

In the Matter of the Application of

ALLIANCE for ENVIRONMENTAL RENEWAL

VERIFIED  
PETITION

Petitioner,

Index No.:  
RJI No.:

for judgment pursuant to Article 78 of the CPLR

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION,  
doing business as EMPIRE STATE DEVELOPMENT,

Respondent.

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Petitioner Alliance for Environmental Renewal respectfully alleges as follows:

## **INTRODUCTION**

- 1) This is a proceeding pursuant to Article 78 of the CPLR to review the determination of Empire State Development (“ESD”) to deny a Freedom of Information Law (“FOIL”) request that sought access to certain records compiled by the Governor’s Broadband Program Office (“the BPO” – the BPO is an office within ESD).
- 2) Petitioner’s FOIL request was originally made on November 12, 2015. As described below, there is no valid reason for the extensive delay in responding to this request. Petitioner treated ESD’s failure to grant access as a “constructive denial” and filed an administrative appeal of such denial. ESD denied the appeal on January 27, 2016.
- 3) The records requested pertain to the BPO’s plans to allocate up to \$500 million appropriated by the Legislature for the improvement of broadband access in New York State. The BPO is planning to receive applications for such funding between March 1,

2016 and April 15, 2016. As explained below, the public is entitled to have an opportunity to review the requested records before the BPO begins its consideration of funding applications.

- 4) Because the issues are time sensitive, petitioner is commencing this petition by Order to Show Cause. Petitioner is seeking an order: 1) overturning the “constructive denial” of its FOIL request pursuant to CPLR 7803 (3), and directing the ESD to grant immediate access to the records requested, 2) enjoining ESD from receiving applications for proposals to spend the money allocated by the Legislature until 15 days after access to the records has been granted, pursuant to CPLR 7803 (2), on the grounds that ESD’s refusal to disclose information pertaining to the development of its funding procedures deprives ESD of jurisdiction to proceed with the distribution of the money, and 3) an award of attorneys’ fees pursuant to § 89 (4) (c) of the Public Officers Law.

## **VENUE**

- 5) Venue is properly laid in Columbia County pursuant to CPLR §506(b). §506(b) permits an Article 78 proceeding to be commenced in any county “within the judicial district where the respondent made the determination complained of... or the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located ...”.
- 6) This proceeding is the result of a FOIL request directed to the BPO, which is headquartered in Albany County, and a principal office of the ESD is also located in Albany County. Albany County is in the 3rd Judicial District. Because Columbia County is also in the 3rd Judicial District, venue is proper in Columbia County.

## **PARTIES**

- 7) Petitioner, Alliance for Environmental Renewal (“the Alliance”) is a not-for-profit corporation, which was duly incorporated in New York State in 1993. The Alliance’s address is 60 Scutt Road, Feura Bush, New York 12067, in the Town of New Scotland, County of Albany.
- 8) The Bylaws of the Alliance permit the President to institute litigation on his own initiative. The President of the Alliance has authorized and directed the institution of this lawsuit, and it was also approved by the unanimous vote of the Board of Directors.
- 3) The Respondent New York State Urban Development Corporation (“UDC) is “a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation.” § 6254 of the Unconsolidated Laws. It is currently doing business under the name “Empire State Development.” The “Governor’s Broadband Program Office” is a bureau or office within Empire State Development.
- 4) UDC is an “agency” for the purposes of the State Administrative Procedure Act (“SAPA”), pursuant to § 102 (1) of SAPA, and is an “agency” for the purposes of FOIL pursuant to § 86 (3) of the Public Officers Law.

## **PROCEDURAL HISTORY**

- 5) The Alliance, by letter from its attorney, Peter Henner, sent a FOIL letter to the BPO on November 12, 2015, seeking access to: 1) all responses to a “Request for Information” that had been issued by the BPO and 2) drafts of any guidelines or regulations prepared by the BPO pertaining to the criteria for the allocation of funds to improve broadband access. A copy of this letter is annexed hereto as Exhibit A.

