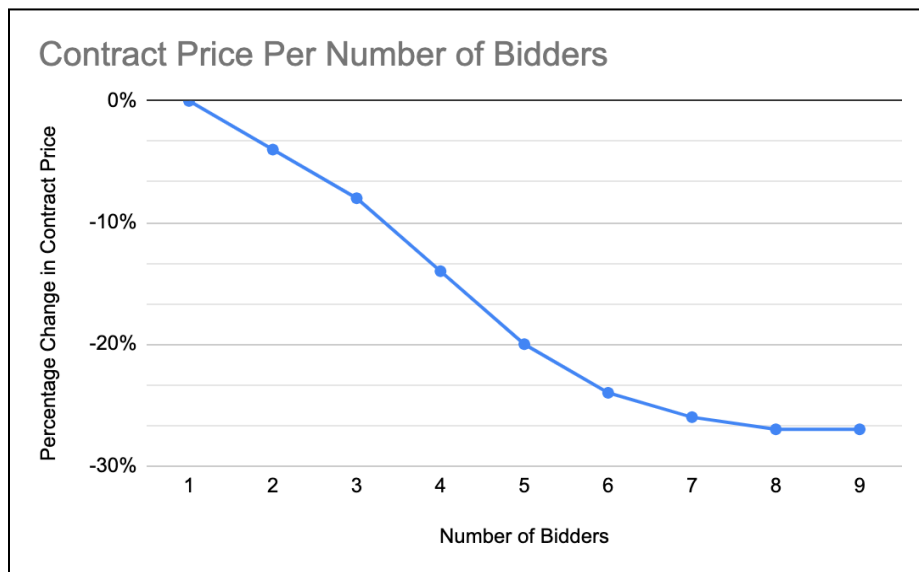


Figure 4: Data Source: Carr, 2005

³⁵ Carr, 2005, 1171

Master of Performative Transparency

ESD has massive amounts of data on its website, but the data is fragmented, incomplete, and often not in machine-readable, tabular formats. It is clear that the authority favors the quantity of documents on its website over the quality and accessibility of its information. Data about projects and programs is sprinkled throughout various PDFs and web pages that are not navigable from the ESD homepage. This makes it difficult for the public to understand what services and programs are provided to businesses and the public, and precisely what the authority is doing with taxpayer dollars. Of course, some of this opacity is not up to the public servants who work at ESD; there are certainly elements of its work that ESD officials are not at liberty to release to the public due to laws and mandates outside of their control. However, there are a number of areas that we believe ESD officials *do* have control over in which the entity is severely falling short.

ESD Website

The ESD website has important links and information but is largely unusable when it comes to understanding authority operations and finding key reports and financial information.

First, the ESD website is rife with broken links. A Reinvent Albany search of the ESD website in late December 2022 found 273 broken links, meaning that the links either show a 404 error or the link takes a user to another webpage that is not the stated destination of the link. In most of these cases, the link either takes the user to the [ESD homepage](#) or the [ESD Corporate Information](#) page.³⁶

Second, while there is limited information on some programs, that information is largely incomplete. For instance, there are [no subsidiary reports before 2020](#) for any of ESD's subsidiaries, which is a glaring omission considering that many of ESD's subsidiaries date as far back as the early 1990s (like the Queens West Development Corporation).

Third, many of ESD's subsidiaries are simply not listed on the website. Information about the Lower Manhattan Development Corporation, the New York Empowerment Zone Corporation, the Statewide Local Development Corporation, and the Upstate Empire State Development Corporation is not available on the ESD [subsidiaries page](#)

³⁶ For a list of broken and misdirected links, see: https://docs.google.com/spreadsheets/d/14LS_2jHhY3EP40TF15KyTs4hfMDIhmlma7GUJqYtQx8/edit?usp=sharing

Fourth, not all the programs that ESD operates and manages are listed on the authority's website. According to the Office of the State Comptroller, ESD administers and manages 57 programs with over 5,000 associated projects.³⁷ Unfortunately, there is no record of all the programming that ESD handles, since online information is disjointed, incomplete, and/or buried in PDFs. For instance, some of the agency's programs are listed on the ESD website but not in the annual report, and vice versa.³⁸ This leaves the public wondering exactly how the agency operates and what exactly they do.

Information on many ESD programs is scant and does not provide the public with a basic understanding of program spending or credits issued. For instance, ESD lists nine tax expenditure programs on their website.³⁹ For each program, the website provides information on the program's objective, how the program works, eligibility, and how to apply. While this information is useful for those applying for the tax credit, crucial basic information about actual program spending and credits issued remain buried in often-outdated PDF documents on ESD's website.

Database of Economic Incentives

In 2015, watchdogs and other transparency advocates began urging ESD to create a "database of deals" that would allow the public to access a list of companies and organizations receiving state subsidies, subsidy amounts, and other detailed information. In response, ESD officials consistently acted as if creating a database would be a burdensome mandate foisted upon it by public and political pressure, rather than an opportunity for it to provide more transparency and increase public confidence in its activities.

In April 2019, the state budget authorized Empire State Development to spend \$500,000 to establish such a database. The database, known as the [Database of Economic Incentives](#) (DOEI), was finally launched in May 2021.

Unfortunately, the 2021 database fell short of providing a clear picture of economic development spending in the state. The database did not allow comparison of the state's myriad subsidy programs because it lacked a uniform definition of "job." The database also did not list job creation commitments stratified by full-time, part-time, contract, or

³⁷ Office of the State Comptroller, 2020:

https://www.osc.state.ny.us/files/state-agencies/audits/pdf/2017-S-60_o.pdf

³⁸ The table in [Appendix 4](#) shows which programs are listed on the website and/or in the agency's annual report.

³⁹ "Tax Credits and Incentives give New York State businesses a competitive edge," <https://esd.ny.gov/tax-based-incentives>

construction, nor did it list the program through which a company had received a benefit/subsidy.⁴⁰

Less than a year later, in April 2022, the Legislature passed and the Governor signed a new law mandating the DOEI and describing specific data fields that it must include. The law was passed because of broad public skepticism that ESD would voluntarily publish useful data on corporate subsidies.

As of the June 5, 2023 update, the DOEI has 55 columns of data on more than 44,000 projects throughout the state. By law, the database should be updated quarterly, although it's unclear what that means for actual publication dates. (The data included in the DOEI is listed in [Appendix 3](#)).

Unfortunately, at the time of writing, many of the data fields in the DOEI are blank, meaning that data for some additional columns is not shown or does not exist. ESD's website notes that the agency will begin collecting much of the information required of the new database in fall 2022, suggesting that, for example, job commitment numbers have not previously been collected or tracked by ESD (this webpage is also out of date).⁴¹ The fact that such data has never before been tracked by ESD is a testament to the entity's lack of transparency, accountability to the public, and ineptitude when evaluating its own programs.

The June 2023 update to the DOEI revealed yet another problem with the database, which is that it only displays the most recent quarter's data. Any other data that was posted previously is deleted each time a quarterly update is made, making it difficult to determine if targets or other goals of the incentives are being changed. This renders accountability of the spending nearly impossible.

