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Attorney for Plaintiff Richard Edelman

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

Richard Edelman

Plaintiff,

vs.

Securities and Exchange Commission
Defendant.

Case No.: '15CV2750 BEN BGS

**COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

- 1 1. This action is brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. §
2 552, as amended, for an order compelling Defendant United States Securities and
3 Exchange Commission (“SEC”) to produce, provide access to, and make available
4 certain records specified below that were requested by Plaintiff Richard Edelman.
- 5 2. As specifically alleged below, Plaintiff seeks the following records under FOIA from
6 the SEC:
 - 7 A. All documents, records, material of any nature concerning investigation in the
8 matter of Empire State Realty Trust MNY08894. This would include Wells
9 Notices and Wells Submissions in response. This FOIA also requests similar
10 documents of any other SEC investigation concerning Empire State Realty
11 Trust; and
 - 12 B. SEC Division of Enforcement Case Closing Report in the matter of Empire
13 State Realty Trust Inc.

JURISDICTION AND VENUE

- 15 3. This Court has jurisdiction and venue over this action pursuant to 5 U.S.C. §
16 552(a)(4)(B).

PARTIES

- 18 4. Plaintiff is a citizen of the United States and a resident of County of San Diego.
- 19 5. Defendant is an agency of the United States Government and has possession and
20 control of the records that are the subject of this action.

RELEASE OF THE RECORDS SOUGHT TO PLAINTIFF WOULD SERVE

THE HIGHEST PUBLIC INTEREST

- 23 6. Federal regulations describe how Defendant SEC has been entrusted with powers and
24 duties of “great social and economic significance to the American people,” the
25 prevention of abuses that would undermine the integrity of the nation’s economic
26 institutions. Section 200.53 of Title 17 of the United States Code of Federal
27 Regulations spells out that trust:

28 / / /

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Members of the Securities and Exchange Commission are entrusted by various enactments of the Congress with powers and duties of great social and economic significance to the American people. It is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens. Their success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions.

7. The release and disclosure of the information sought by Plaintiff's FOIA requests as alleged in this complaint would serve the highest public interest because Plaintiff would utilize the released information to contribute significantly to the public's understanding how Defendant SEC conducts an investigation of the financial structure that maintains one of United States most historical sites, the Empire State Building. The records should be furnished without any charge in that the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of Defendant SEC and is not primarily in the commercial interest of the requester.

FIRST CAUSE OF ACTION

8. Plaintiff is informed and believes and thereon alleges that Defendant SEC's Office of the General Council ("OGC") controls and dominates the SEC's Office of FOIA Services ("FOIA Office"). Plaintiff is further informed and believes and thereon alleges that the FOIA Office follows the dictates of the OGC in relation to requests seeking records of SEC investigations. Plaintiff is further informed and believes and thereon alleges that the FOIA Office customarily asserts exemptions pursuant to the guidance and instructions of the OGC. The FOIA requester must then appeal the FOIA Office's decision denying a request to the same OGC. The OGC then rules upon the assertion of exemptions by the FOIA Office which the OGC directed the FOIA Office to assert. In this way, the OGC can indefinitely delay the release of

1 records sought by FOIA requesters until they become sufficiently frustrated and
2 discouraged to abandon the requests. In this case, the OGC has twice ruled upon
3 decisions by the FOIA Office and twice remanded this matter to the FOIA Office
4 with vague instructions to the FOIA Office to reconsider its prior decision. Said
5 vague instructions allow if not invite the FOIA Office to engage in further delay and
6 engage in yet another cycle of the endless process of decision, appeal, and remand.
7 Such a policy violates both the spirit and letter of FOIA.

- 8 9. On February 9, 2015, pursuant to the applicable provisions of FOIA, Plaintiff
9 submitted a FOIA request to Defendant SEC's FOIA Office using its online form.
10 Plaintiff requested access to and copies of specified documents as follows:

11
12 All documents, records, material of any nature concerning investigation in
13 the matter of Empire State Realty Trust MNY08894. This would include
14 Wells Notices and Wells Submissions in response. This FOIA also requests
15 similar documents of any other SEC investigation concerning Empire State
16 Realty Trust.

17 A true and correct copy of the email confirming said submission is attached hereto and
18 incorporated by reference as Exhibit 1.

- 19 10. By letter of February 9, 2015, the SEC's FOIA office acknowledged receipt of
20 Exhibit 1 and assigned the above request tracking number 15-01819-FOIA. A true
21 and correct copy of said letter is attached hereto and incorporated by reference as
22 Exhibit 2.

- 23 11. By letter of March 19, 2015, the SEC's FOIA Office informed Plaintiff three boxes
24 of documents responsive to his request had been identified and requested
25 confirmation of Plaintiff's willingness to pay estimated review and duplication
26 expenses. A true and correct copy of said letter is attached hereto and incorporated
27 by reference as Exhibit 3.

28 ///

1 12. On March 19, 2015, Plaintiff sent an email to the FOIA Office in which he agreed to
2 pay said estimated review and duplication fees. A true and correct copy of said letter
3 is attached hereto and incorporated by reference as Exhibit 4.

4 13. By May 28, 2015, more than 60 days after Plaintiff had informed the FOIA Office
5 he was willing to pay said fees, the FOIA Office had not responded or released any
6 of the requested records. On that date, as provided by 17 CFR § 200.80(d)(6),
7 Plaintiff appealed the SEC's failure to respond within the time allowed. A true and
8 correct copy of said appeal is attached hereto and incorporated by reference as
9 Exhibit 5.

10 14. On June 16, 2015, the SEC FOIA Office acknowledged receipt of Plaintiff's appeal
11 and assigned it tracking number 15-00302-APPS. A true and correct copy of said
12 letter is attached hereto and incorporated by reference as Exhibit 6.

13 15. On June 23, 2015, the OGC remanded Plaintiff's appeal to the FOIA Office,
14 acknowledging "that the statutory time period has not been met [by the FOIA
15 Office]" and "requesting that the FOIA Officer process this request as expeditiously
16 as possible." A true and correct copy of said remand is attached hereto and
17 incorporated by reference as Exhibit 7.

18 16. On June 30, 2015, the FOIA Office acknowledged the remand from the OGC and
19 assigned it tracking number 15-00052- REMD. A true and correct copy of said letter
20 is attached hereto and incorporated by reference as Exhibit 8.