- 6) On November 30, 2015, Mr. Henner received an e-mail from Empire State Development, stating: “ESD is in receipt of the attached FOIL request seeking access to certain records of the New York State Urban Development Corporation (“UDC”) doing business as Empire State Development. ESD is considering your request in accordance with the Freedom of Information Law (Public Officers Law, Section 84 et. seq.) and its rules concerning access to the records of the Corporation. ESD will notify you of the results of its search for responsive documents within ten (10) business days.” A copy of this email is annexed hereto as Exhibit B.
- 7) On December 10, 2015, Mr. Henner received a second email from ESD, advising that they were still processing the FOIL request and “hoped to have a response on or before January 11, 2015” (*sic*). A copy of this email is annexed hereto as Exhibit C.
- 8) At 3:14 PM on January 11, 2016, Mr. Henner sent an email, addressed to “Empire State Development FOIL Officer” stating that he had not received any response to his original request. He noted that the BPO had issued “Guidelines” three days previously, and that the Guidelines specifically stated that the BPO had considered the public comments that had been received and were the primary subject of the FOIL request. Mr. Henner stated that he was prepared to appeal the nonresponse as a “constructive denial.” A copy of this email is annexed hereto as Exhibit D.
- 9) At 5:00 PM on January 11, 2016, Mr. Henner received an email from ESD, apparently forwarding the two previous emails from ESD (correcting the incorrect 2015 from the December e-mail), and including a new e-mail advising that ESD hoped to have a response “on or before February 9, 2016.” On February 9, 2016, Mr. Henner received an e-mail from ESD, once again stating that ESD was “still processing the attached FOIL

request” and that ESD hoped to have a response by March 9, 2016. Copies of these e-mails are annexed hereto as Exhibit E.

- 10) On January 12, 2016, Mr. Henner filed a FOIL appeal with ESD. Because he received inconsistent advice as to where this appeal needed to be directed, it was filed both by certified mail, return receipt requested, addressed to “Elizabeth Fine, General Counsel and Records Access Appeals Officer” and by e-mail, addressed to Antovk Pidedjian. Although records of the U.S. Postal Service indicate that the certified mail was received on January 14, 2016, the green card acknowledging receipt was never returned. A copy of this appeal, together with the tracking information from the USPS, is annexed hereto as Exhibit F.
- 11) On January 27, 2016, ESD denied the FOIL appeal, by letter from Antovk Pidedjian, which was sent by e-mail. Mr. Pidedjian acknowledged “receipt of your email appeal dated January 12, 2016...” and asserted that the delay in responding to the FOIL request was not unreasonable in light of other pending FOIL requests. A copy of the denial letter is annexed hereto as Exhibit G.
- 12) Section 89 (b) of the Public Officers Law states that a person who is denied access to records as a result of an appeal determination by an agency appeals officer “may bring a proceeding for review of such denial pursuant to article 78 of the civil practice law and rules.”

## **CONSEQUENCES OF DELAYED ACCESS TO THE RECORDS**

- 13) In 2015, the New York State Legislature appropriated \$500 million to improve broadband access in New York State. The Legislature stated that “priority shall be given

to projects that bring high-speed Internet access to unserved areas of the state, public libraries and educational opportunity centers.” (Chapter 54, Part C, Laws of 2015).

- 14) On September 24, 2015, the BPO issued a “Request for Information.” The BPO set forth, in considerable detail, its intended plans and methods to develop guidelines or regulations for the consideration of proposals for funding projects to improve broadband access. The BPO invited interested parties, including parties that might have an interest in actually submitting proposals for funding, to submit comments on BPO’s goals, plans and methodology. Responses were due on or before October 30, 2015. A copy of this Request for Information is annexed hereto as Exhibit H.
- 15) The Alliance for Environmental Renewal submitted extensive comments in response to this Request for Information (the Alliance’s comments were co-signed by the Town of New Scotland, Albany County Legislators Douglas Bullock, Michael Mackey, and Herbert Reilly and four individuals). The Alliance sharply criticized the goals and methodology of the BPO. In summary, the Alliance argued: 1) the stated goal of the BPO to use the appropriated funds to upgrade all New Yorkers to a speed of 100 MB per second download meant that money would not be available for the intended purpose of the legislative appropriation - to provide minimal broadband access for rural areas that do not have any broadband access, 2) the BPO was wrongfully emphasizing economic feasibility criteria rather than focus on the need for broadband in areas where it has not previously been economically practicable, and 3) the BPO’s requirement for 50% private sector matching would effectively preclude projects in rural areas where the private sector has not found it cost-effective to provide broadband access. A copy of the Alliance’s comments is annexed hereto as Exhibit I.