Open Data

ESD is not using best practices for open government, such as fully open data standards. The authority is subject to Executive Order 95 of 2013, which requires ESD to post its public, tabular data on the state's open data portal, data.ny.gov. Yet, there are only 29 datasets on the website, a relatively small number given the breadth of ESD's spending

⁴⁰ "Watchdog groups urge Senate and Assembly to pass "database of deals" transparency law," Reinvent Albany, https://reinventalbany.org/2021/05/watchdog-groups-urge-senate-and-assembly-to-pass-database-of-deals-transparency-law/?mc_cid=fc1a1fa03a&mc_eid=UNIQID

⁴¹ "Database of Economic Incentives" from ESD, <https://esd.ny.gov/database-economic-incentives>. This webpage is out of date as the narrative timeline has not been updated.

and activities in the state.⁴² The New York State Department of Health, in contrast, has 591 datasets on the portal, and has emphasized the liberation of health data, winning the praise of open government advocates and national foundations.⁴³

ESD's datasets include the Database of Economic Incentives, census data, and broadband information, among others. Yet the information provided is only a tiny subset of the wealth of data collected and maintained by ESD. For instance, ESD maintains significant tabular data buried in PDFs on its website, including audited financials and budget statements, conduit debt schedules, and adopted budgets. Unfortunately, none of this data is included in OpenNY. (A list of regularly-updated tabular data that should be available in the state's open data portal is available in [Appendix 6.](#))

Freedom of Information Law

ESD hides behind consultant and commercial exceptions to deny FOIL requests for information it deems politically unpalatable. For example, ESD retained Ernst & Young Infrastructure Advisors, LLC (E&Y), to provide financial advice related to the Penn Station Redevelopment Project. The March 2020 E&Y contract approval by the ESD Board of Directors noted that it would be paid in part through a cost-sharing agreement with the developer, Vornado. Later, at the November 2022 meeting of the Board, the entity stated that the full costs were paid for through a NYS appropriation.

On December 4, 2021, Reinvent Albany submitted a request for records produced by E&Y. Specifically, Reinvent Albany requested *“any reports, analyses or other materials produced by consultant Ernst & Young Infrastructure Advisors, LLC (“Ernst & Young”), per the contract approved by the Empire State Development Corporation (ESD) Board of Directors at its March 26, 2020 meeting.”*

In January, 2022, ESD responded to the request by sending links to draft documents already available on its website, but failed to supply Reinvent Albany with records responsive to the request. ESD cited Public Officers Law §87(2)(c) and stated that they withheld the records because they contain information that “if disclosed would impair present or imminent contract awards.” Reinvent Albany appealed the decision in February 2022 and the appeal was denied.

⁴² ESD's datasets:

https://data.ny.gov/browse?Dataset-Information_Agency=Empire+State+Development&utf8=%E2%9C%93

⁴³ Health data on Open NY: <https://health.data.ny.gov/browse?sortBy=alpha>; See also “Surge in health data innovation: \$2M data challenge and leading role for NYS,” <https://reinventalbany.org/2013/09/knight-news-challenge-for-health-innovation-begins/>

It is also notable that ESD’s March 2020 and July 2021 contracts with E&Y both noted the cost-sharing agreement, through which E&Y would be paid. Strangely, this cost-sharing agreement language was absent for the November 2022 contract amendment – which is notably after FOIL litigation (*Weinstock v. NYS Urban Development Corporation*) over the E&Y materials had commenced. See Figure 5, below, which shows the original March 2020 language below (note that there has only been one cost-sharing agreement with a developer related to financial services: Vornado)⁴⁴:

<u>CONTRACT NEED AND JUSTIFICATION</u>	
I. <u>CONTRACT SUMMARY</u>	
Consultant:	Ernst & Young Infrastructure Advisors, LLC (“Consultant” or “EYIA”)
Scope of Services:	Consultant would provide financial advisory consulting services to ESD in connection with the Empire Station Complex Project.
Contract Term:	January 2020 through January 2022
Contract Amount:	Not to exceed \$600,000
Funding Source:	A New York State budget appropriation and cost sharing agreements to be entered into with participating developers whose properties are within the Project area.

Figure 5: Original cost-sharing agreement

As part of the FOIL litigation, ESD’s cost-sharing agreement with Vornado dated February 3, 2020 was released, which included a “developer obligation to pay certain costs of the work,” specifying that it would be for “all costs for legal services...and financial advisory services performed prior to and after the date of this letter.” According to the cost-sharing agreement, an “imprest account” was set up by ESD to pay for the costs of work in accordance with the agreement, and \$1,000,000 was provided by Vornado for the account, with an obligation by Vornado to replenish the account when the account balance would reach \$750,000.

Troublingly, ESD backtracked on this cost-sharing agreement by claiming that the agreement did not apply to the E&Y contract. ESD staff at the November 2022 meeting of the Board stated that the full costs have been paid for through a NYS appropriation,

⁴⁴ Agenda for the NYS Urban Development Corporation Meeting, Thursday 3/26/2020, <https://esd.ny.gov/sites/default/files/news-articles/032620%20ESD%20Board%20Materials%20v2.pdf>

not from any developer, Vornado or otherwise.⁴⁵ This statement was made *before* the November 2022 amendment to the contract with E&Y was approved by the Board, which for the first time stated that E&Y was to be paid by only a state appropriation. This change, made prior to any vote by the ESD Directors, appears to be an attempt to invalidate arguments from the FOIL petitioners regarding the precedent set by the courts in the *Tuck-It-Away v. Empire State Development Corp* case (54 A.D.3d 154 1st Dep’t 2008).⁴⁶

If ESD staff are retroactively and deliberately changing the manner in which a consultant is paid to evade disclosure of documents under FOIL, contrary to agreements approved by the ESD Board, there are clear governance and ethical concerns.

ESD’s refusal to release E&Y documents reduces confidence in the entity’s truthfulness and public accountability. Further, it appears as though ESD deliberately uses consultants like E&Y to avoid disclosing embarrassing or inconvenient facts to the public and elected officials.

In addition to deliberately hiding FOIL-able information, ESD does not have a webpage that houses frequently-FOILED documents as other agencies and authorities have done.⁴⁷

Open Meetings Law

ESD complies with the state’s Open Meetings Law by posting notices of board meetings on its website. However, ESD often posts meeting materials and agendas less than 24 hours before comments are due to the Board, which is typically at noon the day before a Board of Directors meeting. Materials can number hundreds of pages, and it is not reasonable to expect the public to be able to fully understand the implications of the materials before the Board votes on them. Sometimes, agendas are posted only hours prior to the deadline for public comment, making it impossible for the public to meaningfully review the agenda and provide feedback. When the public has submitted comments to the Board and staff regarding the lateness of the meeting agenda, those comments have not been included in ESD’s meeting materials, which suggests that the authority is simply ignoring some public comments.

⁴⁵ Statements made by Terence Cho to the ESD Board of Directors at its November 2022 meeting (timestamp 1 hour 5 minutes), available here: <https://youtu.be/1yLMFIMoE94?t=3946>

⁴⁶ The *Tuck-It-Away* case precedent is important because if the developer, Vornado, paid the consultant, E&Y, then the records produced under the contract would be subject to disclosure under FOIL because they could not be withheld under the intra- or inter-agency exemption.

⁴⁷ See, for example, the Port Authority: “Public Records Fulfilled Requests,” <https://www.panynj.gov/corporate/en/public-record-access/public-record-fulfilled-requests.html>

Figure 6, below, is a [tweet](#) from journalist and Atlantic Yards/Pacific Park watchdog Norman Oder suggests that ESD’s Board does not take public comments seriously, nor does it consistently record and respond to them.



Figure 6: A tweet from journalist Norman Oder to ESD concerning public comment

When Reinvent Albany requested records of all communications between Norman Oder and ESD via FOIL, ESD did not return the above communication, confirming that the agency is not taking public comments submitted prior to Board meetings seriously.

Open Meetings Law also requires agencies record minutes and make those minutes available to the public. Unfortunately, ESD meeting minutes are buried in the subsequent meeting’s agenda and materials in draft form, making it difficult and tedious for the public to locate and review minutes.