21 17. By letter of September 28, 2015, the FOIA Office informed Plaintiff that 1,442
22 pages of records had been identified as responsive to his request. The FOIA Office
23 granted access to those records except for certain information "protected from
24 release pursuant to 5 U.S.C. § 552(b) (4), (5), (6) and/or (7) (C), 17 CFR § 200.80(b)
25 (4), (5), (6) and/or ii)." A true and correct copy of said letter is attached hereto and
26 incorporated by reference as Exhibit 9.

27 / / /

1 18. By letter of October 23, 2015, Plaintiff's counsel appealed the decision of the FOIA
2 Office. A true and correct copy of said letter is attached hereto and incorporated by
3 reference as Exhibit 10.

4 19. By letter of November 4, 2015, the FOIA Office erroneously acknowledged it had
5 received Plaintiff's appeal on November 4, 2015 and assigned it tracking number 16-
6 00069-APPS. In fact, as alleged below, Plaintiff's appeal was received by the OGC
7 and FOIA Office on October 23, 2015, by facsimile. A true and correct copy of said
8 letter is attached hereto and incorporated by reference as Exhibit 11.

9 20. By email of November 13, 2015, Plaintiff's counsel informed the FOIA Office its
10 acknowledgment letter for the October 23, 2015, appeal wrongly listed its receipt
11 date as of November 4, 2015. A true and correct copy of said letter is attached hereto
12 and incorporated by reference as Exhibit 12. Plaintiff's counsel has received no
13 answer regarding this email.

14 21. By letter of December 2, 2015, Associate General Counsel Richard M. Humes,
15 informed Plaintiff's counsel that he was remanding Plaintiff's "request to the FOIA
16 Officer for further consideration of whether to assert Exemptions 4, 5, 6, and 7(C)"
17 and to reconsider whether to classify Plaintiff as "commercial" or "other" requester.
18 A true and correct copy of said letter is attached hereto and incorporated by
19 reference as Exhibit 13.

20 **SECOND CAUSE OF ACTION**

21 22. On March 11, 2015, pursuant to the applicable provisions of FOIA, Plaintiff
22 submitted a FOIA request to Defendant SEC' FOIA Office using its online form.
23 Plaintiff requested access to and copies of specified documents as follows: "SEC
24 Division of Enforcement Case Closing Report in the matter of Empire State Realty
25 Trust Inc." A true and correct copy of the email confirming said submission is
26 attached hereto and incorporated by reference as Exhibit 14.

27 ///

28 ///

23. By letter of March 12, 2015, the FOIA Office acknowledged receipt of Exhibit 14 and assigned the above request tracking number 15-02304-FOIA. A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 15.

24. By letter of April 1, 2015, the FOIA Office denied Plaintiff's request citing FOIA Exemption (b)(5). A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 16.

25. On October 7, 2015, Plaintiff appealed the decision of the FOIA Office. A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 17.

26. By letter of November 12, 2015, Associate General Counsel Richard M. Humes, denied Plaintiff's appeal asserting Exemption 5. A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 18.

PLAINTIFF'S CLAIM FOR RELIEF: VIOLATIONS OF FOIA

27. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

28. Plaintiff is entitled by law to access the records requested under the FOIA.

29. Defendant SEC is in violation of the FOIA, 5 U.S.C. § 552, by failing to fully and lawfully comply with Plaintiff's February 9 and March 3, 2015, requests for records (Exhibits 1 and 14), as specified in paragraphs 9 and 22 above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court:

A. Declare that Defendant SEC has violated the FOIA by failing to satisfy Plaintiff's February 9 and March 3, 2015, requests for records as specified in paragraphs 9 and 22 above;

B. Order Defendant SEC to immediately search for and release all records responsive to Plaintiff's February 9 and March 3, 2015, requests for records as specified in paragraphs 9 and 22 above;

C. Award Plaintiff his costs and reasonable attorney's fees and litigation costs in this action; and

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1 D. Grant such other and further relief as the Court may deem just and proper.
2 Respectfully submitted,
3 DATED: December 8, 2015
4



6 Gary J. Aguirre, CA Bar #38927
7 Aguirre Law, A.P.C.
8 501 W Broadway, Ste 800
9 San Diego, CA 92101
10 Telephone: 619-400-4960
11 Facsimile: 619-501-7072

12 Attorney for Plaintiff Richard Edelman
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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Edelman, Richard

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Gary J. Aguirre
Aguirre Law, APC
501 W. Broadway, Ste. 800; San Diego, CA 92101

DEFENDANTS

U.S. Securities and Exchange Commission

County of Residence of First Listed Defendant Washington, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'15CV2750 BEN BGS**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 U.S.C. § 552

Brief description of cause:

Declaratory and injunctive relief against agency for FOIA violations.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12/08/2015

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

SIGNATURE OF ATTORNEY OF RECORD


Exhibit 1

[Print](#)[Close](#)

FOIA 2/9/15

From: **richard** (richardedelman@hotmail.com)

Sent: Mon 2/09/15 10:15 AM

To: empirestatebuildinginvestors@gmail.com (empirestatebuildinginvestors@gmail.com); richard (richardedelman@hotmail.com)

Thank you for taking the time to submit your request.

Your request was received on February 9, 2015. If you need to change or cancel your request, please email us at foiapa@sec.gov. DO NOT RESPOND TO THIS NOTICE!

Your request will be assigned to one of our specialists who will respond to you within 20 days.

Please note that all companies, foreign and domestic, are required to file registration statements, periodic reports and other filings electronically through EDGAR. Anyone can access and download this information for free by accessing www.sec.gov SEC Filings and Forms (EDGAR) or [Company Search](#).

Further, the Commission is not a research service. Please use a securities industry research service for voluminous or commercial requests.

Please save this page for your records.

Request received from:

Richard Edelman
608 N.Rios Ave
Solana Beach, California 92075
United States

8589229680
empirestatebuildinginvestors@gmail.com
Empirestatebuildinginvestors.com

Request:

COMP_NAME: Empire State Realty Trust Inc.

DOC_DATE: 01/01/12-02/09/15

TYPE: Investigations

COMMENTS: I request all documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894. This would include Wells Notices and Wells Submissions in response. This FOIA also requests similar documents of any other SEC investigation concerning Empire State State Realty Trust.