- 16) Upon information and belief, there were many comments that were submitted in response to the BPO's Request for Information. Private sector broadband providers, municipalities, especially municipalities hoping to benefit from projects improving broadband access, state agencies, state authorities and commissions, federal agencies such as the Federal Communications Commission, and elected officials would all have an interest in the plans of the BPO, and would have wanted to be heard with respect to the ultimate plans for the appropriation and expenditure of the \$500 million.
- 17) Upon information and belief, many of the comments that were submitted, particularly comments that were submitted by entities that were likely to submit funding proposals, were carefully considered by the BPO and influenced the final Guidelines that were ultimately promulgated by the BPO.
- 18) As of November 12, 2015, when the Alliance submitted its FOIL request, it fully expected that the BPO would make all of the comments that were submitted available to the public, in the same manner that public comments that are submitted on draft environmental impact statements, or that are submitted with respect to other public proposals are made available to the public. In the FOIL request itself, Mr. Henner stated "if the responses that have been received by the BPO will be made available to the public on the website, or in some other publicly available forum.... It is a sufficient response to this request to identify when and where these records will be available."
- 19) However, no information was forthcoming from the BPO. Mr. Henner attempted to inquire, on behalf of the Alliance, as to whether the public comments would be made available, and as to when the BPO attempted to adopt any guidelines or regulations. Several phone calls were simply not returned. Mr. Henner also attempted to enlist the

help of legislative officials. Upon information and belief, inquiries to the BPO from legislative officials were similarly ignored.

- 20) On January 8, 2016, the BPO promulgated “New NY Broadband Grant Program Request for Proposal Guidelines.” Page 2 of this document states: “the BPO issued a Request for Information (RFI) on September 24, 2015 to solicit feedback from stakeholders and interested parties, in order to inform the structure of the Program. The RFI responses have been considered in the development of these Guidelines.” (emphasis added). A copy of these Guidelines is annexed hereto as Exhibit J.
- 21) The Guidelines impose a number of requirements that will, in the opinion of the Alliance, ensure that little, if any, of the \$500 million legislative appropriation will be spent to provide broadband access to rural communities. The Guidelines require the BPO to only consider applications for funding from existing broadband providers, require that any proposal provide broadband access to at least 2500 housing units, require 50% matching funds from the applicant, and propose to rank the proposals on the basis of number of units served per dollar of state investment, with no consideration given to the fact that many communities desperately need broadband access even though it is not economical to provide it.
- 22) Furthermore, the Guidelines may constitute a “Rule” or “Rules” within the meaning of § 102 (2) (a) of SAPA. If so, the promulgation of the Guidelines is illegal because ESD failed to comply with the provisions of Article 2 of SAPA, which sets forth the procedures and agency must follow before adopting rules.
- 23) The Alliance recently submitted written testimony to a hearing conducted by two standing committees of the New York State Assembly addressing the issue of broadband.

These comments address what the Alliance believes are the problems with the Guidelines. A copy of this written testimony is annexed hereto as Exhibit K.

- 24) The Guidelines state that there will be a period for the receipt of application for funding proposals, which will begin on March 1, 2016 and will run until April 15, 2016.
- 25) The Alliance believes that the BPO's intended methodology for the expenditure of the \$500 million violates the intended legislative purpose of providing broadband access for communities that do not presently have it. Therefore, the Alliance believes that the BPO's planned receipt of proposals and possible award of money pursuant to the Guidelines that it has promulgated may be illegal and may be the subject of a legal challenge under CPLR 7803 (2) and/or § 123-b of the State Finance Law. Even if the BPO's plans do not constitute an improper expenditure of appropriated funds, they must still be subject to timely public scrutiny, for, among other possible purposes, enabling the Legislature to take appropriate corrective action.
- 26) The public comments that were received in response to the Request for Information, which were admittedly used by the BPO in the development of its Guidelines, are critical information that should be available to the public. There is no reason why these comments should not have been made publicly available once they were filed, and there is certainly no reason why they cannot be made available now.
- 27) Nor is there any bona fide reason to delay a response to the FOIL request. Upon information and belief, all, or almost all, of the comments that were submitted were submitted in electronic format, and it would be a simple matter to either produce them publicly or, at the very least, to put them onto a compact disc and delivered to petitioner.