Accountability

The evaluation and oversight of ESD and its programs are essential to ensuring that public dollars are spent in the most effective and efficient way possible. This is especially important given ESD’s vague mission and breadth of mandates. Evaluation is also required by law. The Urban Development Corporation Act, the Economic Development Law, and Title 5 of the New York Codes, Rules and Regulations all require ESD to perform certain program evaluations every 2 or 4 years assessing the effectiveness of those programs.⁴⁸ For example, Parts 170 and 230 of Title 5 of the Rules require ESD to issue a biennial report on its film tax credit programs, including efficiency of operations, compliance with laws and regulations, distribution of funds, and an economic impact study prepared by an independent entity. In addition to these requirements, and as noted by the Office of the State Comptroller, ESD should consistently track, monitor, and evaluate its programs per New York State’s internal control standards.⁴⁹

Unfortunately, ESD’s programs and projects severely lack accountability. Projects and programs are rarely, if ever, independently evaluated. The bodies tasked with oversight are politicized or lack the resources necessary to effectively and meaningfully oversee and evaluate ESD operations. That means that the agency itself, the public, the Governor, and the Legislature do not know which programs work because real independent program evaluation is weak or non-existent. This is potentially a function of the fact that ESD projects and programs are mandated by the Governor’s office and the Legislature. Even if an evaluation showed that a program is not creating jobs, it is not clear it would be abandoned. For its part, the Legislature rarely meaningfully advocates for increased evaluation of ESD programs and projects, nor does it hold regular, meaningful oversight hearings.

Theoretically, an array of government bodies oversee ESD (see Figure 7, below). In practice, however, these entities do very little to ensure agency success and effectiveness. Moreover, ESD’s activities are heavily controlled by the Governor. The notable exceptions are the State Legislature and Comptroller, which are independently elected bodies with their own respective legislative, budget, oversight, and appointment confirmation roles.

The oversight structure as it currently exists has meant that the entities responsible for overseeing ESD have, in some cases, failed to provide oversight due to political considerations. In other cases, the entities do not have the capacity to provide more

⁴⁸ “Project Tracking Systems and Economic Assistance Program Evaluations,” Office of the State Comptroller, <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2022-19s48.pdf>

⁴⁹ “Standards for Internal Control in New York State Government,” Office of the State Comptroller, <https://www.osc.state.ny.us/files/state-agencies/guidance/pdf/agencies-ictf-docs-int-control-stds.pdf>

meaningful oversight due to funding and resource constraints, as with the Authorities Budget Office.

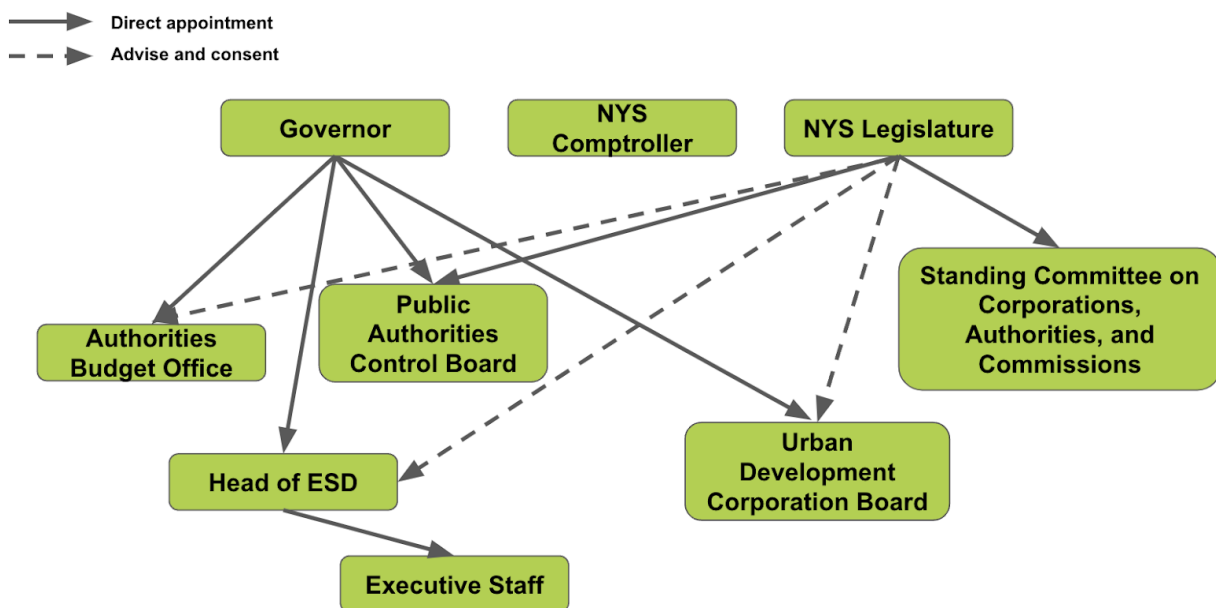


Figure 7: Entities overseeing the Urban Development Corporation

New York State Legislature

The New York State Legislature is empowered to hold hearings about any subject matter, including on business subsidies, megaprojects, and tax abatement programs. For example, in January 2022, Senators Liz Krueger, Anna Kaplan, and James Skoufis held a hearing on the effectiveness of business subsidies and tax incentives in New York State in response to a request from budget watchdogs.⁵⁰ The hearing featured testimony from subject matter experts, independent scholars, and other groups.

The January 2022 hearing was not, however, an ESD oversight hearing. And unfortunately, the Legislature has not held an ESD oversight hearing within the last 15 years. (The latest record of an oversight hearing we could find was from 2007.⁵¹)

⁵⁰ “Watchdog groups call on Sen. Krueger to hold hearing in business subsidies,” <https://reinventalbany.org/2021/12/watchdog-groups-call-on-sen-krueger-to-hold-hearing-on-business-subsidies/>

⁵¹ <https://assembly.state.ny.us/comm/Corp/20070502>

Thanks to the advocacy of Senator James Skoufis, the State Taxation and Finance Department is auditing the State’s tax abatement programs.⁵² But again, this audit does not cover all the activities of ESD, nor does it constitute an audit of the entity as an institution.

The Legislature is empowered to take action, whether by oversight hearings, passing legislation, or rejecting irrational subsidy programs. Unfortunately, much of the Legislature eschews that responsibility or instead leverages ESD for its own use via approving lump sum appropriations or passing legislation with vague appropriation language when it creates new programs within ESD.

Authorities Budget Office

The Authorities Budget Office (ABO) was created as an independent office pursuant to Chapter 506 of the Laws of 2009 (the Public Authorities Reform Act or “PARA”). The mission of the Authorities Budget Office is to make public authorities more accountable and transparent, and to act in the public interest consistent with their intended purpose. While the ABO is funded through fees levied on public authorities, it has not reached necessary funding and staffing levels. In the FY 2024 budget, funding for the ABO was increased to \$3.359 million and the office is currently increasing their staff to 25 to 30 persons, but the funding remains insufficient. Government watchdogs have long said that the ABO needs a minimum of \$5 million to adequately monitor the state’s sprawling list of public authorities.⁵³

The ABO oversees all state and local public authorities, and as part of this role has provided important information about the public authorities within ESD (UDC d/b/a ESDC and JDA). UDC and JDA are required to submit reports to the ABO using the Public Authorities Reporting Information System (PARIS), an online electronic data entry and collection system jointly managed with the Office of the State Comptroller (OSC). Specifically, budget reports must be submitted 90 days before the start of the fiscal year, and annual reports 90 days after the end of the fiscal year. In addition, UDC and JDA must provide copies of an annual independent audit to the ABO, as is required for all state public authorities. This information is self-reported and not verified by the Office of the State Comptroller.