FEE_AUTHORIZED: Willing to Pay \$28

FEE_WAIVER_REQUESTED: No

EXPEDITED_SERVICE_REQUESTED: No

Exhibit 1

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https://tts.sec.gov/cgi-bin/request_public_docs

Exhibit 10

FAX COVER SHEET

TO	FOIAOffice
COMPANY	USSecuritiesandExchangeCommission
FAXNUMBER	12027729337
FROM	Maria Pomares
DATE	2015-10-23 15:13:51 GMT
RE	FREEDOM OF INFORMATION ACT APPEAL

COVER MESSAGE

Dear Madam or sir:

Pleasefind attached Mr. Edelman's appeal of decisions in relation to FOIA Request No. 15-01819-FOIA (15-00302-APPS, and 15-00052-REMD)

Sincerely,

Gary Aguirre

AGUIRRE LAW, APC

501 W BROADWAY, SUITE 800 · SAN DIEGO CA 92101 · PHONE: 619-400-4960 · GARY@AGUIRRELAWAPC.COM



FREEDOM OF INFORMATION ACT APPEAL

By Facsimile to 202-772-9337 and First Class Mail

October 23, 2015

Office of the General Counsel
Securities and Exchange Commission
100 F Street N.E.
Mail Stop 9612
Washington, D.C. 20549

Securities and Exchange Commission
Office of FOIA Services
ATTN: FOIA Appeals
100 F Street N.E., Mail Stop 2465
Washington, DC 20549

Re: Appeal of Decision in Relation to FOIA Request No. 15-01819-FOIA
(15-00302-APPS, and 15-00052-REMD)

Dear Madam or Sir:

By this letter, as attorney for Richard Edelman, I serve notice that Mr. Edelman is appealing all adverse decisions of the FOIA Office as stated in its letter of September 28, 2015, a copy of which is attached hereto as Attachment 1 and incorporated herein by reference, in relation to FOIA Request No. 15-01819-FOIA, a copy of which is attached hereto as Attachment 2 and incorporated herein by reference.

Mr. Edelman is also appealing all adverse decisions of the FOIA Office as stated in its letter of March 19, 2015, a copy of which is attached hereto as Attachment 3 and incorporated herein by reference, including the decision that Mr. Edelman is a “commercial” requester.”

Sincerely,

Gary J. Aguirre

Enclosures

Exhibit 10
Page 33

Attachment 1



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

September 28, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Avenue
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request Nos. 15-01819-FOIA, 15-00302-APPS, and
15-00052-REMD

Dear Mr. Edelman:

This letter responds to your request, dated and received in this office on February 9, 2015, for all documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894, including wells notices and wells submissions, from January 1, 2012 to February 9, 2015.

Reference is also made to your June 1, 2015 appeal to the SEC's Office of the General Counsel (15-00302-APPS), and the remand of your request to this office dated June 23, 2015 (15-00052-REMD).

We have identified the enclosed 1,442 pages of records as being responsive to your request. Access is granted to these records, except for certain information that is protected from release pursuant to 5 U.S.C. § 552(b)(4), (5), (6) and/or (7)(C), 17 CFR § 200.80(b)(4), (5), (6) and/or (ii), for the following reasons:

- Exemption 4 protects confidential commercial or financial information, the release of which could cause substantial competitive harm to the submitter.
- Exemption 5 protects records that were prepared in anticipation of litigation, form an integral part of the SEC's pre-decisional process, and/or contain advice given to the Commission or senior staff by the Commission's attorneys. Such records are protected from release by the attorney work-product, deliberative process and/or attorney-client privileges embodied in Exemption 5.

Mr. Richard Edelman
September 28, 2015
Page 2

15-01819-FOIA,
15-00302-APPS, and
15-00052-REMD

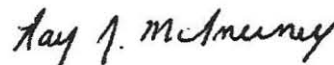
- Exemption 6 protects records that would constitute a clearly unwarranted invasion of personal privacy if released.
- Exemption 7(C) protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

I am the deciding official with regard to this adverse determination. You have the right to appeal my decision within 90 calendar days from the date of this letter to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

You may file your appeal by completing the online Appeal form located at https://www.sec.gov/forms/request_appeal, or mail your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2465, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact Jason Luetkenhaus of my staff at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,



Ray J. McInerney
FOIA Branch Chief

Enclosures

Attachment 2

[Print](#)[Close](#)

FOIA 2/9/15

From: **richard** (richardedelman@hotmail.com)

Sent: Mon 2/09/15 10:15 AM

To: empirestatebuildinginvestors@gmail.com (empirestatebuildinginvestors@gmail.com); richard (richardedelman@hotmail.com)

Thank you for taking the time to submit your request.

Your request was received on February 9, 2015. If you need to change or cancel your request, please email us at foiapa@sec.gov. DO NOT RESPOND TO THIS NOTICE!

Your request will be assigned to one of our specialists who will respond to you within 20 days.

Please note that all companies, foreign and domestic, are required to file registration statements, periodic reports and other filings electronically through EDGAR. Anyone can access and download this information for free by accessing www.sec.gov SEC Filings and Forms (EDGAR) or [Company Search](#).

Further, the Commission is not a research service. Please use a securities industry research service for voluminous or commercial requests.

Please save this page for your records.

Request received from:

Richard Edelman
608 N.Rios Ave
Solana Beach, California 92075
United States

8589229680
empirestatebuildinginvestors@gmail.com
Empirestatebuildinginvestors.com

Request:

COMP_NAME: Empire State Realty Trust Inc.

DOC_DATE: 01/01/12-02/09/15

TYPE: Investigations

COMMENTS: I request all documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894. This would include Wells Notices and Wells Submissions in response. This FOIA also requests similar documents of any other SEC investigation concerning Empire State State Realty Trust.

FEE_AUTHORIZED: Willing to Pay \$28

FEE_WAIVER_REQUESTED: No

EXPEDITED_SERVICE_REQUESTED: No

Exhibit 10
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https://tts.sec.gov/cgi-bin/request_public_docs

Exhibit 10
Page 39

Attachment 3



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

March 19, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Ave
Solana Beach, CA 92075

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-01819-FOIA

Dear Mr. Edelman:

This letter is in reference to your request, dated and received in this office on February 9, 2015, for all documents, records, material of any nature, including Wells Notices and Wells Submissions, concerning the investigation in the matter of Empire State Realty Trust MNY-08894. You are also seeking similar documents of any other SEC investigation concerning Empire State Realty Trust.