## OPINION OF THE COMMITTEE ON OPEN GOVERNMENT

- 28) On January 13, 2016, the Committee on Open Government, by Assistant Director Kristin O'Neill, issued an advisory opinion with respect to the constructive denial of a FOIL request by Empire State Development. The opinion was written in response to a request from Nairobi Vives, an attorney with the firm of Couch White LLP. A copy of this letter is annexed hereto as Exhibit L.
- 29) Ms. Vives, who had originally filed a FOIL request on September 24, 2015, had received similar emails to the ones that were sent to Mr. Henner, had ultimately appealed from the delay as a constructive denial. Ms. Vives received a letter from Mr. Pidedjian denying the appeal that is identical to the denial letter that was sent to Mr. Henner (except for the dates of the correspondence with ESD summarized in the second paragraph of the letter). A copy of this letter is annexed hereto as Exhibit M.
- 30) The Committee on Open Government noted that "there is no provision in the statute for repeated extensions" in response to a FOIL request, and advised that "it was reasonable, upon receipt of the third extension notice, to construe this failure to determine rights of access as a constructive denial on the part of the agency." Furthermore, the Committee noted that, as is also the case with the FOIL request at issue in this proceeding, Empire State Development did not provide any reason for the delay in response in the repeated extensions.
- 31) The Committee also noted that the case cited by Mr. Pidedjian of ESD, Matter of Data Tree, LLC v. Romaine, 9 N.Y. 3d 454 (2007), was decided before the enactment of the most recent amendments to § 89 (3) (a).

- 32) Most pertinently, the Committee stated: “in our opinion, it is unreasonable for an agency to delay its response when requested records can be located with facility and are clearly public. That other earlier requests involved records that may be voluminous, difficult to locate, and/or time-consuming to review would not, in our view, authorize an agency, as a matter of practice or policy, to deal with requests solely on the basis of the dates of their receipt.” (emphasis added).
- 33) Although the opinions of the Committee on Open Government are advisory, upon information and belief, “courts should defer” to these opinions. Kwasnik v. City of New York, 262 A.D.2d 171 (1st Dept.1999). “Since the Committee is the state agency charged with administering the Freedom of Information Law, its interpretation of the statute, if not irrational or unreasonable, should be upheld”, Miracle Mile Association v. Yudelson, 68 A.D.2d 176, 181 (4th Dept. 1979) lv.app.den. 48 N.Y.2d 706.
- 34) In a recent case, the Third Department relied heavily upon Advisory Opinions of the Committee on Open Government as the basis of its decision. The court noted in a footnote: “We note that advisory opinions from the Committee on Open Government are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis (*see Matter of John P. v Whalen*, [54 N.Y.2d 89](#), 96 [1981]; *Matter of Town of Waterford v New York State Dept. of Env'tl. Conservation*, [77 A.D.3d 224](#), 230 n 5 [2010], *lv dismissed* [15 N.Y.3d 906](#) [2010]).” TJS Inc. v. New York State Department of Taxation and Finance, 89 A.D. 3d 239 (3d Dept. 2011)
- 35) Upon information and belief, it is highly unusual for a court to decide an issue pertaining to the Freedom of Information Law contrary to an opinion issued by the Committee on Open Government.

## AS AND FOR A FIRST CAUSE OF ACTION

- 36) Petitioner repeats and realleges each and every allegation set forth above with the same force and effect as if set forth in full herein.
- 37) Section 89 (3) (a) of the Public Officers Law requires an agency, upon a determination to grant a FOIL request “in whole or in part,” to either grant the request within 20 business days or state, in writing, the reason why the request cannot be granted and provide a “date certain within a reasonable period” when the request will be granted.
- 38) As stated in the January 13, 2016 letter from Ms. O’Neill. “It has long been advised [by the Committee on Open Government] that when an agency is unable to deny or provide access to records within five business days, it must provide an acknowledgment within that time indicating an approximate date, not to exceed 20 additional business days, on which it will grant access in whole or in part. If it is determined, either within five business days of the receipt of the request, or at or near the expiration of 20 business days of its acknowledgment, that is unable to respond within 20 additional business days, it must indicate a ‘date certain’ that includes both the date and the reasons for requesting additional time.”
- 39) “[A] delay in responding to a FOIL request or an appeal of its denial is generally treated the same as a denial of the request or the appeal. *Matter of New York Times Co. v City of N.Y. Police Dept.*, [103 A.D.3d 405](#), 406 (1st Dept 2013) (“The FOIL requester’s statutory remedy for an untimely response or ruling is to deem the response a denial and commence a CPLR article 78 proceeding . . .”) *Perlmutter v. New York City Police Department*, Slip Op. 32532 (U) (Sup. Ct., N.Y. Co. October 17, 2013).