These UDC and JDA reports must also be submitted to the Governor, the Chair and ranking minority member of the Senate Finance Committee, the Chair and ranking

⁵² [S8008-C/A9009 of 2022](#), Part JJJ

⁵³ Letter from Reinvent Albany and six other groups, <https://reinventalbany.org/wp-content/uploads/2021/10/Letter-to-NYS-Govt-Budget-Leaders-on-ABO-Funding-2022-v2.pdf>

minority member of the Assembly Ways and Means Committee, and the State Comptroller.⁵⁴

In addition to the reports that it submits to the ABO, UDC must provide a report detailing the operations and accomplishments of its small and medium-sized business program annually on or before October 1. Further, it must submit to the Director of the Budget, the Chairperson of the Senate Finance Committee, and the Chairperson of the Assembly Ways and Means Committee an evaluation of the small and medium-sized business assistance program prepared by an independent entity. This must be submitted by September 1 every four years.

The ABO can investigate authorities either on their own initiative or upon public complaints, and then refer their findings to relevant law enforcement agencies. However, the ABO could be given power over ESD and other public authorities, as detailed in our [recommendations](#).

Public Authorities Control Board

UDC is subject to oversight from the Public Authorities Control Board (PACB) which was formed in response to the UDC crisis in the 1970s. In 1975, UDC was set to default on \$105 million in short-term debt seven years after it was formed.⁵⁵ Critics blamed the paradoxical structure of the UDC for its problems: The authority was supposed to do what private developers could and would not do, but still turn a profit and remain self-sustaining. Others blamed its troubles on the range of functions it was meant to undertake, from project inception to completion and operation. Regardless of the cause, the UDC posed a liability to the state. The authority's risk of default, paired with an increasing use of short-term borrowing to address cash flow problems at the state and New York City levels, motivated the formation of the 1975 Moreland Act Commission.⁵⁶

The Commission's work inspired two major reforms, one of which was the formation of the Public Authorities Control Board (PACB), which reviews financing and construction of any project proposed by the 11 authorities that fall under its purview.⁵⁷

⁵⁴ [NY Pub Auth L § 2800](#)

⁵⁵ Wilson, L., & Eichelberger, C. (2009). New York State Public Authority Reform: Where We Have Come From and Where Do We Need to Go. *Government, Law and Policy Journal*, 11(1).

⁵⁶ Moreland Act Commission. (1976). *Restoring Credit and Confidence: A Reform Program for New York State and its Public Authorities*.

⁵⁷ The eleven authorities include: NYS Environmental Facilities Corporation, NYS Housing Finance Agency, NYS Medical Care Facilities Finance Agency, Dormitory Authority, Urban Development Corporation, Jobs Development Authority, Battery Park City Authority, NYS Project Finance Authority, State of New York Mortgage Agency, NYS Energy Research and Development Authority, Long Island Power Authority.

The PACB is made up of one representative from the executive branch, a representative from the majority in both the Assembly and the Senate, and a non-voting member for the minority in both houses, bringing total board membership to five.⁵⁸

Once the PACB receives and reviews applications, the entity must unanimously approve projects before they move forward. The PACB typically approves an application when it determines that there are enough funds committed to finance a project. To make this determination, it looks at projections of fees, revenues, and securities. While financing proposals are rarely disapproved, the 2018-2020 Executive Budget, released on April 1, 2019, brought more changes to the PACB. The law governing the PACB was changed to state that failure of board members to vote solely on the basis of financial feasibility “constitutes a violation of the public’s trust,” and the Governor has the authority to immediately remove a board member who acts — or threatens to act — beyond the scope of that mandate. In 2022, the Legislature passed [S7337 \(Comrie\)/A10157 \(Paulin\)](#), which would have repealed the 2019 changes to the PACB. Governor Hochul vetoed the bill, though the Legislature passed it again in 2023.

Because the vote of the PACB must be unanimous, the Governor and the representatives of two houses effectively have veto power over authority activities. Further, because PACB membership is limited to the three entities who also control debt authorization for public authorities — the executive branch and the majority from the Assembly and the Senate — independent voices and alternative views are excluded from board deliberations.⁵⁹ Moreover, in early 2019, then-Governor Andrew Cuomo considered blocking the appointment of Senator Michael Gianaris to the PACB due to his opposition to Amazon locating its second headquarters in New York City in exchange for tax breaks (Gianaris’s nomination was later withdrawn). The Governor’s political involvement in PACB nominations calls into question the ability of the Senate and the Assembly to make appointments without interference of the Governor.⁶⁰

PACB’s power does not encompass all activities of a public authority. For instance, procurement, hiring, and contracting are *not* subject to review by the PACB. Further, the

⁵⁸ Ward, R. B. (2006). *New York State Government* (2nd ed.). Albany: The Rockefeller Institute Press.

⁵⁹ Although the Office of the State Comptroller can submit comments to the PACB on proposed projects, the PACB is not required to heed the advice of the OSC.

⁶⁰ See Goodman, D. (2019, February 4). Amazon deal meets new resistance as Cuomo and NY Senate Clash. *The New York Times*; On Amazon’s plans to build in NYC, which were later canceled, see Goodman, J.D. (2019, February 14). Amazon Pulls Out of Planned New York City Headquarters. *The New York Times*. On the withdrawal of Gianaris’ nomination, see, Hinds, K. and O’Grady, J. (2019, February 24). Amazon opponent passed over for state board. *WNYC News*.

PACB merely “reviews project feasibility rather than programs,” and it “rarely turns down financing proposals.”⁶¹

New York State Comptroller

The Office of the State Comptroller ensures that ESD uses taxpayer money effectively and efficiently to promote the common good.⁶² As part of this, the Comptroller is empowered to audit UDC and JDA. Between 2012 and the time of writing, OSC conducted 11 audits of various aspects of ESD, including its adherence to reporting requirements, grant oversight, and project tracking systems. OSC’s audits consistently find that ESD falls short when it comes to oversight and evaluation of its projects and programs. The Comptroller’s most recent audits are summarized below.

In 2015, the Comptroller’s office audited the performance of ESD’s Excelsior Jobs Program.⁶³ The audit sought to determine whether firms who received business subsidies (in the form of tax credits) met the eligibility requirements for job growth and investments before receiving tax credits by sampling 25 companies that received Excelsior subsidies. ESD could not substantiate that any of the sampled companies met all the eligibility requirements for a subsidy as initially established when they were approved for participation in the program. In four separate instances, ESD actually adjusted the annual job creation requirements from the original agreement to align with the companies’ actual lower job creation totals. More worrisome, the audit found that “ESD generally authorizes tax credits based on the job numbers and investment costs that are self-reported by businesses without any additional corroborating support (e.g., invoices, receipts, tax documentation).”

An audit issued in 2017 found that ESD failed to meet more than half of the statutorily-mandated outcome reporting requirements for the programs it managed from April 1, 2012 through September 30, 2016.⁶⁴ Further, in most cases, ESD (/UDC) officials did not provide any explanation about why they had not prepared and submitted the required reports. For the reports ESD did prepare, the Comptroller was often unable to determine whether they were done on time because there was no evidence of when they were published.

⁶¹ Leigland, J. (1992). External Controls on Public Authorities and Other Special Purpose Governments. In J. Mitchell (Ed.), *Public Authorities and Public Policy: The Business of Government* (pp. 31–48). Westport: Greenwood Press., pg 42

⁶² Office of the New York State Comptroller (OSC). About the Comptroller’s Office. <https://www.osc.state.ny.us/about/response.htm>

⁶³ Office of the State Comptroller, “Empire State Development: Performance of the Excelsior Jobs Program,” 2016, <https://www.osc.state.ny.us/files/audits/2018-01/sga-2016-15s15.pdf>.