We have identified 3 boxes of records that are responsive to your request. Under the FOIA, you are considered a "Commercial" requester. As such, you are required to pay all search and review fees beyond the first one-half hour, in accordance with our fee schedule.¹ We typically estimate that it will take approximately 4 hours to review the contents of 1 box of records (approximately 3,000 pages per box) for releasability under the FOIA. However, it could take up to 8 hours per box depending on the subject matter. Therefore, our preliminary estimate at this point is anywhere from 12 to 24 hours of review time, which equates to a cost between \$336.00 and \$672.00. Additionally, you will also be responsible for the cost of copying all releasable records at a rate of \$0.24 per page.

Exhibit 10
Page 41

¹ All search and review time beyond the first one-half hour that is free of charge to you is charged at a rate of \$28.00 per hour. Note, you will be charged fees even if the data located is subsequently determined to be exempt under the FOIA.

Mr. Richard Edelman

15-01819-FOIA

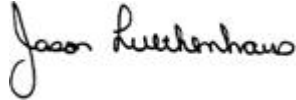
March 19, 2015

Page 2

However, you have only authorized up to \$28.00 in FOIA processing fees. If you would like for us to review the 3 boxes of records we located for possible release under the FOIA, please write or call me by **March 30, 2015** and confirm your commitment to pay the estimated processing fees. If we do not hear from you by that date we will assume that you are no longer interested in pursuing this request, and we will close our file on it without further notice to you.

If you have any questions, please contact me at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,

A handwritten signature in black ink that reads "Jason Luetkenhaus". The signature is written in a cursive style with a large, stylized "J" and "L".

Jason Luetkenhaus
FOIA Lead Research Specialist

Attachment 3



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

March 19, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Ave
Solana Beach, CA 92075

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-01819-FOIA

Dear Mr. Edelman:

This letter is in reference to your request, dated and received in this office on February 9, 2015, for all documents, records, material of any nature, including Wells Notices and Wells Submissions, concerning the investigation in the matter of Empire State Realty Trust MNY-08894. You are also seeking similar documents of any other SEC investigation concerning Empire State Realty Trust.

We have identified 3 boxes of records that are responsive to your request. Under the FOIA, you are considered a "Commercial" requester. As such, you are required to pay all search and review fees beyond the first one-half hour, in accordance with our fee schedule.¹ We typically estimate that it will take approximately 4 hours to review the contents of 1 box of records (approximately 3,000 pages per box) for releasability under the FOIA. However, it could take up to 8 hours per box depending on the subject matter. Therefore, our preliminary estimate at this point is anywhere from 12 to 24 hours of review time, which equates to a cost between \$336.00 and \$672.00. Additionally, you will also be responsible for the cost of copying all releasable records at a rate of \$0.24 per page.

Exhibit 10
Page 44

¹ All search and review time beyond the first one-half hour that is free of charge to you is charged at a rate of \$28.00 per hour. Note, you will be charged fees even if the data located is subsequently determined to be exempt under the FOIA.

Mr. Richard Edelman

15-01819-FOIA

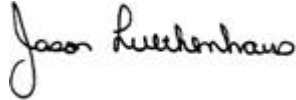
March 19, 2015

Page 2

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If you have any questions, please contact me at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,

A handwritten signature in black ink that reads "Jason Luetkenhaus". The signature is written in a cursive, slightly slanted style.

Jason Luetkenhaus
FOIA Lead Research Specialist

From: send@mail.efax.com
To: maria@aguirrelawapc.com
Subject: Successful transmission to 12027729337. Re: FREEDOM OF INFORMATION ACT APPEAL
Date: Friday, October 23, 2015 8:27:33 AM

eFax_Faxing_Simplified



Dear Maria,



Re: FREEDOM OF INFORMATION ACT APPEAL

The 14 page fax you sent through eFax.com to 12027729337 was successfully transmitted at 2015-10-23 15:27:33 (GMT).

The length of transmission was 781 seconds.

The receiving machine's fax ID: 2027729336

If you need assistance, please visit our online help center at <https://www.efax.com/help/faq>.

Thank you for using the eFax service.

Best Regards,
eFax.com

Customer Service

Online Help: <https://www.efax.com/help-center/faq>
Tel: 323-817-3205 (US) or 353 1 656 4910 (EU)
Email: help@mail.efax.com

Reference ID:



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6922 Hollywood Blvd., Los Angeles, CA 90028

This account is subject to the terms listed in the [eFax Customer Agreement](#).



Exhibit 10
Page 46

Exhibit 11



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

November 04, 2015

Mr. Richard Edelman
empirestatebuildinginvestors.com
608 North Rios Avenue
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Appeal No. 16-00069-APPS (15-01819-FOIA)

Dear Mr. Edelman:

This letter is an acknowledgment of your FOIA Appeal dated October 23, 2015 and received in this office on November 04, 2015 regarding Empire State Realty Trust Inc.

Your appeal has been assigned tracking number **16-00069-APPS**, and is assigned to the SEC's Office of the General Counsel for processing. You will receive a direct response from that office regarding a decision on your Appeal.

In the interim, if you have questions about your appeal, you may contact the Office of the General Counsel by calling 202-551-5100, or sending an email to foiapa@sec.gov. Please cite the Appeal tracking number provided above.

Sincerely,

Office of FOIA Services

Exhibit 12

From: Gary Aguirre
To: "McInemey, Raymond"; "foiapa@sec.gov"; "neilsonc@sec.gov"
Cc: "humesr@sec.gov"
Subject: Appeal of Decision in Relation to FOIA Request No. 15-01819-FOIA (15-00302-APPS, and 15-00052-REMD)
Date: Friday, November 13, 2015 10:53:00 AM
Attachments: [2015-11-4 APL Ackn..pdf](#)
[2015-10-23 APL.pdf](#)

Gentlemen:

The attached acknowledgment of the filing of the FOIA appeal incorrectly states the service of that appeal as of November 4, 2015. I am attaching the fax confirmation showing service on October 23, 2015, (see last page of appeal).