- 40) Although ESD has not yet determined that the request must be granted, at least in part, it is clear that the law will require the granting of access to at least some of the records that have been requested.
- 41) Petitioner is seeking access to comments that were received by the agency, ESD, in response to a public Request for Information. Upon information and belief, such comments are not subject to any statutory exemptions.
- 42) The appeal denial letter claims that the records requested by petitioner “are subject to potential redactions pursuant to exemptions from disclosure under Section 87 (2) (b) (d) and (g) of FOIL.” These are the same exemptions cited by ESD in its response to Ms. Vives. Upon information and belief, the citation of these exemptions is part of a “form” denial letter, rather than an indication of any substantial consideration of any particular FOIL request.
- 43) While these cited possible exemptions might justify the withholding of a small portion of the internal ESD records that were requested by the instant FOIL request, they should not apply to the public comments that were received by Empire State Development in response to the Request for Information. These public comments constitute the major portion of the FOIL request.
- 44) Section 87 (2) (g) refers to “inter-agency or “intra-agency” materials. Comments received from the general public in response to a public solicitation do not constitute such materials.
- 45) Section 87 (2) (d) refers to “trade secrets” or records submitted by a commercial enterprise, where disclosure will cause substantial injury to the commercial enterprise. It is possible, but by no means certain, that some of the comments that may have been

submitted include some material that might arguably contain such “trade secrets. ”

However, the overwhelming majority of the records that were submitted are almost certainly not exempt from disclosure under this section.

- 46) Section 87 (2) (b) refers to “an unwarranted invasion of personal privacy.” It is difficult to see how the disclosure of a record that was submitted as a public comment can be an invasion of personal privacy.
- 47) The records that are sought, public responses to a Request for Information, can be easily identified and collected without an extensive file search. The responses should all be in the same place, and they can be easily reviewed to determine if any material in those responses should be redacted.
- 48) Therefore, there is no reason why access to these records cannot be granted promptly, and certainly no reason for ESD to delay the granting of this request for three months.
- 49) The failure of ESD to grant access to the records requested constitutes a constructive denial of the request, and such a denial is arbitrary, capricious, and in violation of the clear statutory mandate of the New York State Freedom of Information Law (Article 6 of the Public Officers Law).

### **AS AND FOR A SECOND CAUSE OF ACTION**

- 50) Petitioner repeats and realleges each and every allegation set forth above with the same force and effect as if set forth in full herein.
- 51) The public reasonably expected to have had an opportunity to review the public comments that were received by ESD in response to its Request for Information

- 52) If the procedures that were ultimately to be adopted by the BPO and/or the Guidelines are ultimately deemed to be part of a rulemaking process, the rules would have been subject to an extensive public review process before their adoption (see § 202 SAPA).
- 53) Even if the Guidelines are not subject to SAPA as rulemaking, the public could generally have expected to have had an opportunity to review the extensive public comments that were received by the BPO prior to the adoption of the Guidelines.
- 54) Because these public comments were not made available to the public, either on the BPO's own initiative, or in response to the Alliance's FOIL request, the public has been precluded from meaningfully critiquing the process by which a governmental agency has made critical decisions with respect to the expenditure of \$500 million.
- 55) The BPO, as part of ESD, intends to go forward with the Guidelines that it has promulgated, receive proposals for funding, and award funding, in the next few months.
- 56) The instant FOIL request seeks records that are essential to an evaluation of the legality of the Guidelines, and to determine whether there are any grounds, either in law, to be determined by a court of competent jurisdiction, or as a matter of public policy, to be addressed by the public or by the Legislature, to challenge or overturn these Guidelines.
- 57) If the BPO is permitted to withhold these records until after it has received its proposals and awarded funding, it will have successfully avoided the public review of its actions, by improperly delaying its response to a FOIL request.
- 58) "It is well settled that courts are empowered, as a matter of discretion and for good cause shown, to void any action taken by a public body in violation of [the Open Meetings Law] Gordon v. Village of Monticello, 207 A.D.2d 55 (3d. Dept. 1994). Affd. 87 N.Y. 2d 124 (1995).