⁶⁴ Office of the State Comptroller, “Empire State Development: Compliance With Outcome Reporting Requirements,” 2017, <https://www.osc.state.ny.us/files/audits/2018-01/sga-2017-16s40.pdf>

In 2020, the Comptroller released an audit of selected high-technology programs that ESD manages and oversees.⁶⁵ In it, the Office of the State Comptroller notes that ESD has approved \$2.2 billion for high-tech projects administered through SUNY Polytechnic Institute and the Buffalo Billion initiative and \$477.5 million for NYSTAR, ESD’s Division of Science, Technology, and Innovation programs.

The audit is scathing, asserting that ESD did not conduct adequate analyses prior to awarding subsidies and further, that ESD does not adequately evaluate programs and projects to ensure that they were achieving their stated goals. The audit states:

Despite private tech companies benefiting from millions of dollars in ESD funding, ESD did not perform comprehensive assessments and analyses that would warrant allocating such significant State investments or provide reasonable assurance that the companies’ achievements are commensurate with the funding they received. Furthermore, we found a lack of consistent and rigorous performance and evaluation standards for measuring whether programs and projects are attaining their intended goals.

The Office of the State Comptroller released an audit of ESD’s Project Tracking Systems and Economic Assistance Program Evaluations in 2021.⁶⁶ The audit specifically sought to understand whether ESD appropriately and adequately maintains information systems to collect data to effectively manage and report on the programs it administers. Like previous Comptroller audits, the audit found, once again, that ESD falls short when it comes to internal oversight and evaluation. The audit notes: “With few exceptions...ESD does not evaluate its economic assistance programs to ensure they are meeting their intended goals and furthering ESD’s mission.”

⁶⁵ Office of the State Comptroller, “Empire State Development: Oversight of Select High-Technology Projects,” 2020, https://www.osc.state.ny.us/files/state-agencies/audits/pdf/2017-S-60_o.pdf

⁶⁶ Office of the State Comptroller, “Empire State Development: Project Tracking Systems,” 2021, <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2022-19s48.pdf>

Making ESD More Accountable

ESD is among the state authorities and agencies most vulnerable to corruption, pay-to-play, and political abuse. The entity's confusing and opaque structure, paired with its amorphous mandate and gubernatorial control, has consistently allowed it to escape public and legislative accountability and scrutiny.

Where the Legislature is empowered to take action, whether by oversight hearings, passing legislation, or rejecting irrational subsidy programs, it does not. Indeed, both the Governor and Legislature use ESD to oversee misguided and discredited programs and projects that they manufacture.

While we are sympathetic to the UDC Board and ESD staff, who often have to choose between obeying dictates mandated by the Governor and Legislature, or fulfilling their duty to the people of New York, UDC Board members and ESD staff do not use all the tools they have within their power to make information easily accessible. One only needs to look at ESD's unnavigable and inadequate website to conclude that they do not take public accountability seriously.

In this report we make [35 recommendations](#) for improving ESD. These are actionable things the Governor, the Legislature, the State Comptroller, and the Authorities Budget Office – and ESD itself – can do to improve ESD governance, accountability, transparency, and ethics both immediately and over the long term.

Appendix 1: History of ESD

Empire State Development as we know it today – a sprawling public authority that runs various tax expenditure, loan, grant, marketing, and advertising programs and manages scores of megaprojects and other developments throughout the state – has mutated from its organizational beginnings. The core of ESD, the Urban Development Corporation (UDC), was created in 1968 in response to an economic downturn. In 1995, the authority was merged with another public authority, the Job Development Authority (JDA), and the Department of Economic Development (DED) to create Empire State Development. The merger was meant to streamline economic development operations but also served to create a larger agency that is more difficult for the public and lawmakers to understand.

Origins of Empire State Development

The origins of the Empire State Development date to the late 1960s when Governor Rockefeller established a suite of public authorities aimed at addressing the state's flagging economy. In 1968, Rockefeller established the Urban Development Corporation, or UDC, which was tasked with addressing urban problems by clearing slums and overall improving the physical spaces of cities.

UDC was essentially a one-stop shop for urban redevelopment. UDC's enabling legislation empowered it to take on all the tasks associated with urban development: promotion, financing, acquisition, consulting, and development.⁶⁷ Specifically, the authority was granted the power to condemn and clear land and relocate those displaced; issue up to \$1 billion of revenue bonds; issue notes; grant loans and tax exemptions and abatements; acquire private property; acquire real property through eminent domain, create subsidiaries; and sue and be sued. Further, the authority, its lessees, and successors were exempted from municipal permit-granting powers and certificates of occupancy. Local governments are not allowed to alter any of UDC's plans, drawings, or specifications for any project and the authority was empowered to override local laws, ordinances, codes, and charters. With these vast powers, UDC was said to possess the flexibility of a private developer with the legal authority of government.⁶⁸

Boosting UDC's powers was its unique bonding authority. First, the agency had the ability to take advantage of moral obligation bonding. Although moral obligation bonds are not backed by the full faith and credit of the state, the bonds are considered a "moral" obligation of the state. Such bonds have greater flexibility of use and were

⁶⁷ Brilliant, E. L. (1975). *The Urban Development Corporation: Private Interests and Public Authority*. Lexington: Lexington Books.

⁶⁸ Brilliant, 1975

attractive to investors because of their low risk. Further, moral obligation bonds provide an additional level of security to investors. In addition to the security provided by a pledge of revenues generated from the project financed by the bonds, under a moral obligation bond, the bondholder has assurance that a government entity will maintain a certain level of funding to the issuing authority. According to Griffith, “[s]ome believe that [with moral obligation bonds] the state commits itself...to assure prospective investors that its public authorities will have enough funds to cover debt service on their obligations.”⁶⁹

Second, to make UDC as nimble as possible, it operated with general purpose bonds, which meant that bonds were not tied to specific projects as is typical for other public authorities.⁷⁰ Using general purpose bonds had several advantages. Bonds could be issued when market conditions were favorable, funding would be available for ordinary operating expenses, and most importantly, the risk of UDC’s various projects could be pooled. With this strategy, the failure of any one project did not seriously threaten the agency’s credit-worthiness.

In addition to its vast legal authority and its bonding advantages, UDC was granted enormous programmatic flexibility. It could take on public works, residential, commercial, and industrial projects as long as those projects eliminate blight. UDC could also act as a conduit for grant money from other sources like the federal government or enter into joint-venture relationships with other governments and private developers.⁷¹ Moreover, UDC could finance 50-90% of a project’s cost depending on the project type. In many cases, UDC provided the financing mechanisms necessary to meet a project’s needs (bonding authority) while the developer must demonstrate that they were unable to obtain additional financing through, for example, institutional, public, or private sources. In addition, the developer had to demonstrate an inability to obtain private financing for the full cost of the project without UDC assistance.⁷² Once a project was complete, UDC could manage the project itself or it could lease or sell it to another party.

Crisis and a Shift in Focus

UDC’s vast powers gave the authority enormous capacity. But, those powers also created ambiguity around the agency’s central purpose: was it to carry out profitable industrial and commercial development or to build housing, an activity that was not as

⁶⁹ Griffith, J. C. (1976). Moral Obligation” Bonds: Illusion or Security? *The Urban Lawyer*, 8(1), 54–93.

⁷⁰ Cohen, L. (2019). *Saving America’s Cities: Ed Logue and the Struggle to Renew Urban American in the Suburban Age*. New York: Farrar, Straus and Giroux.

⁷¹ Ponte, R. (1984). UDC: After a Record of Achievement, a Shift in Course? *New York Affairs*, 8, 19–34.