I am informing Richard Humes by copy of this appeal that we consider the appeal to have been served on the SEC on October 23, 2015, in relation to the requester's right to file a civil action.

Sincerely,

Gary J. Aguirre
Aguirre Law, APC
501 W. Broadway, Suite 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072

www.aguirrelawapc.com

This E-Mail is intended only for the use of the individuals to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege. If you have received this communication in error, please do not distribute it and notify us immediately by email to maria@aguirrelawapc.com.

Exhibit 13



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

December 2, 2015

Mr. Gary Aguirre
Aguirre Law, APC
501 W. Broadway, Suite 800
San Diego, CA 92101

Re: Appeal, Freedom of Information Act (FOIA) Request No. 15-01819-FOIA
(15-00302-APPS and 15-00052-REMD), designated on appeal as No.
16-00069-APPS

Dear Mr. Aguirre:

I am responding to your October 23, 2015, Freedom of Information Act appeal of the decisions of the FOIA/Privacy Act Officer, Securities and Exchange Commission, regarding your client Richard Edelman's request for "all documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894." On September 28, 2015, the FOIA Officer granted Mr. Edelman access to 1,442 pages of documents, but withheld certain information in the documents under FOIA Exemptions (b) (4), (5), (6), and 7(C). The FOIA Office's decision also classifies Mr. Edelman as a "commercial" requester for purposes of determining the fees he may be charged for processing his FOIA request.

I am remanding your request to the FOIA Officer for further consideration of whether to assert Exemptions 4, 5, 6, and 7(C). Upon appeal, I determined that in asserting those FOIA exemptions there was not an adequate review of the responsive documents identified, there are other potentially responsive documents not reviewed by the FOIA Office, and that some responsive documents are subject to confidential treatment requests which must be considered by the FOIA Office before it can determine whether those documents may properly be released.

I am also remanding to the FOIA Office the issue of the appropriate classification of your client for FOIA processing fees purposes. On March 19, 2015, the FOIA Office informed Mr. Edelman that he was classified as a "commercial" requester. However, the FOIA Office did not charge Mr. Edelman any fees when it provided him with the 1,442 pages of documents. Therefore, your appeal on that ground is moot. *See Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that agency's release of documents without seeking payment mooted plaintiff's "arguments that the district court's denial of a fee waiver was substantively incorrect"). However, the FOIA Office has at times classified Mr. Edelman as a "commercial" requester and other times as an "other" requester. Resolution of the question of the proper classification of Mr. Edelman may be

relevant to the issue whether the FOIA Office should charge fees for processing the responsive documents on remand. Thus, on remand the FOIA Office should reconsider how to classify Mr. Edelman.

You may contact Mr. Ray McInerney, FOIA Branch Chief, at 202-551-6376, regarding the status of the file on remand.

For the Commission
by delegated authority,

A handwritten signature in blue ink, appearing to read 'RMA', is positioned above the printed name of the signatory.

Richard M. Humes
Associate General Counsel

Exhibit 14

[Print](#)[Close](#)

FOIA 3/11/15

From: **richard** (richardedelman@hotmail.com)
Sent: Wed 3/11/15 4:35 PM
To: richard (richardedelman@hotmail.com)

Thank you for taking the time to submit your request.

Your request was received on March 11, 2015. If you need to change or cancel your request, please email us at foiapa@sec.gov. DO NOT RESPOND TO THIS NOTICE!

Your request will be assigned to one of our specialists who will respond to you within 20 days.

Please note that all companies, foreign and domestic, are required to file registration statements, periodic reports and other filings electronically through EDGAR. Anyone can access and download this information for free by accessing www.sec.gov SEC Filings and Forms (EDGAR) or [Company Search](#).

Further, the Commission is not a research service. Please use a securities industry research service for voluminous or commercial requests.

Please save this page for your records.

Request received from:

Richard Edelman
608 N. Rios Ave
Solana Beach, California 92075
United States

8589229680
empirestatebuildinginvestors@gmail.com
Empirestatebuildinginvestors.com

Request:

COMP_NAME: Empire State Realty Trust, Inc

DOC_DATE: 2/1/12-3/11/15

CIK_NUM: 0001541401

TYPE: Investigations

COMMENTS: SEC Division of Enforcement Case Closing Report in the matter of Empire State Realty Trust Inc.

FEE_AUTHORIZED: Willing to Pay \$28

FEE_WAIVER_REQUESTED: No

EXPEDITED_SERVICE_REQUESTED: No

Exhibit 14

Page 54

Exhibit 15



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

March 12, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 North Rios Avenue
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-02304-FOIA

Dear Mr. Edelman:

This letter is an acknowledgment of your FOIA Request dated and received in this office on March 12, 2015, regarding the Case Closing Report in the matter of Empire State Realty Trust Inc.

Your request has been assigned tracking number 15-02304-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible.

In the interim, if you have any questions about your request, you may contact this office by calling 202-551-7900, or sending an email to foiapa@sec.gov. Please refer to your tracking number when contacting us.

For additional information, please visit our website at www.sec.gov and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services

Exhibit 15
Page 57

Exhibit 16



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

April 1, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Ave.
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-02304-FOIA

Dear Mr. Edelman:

This letter is in response to your request dated March 11, 2015, and received in this office on March 12, 2015, for the Case Closing Report in the matter of Empire State Realty Trust Inc.

We have been advised that the Case Closing Recommendation is the Case Closing Report for matters under inquiry (MUIs). Effective in February 2013, a separate Case Closing Report is not required to close a MUI, and in this matter a Case Closing Report was not produced. However, as we advised you in our March 11, 2015 response to your previous FOIA request, 15-00564-FOIA, the five (5) page Case Closing Recommendation is exempt from release under the FOIA pursuant to 5 U.S.C. § 552(b)(5), 17 CFR § 200(b)(5).

If you consider this response to be an adverse determination, you have the right to file an appeal with our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2465, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

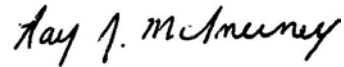
Exhibit 16
Page 59

Mr. Richard Edelman
April 1, 2015
Page 2

15-02304-FOIA

If you have any questions, please contact Jason Luetkenhaus of my staff at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,

A handwritten signature in black ink that reads "Ray J. McInerney". The signature is written in a cursive, slightly slanted style.