- 59) The Open Meetings Law, Article VII of the Public Officers Law, provides a specific statutory authorization for the invalidation of actions taken in violation of its provisions (§107 (1)). Although the Freedom of Information Law, Article VI of the Public Officers Law, lacks this specific provision, petitioners nevertheless maintain that the court, acting as a court in equity, as a matter of discretion, and to fulfill the legislative intent to provide access to records and ensure transparency of governmental action, has the power to take action to prevent a governmental agency from flouting the statutory requirement to provide access to public records by excessive delay.
- 60) CPLR 7803 (2) permits a petitioner to raise the question of “whether the body are officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction” in an Article 78 proceeding.
- 61) The failure of ESD to publicly disclose the records which form the basis of its intended action, both on its own, and in response to a proper Freedom of Information Law request, deprives ESD of jurisdiction to implement its intended actions with respect to receiving funding proposals and distributing money.
- 62) Because Empire State Development has not complied with the Freedom of Information Law with respect to information pertaining to the promulgation of the Guidelines, any action that it may take to implement the procedures described in these Guidelines should be deemed to be in excess of its jurisdiction, and can and should be enjoined until such time as Empire State Development complies with its obligations.

### **ATTORNEY’S FEES**

- 63) The Freedom of Information Law authorizes an award of litigation costs and reasonable attorney’s fees to a successful party.

- 64) §89 (4) (c) of the Public Officers Law permits the court to “assess. . . reasonable attorney’s fees and litigation costs reasonably incurred. . . in any case. . . in which [a requester] has substantially prevailed.”
- 65) “The counsel fee provision was first added to FOIL in 1982, based upon the Legislature’s recognition that persons denied access to documents must engage in costly litigation to obtain them and that ‘[c]ertain agencies have adopted a ‘sue us’ attitude in relation to providing access to public records,” thereby violating the Legislature’s intent in enacting FOIL to foster open government. (Assembly Mem. in Support, at 1, L.1982, ch. 73) the provision was subsequently amended . . . . Adding the failure to respond within the statutory time as an additional, alternative basis for an award of counsel fees (see L.2006, ch. 492, § 1: Public Officers Law § 89 (4) (c)) - in order to ‘create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good-faith effort to comply with the requirements of FOIL’ (Senate Introducer’s Mem. In Support, Bill Jacket, L 2006, ch. 492, at 5) ” New York Civil Liberties Union v. City of Saratoga Springs, 87 A.D. 3d 336, 338 (3d. Dept. 2011), See also Legal Aid Society v. New York State Department of Corrections and Community Supervision, 105 A.D. 3d 1120 (3d Dept. 1120, 1122 (3d Dept. 2013).
- 66) The records at issue in this proceeding are plainly of significant interest to the general public. The records involve public comments that may have been submitted by a variety of public and private entities, and that have influenced Guidelines that will determine how \$500 million in public money will be spent. These comments were solicited by an agency in a highly public manner. Furthermore, the Guidelines themselves are of great interest to many communities around New York State that lack broadband access, and are

hoping to get a share of the \$500 million that was appropriated money in order to obtain broadband access.

- 67) There is no reasonable basis for ESD to deny access to the records nor excuse for ESD's failure to respond to this request within a reasonable period of time. The records sought can be located with facility, and can easily be made available. As noted by the Committee on Open Government, the excessive delay in response was unreasonable.
- 68) Furthermore, ESD's delay in responding to the FOIL request is plainly self-serving, in that it will act to insulate the process by which it adopted controversial Guidelines for the expenditure of \$500 million from public review. It is not only that ESD lacked a reasonable basis to deny access to the records; the agency should be punished for affirmatively trying to keep these records from the public.
- 69) Petitioner respectfully maintains that Respondent Empire State Development's blatant disregard of the clear requirements of the Freedom of Information Law warrants an award of attorney's fees to Petitioner for litigating an action to compel compliance with the statute.

**WHEREFORE**, Petitioner Alliance for Environmental Renewal respectfully demands judgment, pursuant to Article 78 of the Civil Practice Law and Rules, ordering, adjudging and decreeing:

- 1) Directing Respondent to grant Petitioner's November 12, 2015 FOIL request.
- 2) Directing Respondent to provide access to all of the records identified in Petitioner's November 12, 2015 FOIL request, with the exception of any material properly redacted, within 10 days of an order by this court.

- 3) Enjoining Respondent from taking any action to solicit, receive, consider, or take any action upon any proposal to fund broadband access from the \$500 million appropriated by the Legislature in 2015 until at least 15 days after Respondent has provided access to the public comments that were submitted to the Broadband Program Office as a result of the September 24, 2015 Request for Information,
- 4) Awarding Petitioner reasonable attorney's fees, litigation costs and disbursements, under §89 (4) (c) of the Public Officers Law.
- 5) Awarding such other and further relief as to this court may seem just, proper, and equitable.

Dated: February 10, 2015  
Clarksville, New York

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