⁷² New York State Red Book, 1985-86

profitable?⁷³ Further, UDC's structure posed a paradox for its long-term viability as an independent organization: It was supposed to do what private developers would not do (produce housing in low-income areas) but still turn a profit.⁷⁴ The public authority was caught in a catch-22. A volatile bond market, the departure of its champion in the Governor's office (when Governor Rockefeller resigned three years into his fourth term), and an absence of a steady revenue stream stymied UDC's chances of survival.⁷⁵

In early 1975, UDC defaulted.

Governor Hugh Carey (D, 1975-1982) took office as a national recession was underway and the city was on the verge of bankruptcy. Just over a month after his inauguration, UDC payments came due on February 25, 1975. Carey signaled early on that he would make changes to the state's approach to spending and consequently, economic development. In his first state-of-the-state address in 1975, Carey declared: "Every interest and group and advocate came to think of the state budget and of the state subsidy of local budgets as a cornucopia, a never-ending horn of plenty that could pay for more and more each year. Now the times of plenty, the days of wine and roses, are over."⁷⁶

In the Department of Commerce, officials were torn between two views of how to carry out its mandate. In one view, the Department's main mission was promotion and its mandate was to provide industrial location assistance "in an active, entrepreneurial way."⁷⁷ Led by the Commissioner of Commerce, the Department would advocate reforms that improve the business climate of the state and make it more appealing to businesses. In a second view, the Commissioner acted as an advocate for the state, but also contributed to policy and strategies that improved conditions for the state's industries. Thus, not only was the agency tasked with making the state attractive to firms, it had to improve resident firms' abilities in exports, technology development, and labor-management relations. The Department of Commerce under Carey was focused on reversing "the outflow of firms by improving the business climate."⁷⁸

The February 25, 1975 due date for a payment on a Bond Anticipation Notes of \$104.5 million and a February 28, 1975 due date on a bridge loan payment of \$30 million to banks came and went. The Governor recognized that if UDC were to declare bankruptcy,

⁷³ Brilliant, 1975

⁷⁴ Brilliant, 1975

⁷⁵ Loewenstein, Louis K. 1978. "The New York State Urban Development Corporation — A Forgotten Failure or a Precursor of the Future?" *Journal of the American Institute of Planners* 44 (3): 261–73.

⁷⁶ Carey, H.L. (1975). Annual Message to the Legislature. New York State.

⁷⁷ Sternberg, E. 1988. "Promotion, Policy and Programs: A Report on New York State's Department of Economic Development." *The Nelson A. Rockefeller Institute of Government*. New York Economic Development Working Papers, number 6.

⁷⁸ Sternberg, 1988, 17

consequences would reverberate throughout the state and the state's credit rating would be destroyed.⁷⁹ Further, the default coincided with New York City's fiscal crisis, increasing the stakes of a UDC bankruptcy and highlighting the dependency of government on private financing via the bond market.⁸⁰ These corresponding crises forced scrutiny of the questionable fiscal practices of the State, UDC, and New York City.⁸¹

Governor Carey took steps to prevent bankruptcy and address the root challenges facing UDC. First, through a series of negotiations he secured funding for UDC's projects. The package authorized by the state legislature not only brought UDC out of default, it filled the authority's reserves to the level of annual debt service, and again filled those reserves in 1976.⁸² Second, he authorized a critical inquiry into the UDC and other financing agencies enabled by the Moreland Act (NY EXEC § 6).

According to the final report of the commission formed under the purview of the Moreland Act, UDC's vulnerability was both a function of its management and mandate. The authority accumulated too many projects too quickly and could not finance those commitments. While management created some vulnerabilities, UDC's downfall could largely be attributed to the contradiction in its underlying mandate. The authority was tasked with building housing in marginalized areas for families who could not pay market-rate rent, all while not costing taxpayers any money.⁸³

The Commission ultimately recommended that UDC's operations be halted under two conditions. First, UDC's housing functions should be transferred to an existing public authority, the Housing Finance Agency (HFA), and second, the state's industrial and commercial development functions, such as those carried out by the JDA and UDC, should be consolidated under a new public authority. This represented the first suggestion that state economic development efforts might be more effective and efficient if consolidated under a new governance structure.

Instead of halting UDC operations and centralizing economic development efforts, Carey encouraged it to take on commercial and industrial development in addition to its existing housing activities. Fortunately, language already existed in the authority's statute to activate both functions. Although it reversed Rockefeller-era priorities that

⁷⁹ Peterson, E.D. (2018). The Urban Development Corporation's "Imaginative Use of Credit": Creating Capital for Affordable Housing Development. *Journal of Urban History*, 45(6): 1174-1192.

⁸⁰ Phillips-Fein, K. (2017). *Fear City: New York's Fiscal Crisis and the Rise of Austerity Politics*. New York: Metropolitan Books.

⁸¹ Osborn, J. E. (1977). New York's Urban Development Corporation: A Study on the Unchecked Power of a Public Authority. *Brooklyn Law Review*, 43(2), 237-382.

⁸² Walsh, A. H. (1978). *The Public's Business: The Politics and Practices of Government Corporations*. Cambridge and London: The MIT Press.

⁸³ Cohen, 2019.

focused on housing, it was consistent with Carey’s retrenchment approach to governance. According to Ponte, “there was little choice [in this course of action], given the State’s diminished credit worthiness and uncertainties about federal housing subsidies.”⁸⁴

In January 1976, UDC’s new functions would be put to the test when New York City officials approached UDC for help with redeveloping the Commodore Hotel, owned by Penn Central Railroad, near Grand Central Terminal. The developer, Donald Trump, offered to buy the hotel and rebuild it as a branch of the Hyatt Regency. In turn, he would then sell it to UDC for \$1, which would then lease it back to Trump and the Hyatt Corporation for 29 years, permitting the developer to pay taxes far below the normal rate for 40 years.⁸⁵

The proposed plan was adopted. The hotel was rebuilt and as of 2016, the tax break cost New York City \$360 million in uncollected taxes. The cost to the state was uncollected sales taxes from construction materials because “the property title was transferred with no purchase price as part of a lease arrangement.”⁸⁶

At the time, public sentiment was that there was not much choice but to take Trump’s offer. A local television broadcast said, “If the Trump bid is rejected, the Commodore will shut down – probably this summer – and lie vacant, taxes unpaid, a monument to urban failure.”⁸⁷ Whether or not this was true was irrelevant. The state had to send a signal that it was open for business, and that businesses had a leading role to play in economic development. UDC’s shift toward industrial and commercial development in the aftermath of its default marked the beginning of a dramatic shift in the direction of the agency (see the figure, below). From that point forward, the agency – and economic development policy across the state – would increasingly focus on fostering the growth and development of businesses and less on public infrastructure.

⁸⁴ Ponte, 1984, 22

⁸⁵ Phillips-Fein, 2017

⁸⁶ Ponte, 1984, 22

⁸⁷ Phillips-Fein, 2047, 258

The Urban Development Corporation Changes Course and Survives

Goodbye, Slum Razing; Hello, Grand Hyatt

By JOSEPH P. FRIED

Anyone who wants to see how far the enthusiastic social activism of the 1960's has given way to the sober economic realities of the 1970's need only look at the current activities of the New York State Urban Development Corporation. Moreover, as a recently released report by State Comptroller Edward V. Regan illustrates, the U.D.C. offers a prime example of how earlier enthusiasms, even after having been abandoned because of their wasteful consequences, can continue to prove haunting.

The corporation was formed in 1968 as the most powerful urban renewal agency in the nation. It was the product of a decade in which ghetto unrest across the country had made inner-city uplift the order of



CART GREENBERG; JIM ANDERSON/WOODFIN CAMP
Urban Development Corporation president Richard A. Kaban;
Roosevelt Island complex (rear).