Ray J. McInerney
FOIA Branch Chief

Exhibit 17

[Print](#)[Close](#)

Oct 7, 2015 Appeal Case Closing Recommendation 15-02304

From: **richard** (richardedelman@hotmail.com)
Sent: Wed 10/07/15 10:07 AM
To: richard (richardedelman@hotmail.com)



[Home](#) | [Jobs](#) | [Answers](#) | [Site Map](#) | [Search](#)

U.S. Securities and Exchange Commission

Thank you for taking the time to submit your request.

Your Freedom of Information Act Appeal was received on October 7, 2015. If you need to change or cancel your request, please email us at foiapa@sec.gov. DO NOT RESPOND TO THIS NOTICE!

Your request will be assigned to one of our specialists who will respond to you within 30-60 days.

Please note that all companies, foreign and domestic, are required to file registration statements, periodic reports and other filings electronically through EDGAR. Anyone can access and download this information for free by accessing www.sec.gov SEC Filings and Forms (EDGAR) or [Company Search](#).

Further, The Commission is not a research service. Please use a securities industry research service for voluminous or commercial requests.

Please save this page for your records.

Request received from:

Prefix:
{No Response Provided}
First:
Richard
MI:
{No Response Provided}
Last:
Edelman
Suffix: (If any):
{No Response Provided}

Exhibit 17
Page 62

Telephone:

8589229680

Email:

empirestatebuildinginvestors@gmail.com

Company Name, if Applicable:

{No Response Provided}

Address line 1:

608 N Rios Ave

Address line 2:

{No Response Provided}

City:

Solana Beach

State / Province:

California

Country:

United States

Zip:

92075

FOIA Request Number:

15-02304

FOIA Request Subject:

Case Closing Recommendation

Name of the Deciding Official:

{No Response Provided}

Date of Denial:

4/1/15

Adverse Decision:

OTHER

Your FOIA Appeal – The appeal should state why the requester disagrees with the determination and provide any additional supporting information. **This MUI for ESRT dealt with, among other things, a proxy solicitation done by Malkin Holdings LLC for the Empire State Building under supervision of the SEC. Bloomberg News, and other news organizations have published stories that the Chairman of Malkin Holdings called investors and lied about how much money they would receive if they approved the vote. The reporters have listened to a recording of the Chairman's call which was left as a voicemail, so no privacy issues were involved. This is the Empire State Building, a symbol of the United States, so it is a matter of national interest in knowing what the SEC Case Closing Recommendation was.**

Attachment File:

{No Response Provided}

https://www.sec.gov/cgi-bin/request_appeal

Exhibit 17

Page 63

Exhibit 18



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

November 12, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 North Rios Avenue
Solana Beach, CA 92075

Re: Appeal, Freedom of Information Act (FOIA) Request No. 15-02304-FOIA,
designated on appeal as No. 16-00011

Dear Mr. Edelman:

I am responding to your October 7, 2015, Freedom of Information Act appeal of the decision of the FOIA/Privacy Act Officer, Securities and Exchange Commission, regarding the above-referenced FOIA request in which you sought "SEC Division of Enforcement Case Closing Report in the matter of Empire State Realty Trust Inc." On April 1, 2015, the FOIA Officer denied your request citing FOIA Exemption (b)(5). On October 7, 2015, you filed a FOIA appeal in which you challenge the FOIA Officer's invocation of Exemption 5, arguing "the Empire State Building, a symbol of the United States, ... is a matter of national interest in knowing what the SEC Case Closing Recommendation was." I have considered your appeal and it is denied.

The FOIA Officer asserted the deliberative process privilege and the attorney work-product doctrine embodied in Exemption 5 to withhold the internal record.¹ Under Exemption 5, intra- and inter-agency memoranda that reflect deliberations amongst agency personnel may be withheld from public disclosure. Such deliberative materials are protected from public release so that agency staff may freely engage in the candid, frank and open interchange of ideas critical to decision making as well as preventing confusion in the public as to the basis for a decision.²

As staff created the internal record, which has been maintained in a non-public file, the threshold requirement to be "intra-agency" is met. The second consideration is whether the

¹Courts have construed Exemption 5 to exempt those documents that would normally be privileged in the civil discovery context and to incorporate all civil discovery privileges, including the deliberative process privilege and the attorney work-product doctrine. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983); *Burka v. Dept. of Health and Human Services*, 87 F.3d 508, 516 (D.C. Cir. 1996) (noting that FOIA "incorporates . . . generally recognized civil discovery protections"); *Martin v. Office of the Special Counsel*, 819 F.2d 1181, 1185 (D.C. Cir. 1987) (statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]").

²See, e.g., *City of Virginia Beach v. Dept. of Commerce*, 995 F.2d 1247, 1252-53 (4th Cir. 1993).

record is predecisional and deliberative.³ A predecisional document is one designed to assist agency decisionmakers in arriving at a decision and which contains the opinions of the writer rather than the policy of the agency.⁴ In demonstrating a document is predecisional, it suffices to establish “what deliberative process is involved, and the role played by the document in issue in the course of that process.”⁵ An agency must also show that the document makes recommendations or expresses opinions on matters facing the agency.⁶ Exemption 5 generally covers drafts, recommendations, proposals, suggestions, discussions and other subjective documents that reflect the consultative process.⁷

In this case, the authors of the internal record did not have decision-making authority. Rather, they presented their opinions, evaluative commentary, analysis and evaluation of the evidence obtained during the course of their investigation. These internal records were created to assist the decisionmaker in assessing the appropriateness of opening, continuing or ending an investigation. The internal records also preceded and informed any decision, and so reflect the consultative process among agency personnel. Nor did the decision maker adopt or incorporate this internal record into his decision.⁸ Accordingly, this internal record comprises predecisional deliberative information, the disclosure of which would compromise the Commission’s decision-making and consultative processes.

Exemption 5 also protects records prepared in anticipation of litigation under the attorney work-product doctrine.⁹ Commission attorneys or staff under their supervision created the

³*Access Reports v. Dept. of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

⁴*Formaldehyde Institute v. HHA*, 889 F.2d 1118, 1120 (D.C. Cir. 1989) (material is predecisional when it is part of the process leading to a decision on an issue).