Source: Fried, J. P. (1979, July 15). Goodbye, Slum Razing; Hello, Grand Hyatt. *The New York Times*.

ESD is Born

When Governor Pataki (R, 1995-2006) took office in 1995, he sought to make the state's economic development programs easier to understand and access. In May 1995, Pataki created the Empire State Development Corporation as a UDC subsidiary, which allowed ESDC to inherit all the privileges, immunities, and exemptions of UDC. ESDC then absorbed the Job Development Authority (JDA), which was also launched by Rockefeller in the 1960s and whose mission is to spur job growth by using State-guaranteed bonds to support low-interest loans to manufacturers throughout the state. Although JDA still exists on paper, it operates under the auspices of ESDC. UDC has operated as "UDC d/b/a ESDC" since Governor Pataki's launch of ESDC, which means that UDC "does business as" ESDC.

In an effort to further streamline state economic development activities, Governor Pataki then created Empire State Development (without "Corporation") as an umbrella organization for the Urban Development Corporation d/b/a Empire State Development Corporation and the State Department of Economic Development. The agglomeration's mission reads: "The mission of Empire State Development ("ESD") is to promote a vigorous and growing state economy, encourage business investment and job creation, and support diverse, prosperous local economics across New York State."

Appendix 2: Authorities Budget Office Policy Guidance on Fiduciary Duty

Authorities Budget Office Policy Guidance



No. 10-01

Date Issued: March 1, 2010

Supersedes: New

Subject: Acknowledgement of Fiduciary Duty

Statutory Citation: Public Authorities Law Section 2824(1)(h)

Provisions: Section 6(i) of Public Authorities Law, as amended by Chapter 506 of the Laws of 2009 ("The 2009 Public Authorities Reform Act" or "PARA"), requires the Authorities Budget Office (ABO) to develop and issue a written acknowledgement that all board members must execute as part of their duties and responsibilities under Section 2824 of Public Authorities Law. By signing this acknowledgement a board member is stating they understand their role and fiduciary responsibilities as well as their duty of loyalty and care to the organization and commitment to the authority's mission and the public interest.

Pursuant to PARA, every board member of a Public Authority is required to sign an acknowledgement of fiduciary duty at the time they take the oath of office. The effectiveness of the acknowledgement will be deemed applicable throughout the duration of such board member's term and/or for as long as such director continues to serve in such capacity. Board members appointed to their positions prior to the effectiveness of PARA and the implementation of this new requirement are required to execute an acknowledgement by May 1, 2010.

Authorities Budget Office Policy Guidance: The primary responsibility of a board member is to understand the mission and public purpose of the Authority and to act in the best interests of the Authority, its mission, and the public. The intent of this written acknowledgement is to re-affirm the importance of this duty to board members.

The ABO is directing all state and local public authorities to use the attached acknowledgement form to satisfy this statutory requirement. Public authorities are to maintain signed copies of the acknowledgement throughout the official term of each active board member. State and local authorities will also be expected to certify as part of the Annual Report submission that these statements were executed in accordance with Section 2824 of Public Authorities Law. The failure to execute this acknowledgement will be considered a failure to comply with the requirements of Public Authorities Law. The failure to act in accordance with the principles stated in this acknowledgment can be considered a breach of fiduciary duty and could result in a recommendation that the board member be sanctioned.

A board member is to sign a new acknowledgement document at the start of each new term to which the board member is appointed.



Acknowledgement of Fiduciary Duties and Responsibilities

As a member of the Authority's board of directors, I understand that I have a fiduciary obligation to perform my duties and responsibilities to the best of my abilities, in good faith and with proper diligence and care, consistent with the enabling statute, mission, and by-laws of the Authority and the laws of New York State. The requirements set forth in this acknowledgement are based on the provisions of New York State law, including but not limited to the Public Authorities Reform Act of 2009, Public Officers Law, and General Municipal Law. As a member of the board of directors:

I. Mission Statement

I have read and understand the mission of the Authority; and the mission is designed to achieve a public purpose on behalf of the State of New York. I further understand that my fiduciary duty to this Authority is derived from and governed by its mission.

I agree that I have an obligation to become knowledgeable about the mission, purpose, functions, responsibilities, and statutory duties of the Authority and, when I believe it necessary, to make reasonable inquiry of management and others with knowledge and expertise so as to inform my decisions.

II. Deliberation

I understand that my obligation is to act in the best interests of the Authority and the People of the State of New York whom the Authority serves.

I agree that I will exercise independent judgment on all matters before the board.

I understand that any interested party may comment on any matter or proposed resolution that comes before the board of directors consistent with the laws governing procurement policy and practice, be it the general public, an affected party, a party potentially impacted by such matter or an elected or appointed public official. However, I understand that the ultimate decision is mine and will be consistent with the mission of the Authority and my fiduciary duties as a member of the Authority's board of directors.

I will participate in training sessions, attend board and committee meetings, and engage fully in the board's and committee's decision-making process.

III. Confidentiality

I agree that I will not divulge confidential discussions and confidential matters that come before the board for consideration or action.

IV. Conflict of Interest

I agree to disclose to the board any conflicts, or the appearance of a conflict, of a personal, financial, ethical, or professional nature that could inhibit me from performing my duties in good faith and with due diligence and care.

I do not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of my duties in the public interest.

Signature: _____

Print Name: _____

Authority Name: _____

Date: _____

Appendix 3: ESD's Transparency Initiative

In October 2021, [ESD released a transparency initiative](#) in response to Governor Hochul's Government Transparency Initiative Directive. Below are the goals established in the ESD transparency initiative. In italics are Reinvent Albany comments on each point of the ESD initiative.

1. Making additional information available to the public on ESD's website, or through the use of social and/or other media, while upholding the State's commitment to language access.

→ Reports and other materials are difficult to find, and much information on the ESD website is only available via search, meaning that it's not linked to from a master page on the ESD website. As is noted in our [recommendations](#), reports should be accessible in list/table form and filterable by topic and/or subsidiary releasing the report. This would be much easier to navigate than the current system which involves a lot of clicking through pages and skimming to find specific reports.

2. Ensuring the timely preparation of all mandated reporting and identifying ways to make useful information available to the public.

→ There is no way for the public to hold ESD accountable on this point. ESD should publish a schedule of reporting requirements, so the public anticipates when reports are due. In the long-term, the Governor and the Legislature should streamline the reporting process so reports are less onerous to ESD staff.

3. Ensuring the use of the Project Sunlight database in accordance with the Public Integrity Reform Act of 2011.

→ Elsewhere in the Transparency Initiative, ESD notes that the majority of their communications are not subject to inclusion in the Project Sunlight database due to the fact that disclosure could jeopardize economic development projects from being undertaken in NY or could damage NY's ability to attract top talent. ESD should strive to be fully transparent with the public and stop hiding behind exceptions to FOIL.

4. Improving response time for Freedom of Information Law (FOIL) requests, including by tracking monthly backlogs of outstanding requests and new requests, and by proactively posting frequently requested information or completed requests online.

→ *This is a laudable goal. ESD has significant room for improvement when it comes to FOIL, as noted in the [section on FOIL](#).*

5. Complying fully with Executive Order 8.95 'Using Technology to Promote Transparency, Improve Government Performance and Enhance Citizen Engagement' regarding Open Data.

→ *ESD maintains significant tabular data that is not included in the state's open data portal. This is addressed in the above section on Open Data compliance.*

6. Posting documents required for meetings open to the public at the same time the agenda is posted, to the extent practicable.