⁵*Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁶*Mapother v. Dept. of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

⁷*Coastal States*, 617 F.2d at 866.

⁸ The decision maker is not obligated to adopt its recommendation or reasoning, and so cannot be characterized as a “final opinion.” Nor is there any evidence that it was adopted or incorporated into the decision. See, e.g., *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 176-77 (1975) (decision maker not bound by any prior recommendations and was free to reject the proposed conclusion or to accept it based on reasons other than those set forth by staff). In fact, some agency decisions may simply not have any accompanying rationale as FOIA does not require agencies to write opinions about their decisions. *Id.* at 191.

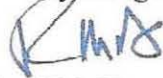
Where a decision maker, “having reviewed a subordinate’s non-binding recommendation, makes a ‘yes or no’ determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate’s report.” *National Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 359 (2nd Cir. 2005); *Afshar v. Dept. of State*, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983) (noting that “[i]f the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately reflected the decisionmaker’s thinking”). Further, a “failure” to provide evidence that an agency decision maker “adopted the reasoning [of a memorandum] . . . is fatal” to an adoption finding. *Wood v. FBI*, 432 F.3d 78, 84 (2nd Cir. 2005).

⁹See *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (work product protection extends to documents prepared in anticipation of litigation).

internal record in the course of an investigation. As Commission investigations are conducted with an eye towards litigation, the internal record includes information subject to the attorney work-product doctrine.¹⁰ To release the withheld record would permit the probing into the mental processes of the attorney authors of the closing recommendation.¹¹ Further, the internal record reflects confidential communications from Commission attorneys to their client.¹² Thus, I find that the FOIA Officer properly asserted the protections embodied in Exemption 5.

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business.¹³ Voluntary mediation services as a non-exclusive alternative to litigation are also available through the Office of Government Information Services (OGIS). For more information, please contact OGIS at ogis@nara.gov, www.archives.gov/ogis, or 1-877-684-6448. If you have any questions concerning my determination, please call Carin Cozza, Senior Counsel, at 202-551-7958.

For the Commission
by delegated authority,



Richard M. Humes
Associate General Counsel

¹⁰*SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (Exemption 5's work product privilege attaches to records of law enforcement investigation when the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer"); *Gavin v. SEC*, No. 04-4522, 2007 WL 2545156 at *9 (D.Minn. Aug. 23, 2007) (upholding use of privilege to protect documents created as part of investigation into possible violations of securities laws).

¹¹The fact that closing of an investigation was recommended does not preclude application of Exemption 5 as the temporal relationship between a document and the anticipated litigation is irrelevant. See *Grolier*, 462 U.S. at 28 ("under Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared" or anticipated).

¹²See *Mead Data Cent. v. Dept. of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (Exemption 5 applies to confidential communications between an attorney and his client relating to a legal matter for which the client sought professional advice); *W&T Offshore, Inc. v. Dept. of Commerce*, No. 03-2285, 2004 WL 2115418 at *4 (E.D. La. Sept. 21, 2004) (applying the attorney-client privilege to documents reflecting communications between agency employees and agency counsel).

¹³See 5 U.S.C. 552(a)(4)(B).

Exhibit 2



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

February 09, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 North Rios Avenue
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-01819-FOIA

Dear Mr. Edelman:

This letter is an acknowledgment of your FOIA Request dated February 09, 2015, and received in this office on February 09, 2015, regarding Empire State Realty Trust Inc.

Your request has been assigned tracking number 15-01819-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible.

In the interim, if you have any questions about your request, you may contact this office by calling 202-551-7900, or sending an email to foiapa@sec.gov. Please refer to your tracking number when contacting us.

For additional information, please visit our website at www.sec.gov and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services

Exhibit 3



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

March 19, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Ave
Solana Beach, CA 92075

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 15-01819-FOIA

Dear Mr. Edelman:

This letter is in reference to your request, dated and received in this office on February 9, 2015, for all documents, records, material of any nature, including Wells Notices and Wells Submissions, concerning the investigation in the matter of Empire State Realty Trust MNY-08894. You are also seeking similar documents of any other SEC investigation concerning Empire State Realty Trust.

We have identified 3 boxes of records that are responsive to your request. Under the FOIA, you are considered a "Commercial" requester. As such, you are required to pay all search and review fees beyond the first one-half hour, in accordance with our fee schedule.¹ We typically estimate that it will take approximately 4 hours to review the contents of 1 box of records (approximately 3,000 pages per box) for releasability under the FOIA. However, it could take up to 8 hours per box depending on the subject matter. Therefore, our preliminary estimate at this point is anywhere from 12 to 24 hours of review time, which equates to a cost between \$336.00 and \$672.00. Additionally, you will also be responsible for the cost of copying all releasable records at a rate of \$0.24 per page.

Exhibit 3
Page 16

¹ All search and review time beyond the first one-half hour that is free of charge to you is charged at a rate of \$28.00 per hour. Note, you will be charged fees even if the data located is subsequently determined to be exempt under the FOIA.

Mr. Richard Edelman

15-01819-FOIA

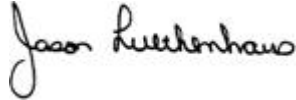
March 19, 2015

Page 2

However, you have only authorized up to \$28.00 in FOIA processing fees. If you would like for us to review the 3 boxes of records we located for possible release under the FOIA, please write or call me by **March 30, 2015** and confirm your commitment to pay the estimated processing fees. If we do not hear from you by that date we will assume that you are no longer interested in pursuing this request, and we will close our file on it without further notice to you.

If you have any questions, please contact me at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,

A handwritten signature in black ink that reads "Jason Luetkenhaus". The signature is written in a cursive, slightly slanted style.

Jason Luetkenhaus
FOIA Lead Research Specialist

Exhibit 4

From: **Empire State Building Investors** <empirestatebuildinginvestors@gmail.com>
Date: Thu, Mar 19, 2015 at 11:45 AM
Subject: Re: SEC FOIA REQUEST
To: "Luetkenhaus, Jason" <LuetkenhausJ@sec.gov>

Hi Jason,

I confirm to pay any additional costs associated with this request.

FYI, the SEC previously designated me as an "other" type requester, not commercial.

Either way, the answer is the same, please proceed.

Thanks.