→ *ESD often posts agenda materials less than 24 hours before comments are due to the Board, which is typically at noon the day before a Board of Directors meeting. ESD should provide all materials for board meetings well in advance of Board meetings so the public can meaningfully participate in meetings. Any budget or tabular data should be provided in an open, machine-readable format.*

7. Reducing or eliminating the costs associated with providing data or records.

→ *ESD could further reduce costs by proactively publishing data or records by opening a FOIL reading room, as noted in the section on FOIL.*

8. Updating records retention policies, including ensuring the timely transfer of pertinent records to the State archives.

→ *It would be helpful if ESD posted a timeline of progress on this goal to manage public expectations.*

9. Increasing participation of agency personnel in community events and town meetings and providing new avenues for public participation in government decision-making.

→ *Elsewhere in the ESD Transparency Initiative, ESD indicates that the authority will do webinars on its various processes and programs. These seemingly have not yet begun and there is no timeline provided as to when these will begin.*

In sum, ESD is falling short of the goals it established for itself in the transparency initiative, most notably with regard to compliance with Executive Order 95.

Appendix 4: ESD Projects and Programs on the ESD Website

ESD's programming is scattered throughout the website and its annual reports. Some of the agency's programs are listed on the ESD website but not in the annual report, and vice versa. The table below shows the discrepancies between the website and the annual report, and is also an attempt to list all the programs of ESD.

	Page on ESD Website	In Annual Report
Tax Expenditure Programs		
Commercial Tax Credit	✓	✓
Employee Training Incentive Program	✓	✓
Excelsior Jobs Program	✓	✓
Film Tax Credit (Production)	✓	✓
Film Tax Credit (Post-Production)	✓	✓
Jobs Retention Program	✓	✓
Life Sciences Tax Credit Program	✓	✓
Musical and Theatrical Production Tax Credit	✓	✓
START-UP NY	✓	✓
New Markets Tax Credits Program	✓	✗
New York Empowerment Zone Program	✓	✗
Opportunity Zone Program	✓	✗
Brownfield Cleanup Program	✓	✗
Loan and Grant Programs		
Buffalo Regional Innovation Cluster	✗	✓
Community Development Financial Institution Program	✓	✓
Department of State Office for New Americans	✗	✓
Downstate Revitalization Fund	✗	✓
Downtown Revitalization Initiative	✗	✓

	Page on ESD Website	In Annual Report
Economic Development Fund	✓	✓
Economic Development Purposes Fund	✗	✓
Economic Transformation Program	✓	✓
Electric Generation Facility Cessation Mitigation	✓	✓
Entrepreneurship Assistance Centers	✓	✓
FAST NY Shovel-Ready Grant Program	✓	
JOBS NOW	✓	✓
Metropolitan Economic Revitalization Fund	✓	✓
Minority and Women Business Development and Lending Program	✓	✓
Minority and Women Revolving Loan Trust Fund	✗	✓
New Farmers Grant Fund	✗	✓
New NY Broadband Program	✗	✓
New York Works Economic Development Fund	✗	✓
NYS Life Sciences Initiative Fund	✗	✓
Regional Council Capital Fund	✓	✓
Regional Revolving Loan Trust Fund	✓	✓
Restore New York Communities Initiative	✓	✓
Upstate Regional Blueprint Fund	✗	✓
Upstate Revitalization Initiative	✓	✓
Urban and Community Development Program	✓	✓
World Trade Center Job Creation and Retention Program	✗	✓
Marketing and Advertising Programs		
Craft Beverage Marketing Program	✓	✓
Economic Development Initiatives	✗	✓
Market New York	✓	✓

	Page on ESD Website	In Annual Report
Tourism Promotion Matching Grants	✓	✓
Innovation Programs		
Centers for Advanced Technology	✓	✓
Centers of Excellence (CoEs)	✓	✓
Focus Centers	✗	✓
Innovation Hot Spots and New York State-Certified Business Incubators	✓	✓
Innovation Economy Matching Grants	✗	✓
NY Manufacturing Extension Partnership (MEP)	✗	✓
Science and Technology Law Center	✓	✓
Matching Grants Leverage Program	✓	✗
Cornell Center for Materials Research	✓	✗
Defense Industry Assistance	✓	✗
New York Smart Cities Innovation Partnership	✓	✗

Appendix 5: DOEI Data Fields

Below are the data fields that ESD has made available in its [Database of Economic Incentives](#).

1. EIN of the recipient
2. Lead Agency Name
3. Lead Agency Code
4. Quarter Number of the Submission
5. Project ID number
6. Program through which funding was awarded
7. Recipient Name
8. Name of Project
9. Is the award to a public or private sector entity?
10. Project description
11. Industry
12. If the project is a Member Item, the originating district
13. Street Address
14. County
15. Postal Code
16. Economic Development Region
17. Start date
18. End date
19. Assistance type
20. Assistance amount
21. Total lead agency benefits awarded
22. Disbursement to date
23. Does this project include additional NYS benefits?
24. If "YES" what is the additional awarding agency name?
25. Other state agency funding program
26. Other state agency funding awarded
27. Is the project also receiving benefits from a local Industrial Development Agency (IDA)?
28. If applicable, from which IDA is the project also receiving benefits?
29. If applicable, what is the net value of the tax benefits awarded by the IDA?
30. Total NYS investment
31. Total public-private investment
32. Project status
33. Compliant with terms and conditions
34. Reason for non-compliant status
35. Penalties applied?

36. Reason for termination
37. Total Employees at the Site (FTEs)
38. Total Employees at the Site (PTs)
39. Total Employees at the site (project Hires in FTEs)
40. Total Employees at the site (project Hires in PT workers only)
41. Is this a job creation/retention project?
42. Job Creation Commitments (FTEs)
43. Job Creation Commitments (PTs)
44. Job Retention Commitments (FTEs)
45. Job Retention Commitments (PTs)
46. Jobs Created to Date (FTEs)
47. Jobs Created to Date (PTs)
48. Jobs Retained to Date (FTEs)
49. Jobs Retained to Date (PTs)
50. Project Hires (FTEs)
51. Project Hires (PTs)
52. NYS MWBE utilization goal applied
53. Current MWBE utilization rate
54. Is this a legacy project?
55. Contact

Appendix 6: Regularly-Updated Tabular Data

The information that ESD has available on OpenNY is severely lacking. The below is a list of tabular data that is currently buried in PDFs but should be made available on OpenNY per EO 95 of 2013.

1. [Portfolio of Lenders / Regional Revolving Loan Trust Fund Annual Report](#)
2. [ESD Annual Jobs Reports](#)
3. [Empire State Development Quarterly Status Reports](#)
4. [Various tables within the ESD Comprehensive Economic Development Report](#)
5. [Summary of Life Science Initiative Operations / Life Science Initiative Annual Report](#)
6. [Various tables within the Commercial Production Tax Credit Annual Report](#)
7. [Various tables within Film Tax Credit Quarterly Reports](#)
8. [Empire State Jobs Retention Program Quarterly Reports](#)
9. [Excelsior Jobs Program Quarterly Reports](#)
10. [Tables within the Comprehensive Economic Development Report](#)
11. [Various tables within the Division of Minority and Women's Business Development Report](#)
12. [Tables within the Annual Program Report](#)
13. [Tables within the Annual Report of the State of Small Businesses](#)
14. [Impact tables in the NYSTAR Annual Report](#)
15. [Tables within the Economic Impact of Visitors in New York report](#) (for all regions)
16. [Tables within the Centers for Advanced Technologies Program report](#)
17. [Tables within the Centers of Excellence reports](#)

Front cover image by “Workforce and Economic Advancement: Rensselaer County Regional Chamber of Commerce.” Rensselaer County Regional Chamber of Commerce, www.renscochamber.com/doing-business-here/economic-development-partnership. Accessed 18 July 2023.



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