Richie

On Thu, Mar 19, 2015 at 11:33 AM, Luetkenhaus, Jason <LuetkenhausJ@sec.gov> wrote:

Exhibit 5

GRIGGS & ADLER, P.C.

ATTORNEYS AT LAW
12020 SUNRISE VALLEY DRIVE, SUITE 100
RESTON, VIRGINIA 20191-3429
(703) 860-6315 FAX (703) 716-2865
E-Mail: griggsandadler@comcast.net

DEBRA BETH ADLER⁺
JOHN WYETH GRIGGS*

⁺ Admitted VA, DC

* Admitted VA, DC, FL, AK

FREEDOM OF INFORMATION ACT APPEAL

May 28, 2015

Office of Freedom of Information
and Privacy Act Operations
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Denial of FOIA Request No.15-01819-FOIA

Dear Sir or Madam:

We represent Mr. Richard Edelman in connection with the FOIA request he made on February 9, 2015, for documents relating to the matter of Empire State Realty Trust No. MNY-08894. The request was acknowledged by the SEC on February 9, 2015, and was assigned No. 15-01819-FOIA. A copy of the request and the SEC's acknowledgement are attached. SEC next contacted Mr. Edelman by letter dated March 19, 2015, which identified three boxes of records responsive to his request and requested confirmation of Mr. Edelman's willingness to pay estimated review and duplication expenses. Mr. Edelman responded by email dated March 19, 2015, that he was willing to pay the estimated processing costs. In excess of 60 days has now passed with no further response from SEC regarding this request.

Pursuant to 17 CFR § 200.80(d)(5), a response to Mr. Edelman's request is now overdue. To date, and despite repeated requests from Mr. Edelman, the SEC has failed to produce the requested documents. As provided by 17 CFR § 200.80(d)(6), the SEC's failure to respond within the time allowed constitutes a denial of the request.

Pursuant to 17 CFR § 200.80(d)(6), we hereby appeal the denial of Request No. 15-01819-FOIA. On appeal, we ask that you require the production of the requested documents.

Respectfully submitted,

John W. Griggs

cc: General Counsel
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Exhibit 5
Page 21

Exhibit 6



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

June 16, 2015

Mr. John Griggs
Griggs & Adler, P.C.
12020 Sunrise Valley Drive Suite 100
Reston, VA 20191-3429

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Appeal No. 15-00302-APPS (15-01819-FOIA)

Dear Mr. Griggs:

This letter is an acknowledgment of the FOIA Appeal, on behalf of your client, dated June 01, 2015 and received in this office on June 05, 2015 regarding Empire State Realty Trust, Inc.

Your appeal has been assigned tracking number **15-00302-APPS**, and is assigned to the SEC's Office of the General Counsel for processing. You will receive a direct response from that office regarding a decision on your Appeal.

In the interim, if you have questions about your appeal, you may contact the Office of the General Counsel by calling 202-551-5100, or sending an email to foiapa@sec.gov. Please cite the Appeal tracking number provided above.

Sincerely,

Office of FOIA Services

Exhibit 7



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

June 23, 2015

Mr. John W. Griggs
Griggs & Adler, P.C.
12020 Sunrise Valley Drive, Suite 100
Reston, VA 20191

Re: Appeal, Freedom of Information Act Request No. 15-01819-FOIA, designated on
appeal as No. 15-00302

Dear Mr. Griggs:

This responds to your June 1, 2015, Freedom of Information Act (FOIA) appeal regarding the timeliness of the FOIA Officer's determination in response to your client Mr. Edelman's February 9, 2015 FOIA request. I have reviewed your appeal and acknowledge that the statutory time period has not been met. I am remanding your request back to the FOIA Office, and I am requesting that the FOIA Officer process this request as expeditiously as possible. You may contact Ray McInerney, FOIA Branch Chief, at 202-551-7900, regarding the status of the matter.

For the Commission
by delegated authority,

A handwritten signature in black ink, appearing to read "R. Humes".

Richard M. Humes
Associate General Counsel

Exhibit 8



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

June 30, 2015

Mr. John Griggs
Griggs & Adler, P.C.
12020 Sunrise Valley Drive Suite 100
Reston, VA 20191-3429

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No.

Dear Mr. Griggs:

This letter is an acknowledgment of the Office of General Counsels remand of your FOIA appeal, dated June 23, 2015 and received in this office on June 30, 2015, regarding List of chief compliance officers at registered broker-dealers.

Your remand has been assigned tracking number **15-00052-REMD**. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible.

In the interim, if you have any questions about your request, you may contact this office by calling 202-551-7900, or sending an e-mail message to foiapa@sec.gov. Please refer to your tracking number when contacting us.

Sincerely,

Office of FOIA Services

Exhibit 9



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

September 28, 2015

Mr. Richard Edelman
Empire State Building Associates LLC
608 N. Rios Avenue
Solana Beach, CA 92075

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request Nos. 15-01819-FOIA, 15-00302-APPS, and
15-00052-REMD

Dear Mr. Edelman:

This letter responds to your request, dated and received in this office on February 9, 2015, for all documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894, including wells notices and wells submissions, from January 1, 2012 to February 9, 2015.

Reference is also made to your June 1, 2015 appeal to the SEC's Office of the General Counsel (15-00302-APPS), and the remand of your request to this office dated June 23, 2015 (15-00052-REMD).

We have identified the enclosed 1,442 pages of records as being responsive to your request. Access is granted to these records, except for certain information that is protected from release pursuant to 5 U.S.C. § 552(b)(4), (5), (6) and/or (7)(C), 17 CFR § 200.80(b)(4), (5), (6) and/or (ii), for the following reasons:

- Exemption 4 protects confidential commercial or financial information, the release of which could cause substantial competitive harm to the submitter.
- Exemption 5 protects records that were prepared in anticipation of litigation, form an integral part of the SEC's pre-decisional process, and/or contain advice given to the Commission or senior staff by the Commission's attorneys. Such records are protected from release by the attorney work-product, deliberative process and/or attorney-client privileges embodied in Exemption 5.

Mr. Richard Edelman
September 28, 2015
Page 2

15-01819-FOIA,
15-00302-APPS, and
15-00052-REMD


- Exemption 6 protects records that would constitute a clearly unwarranted invasion of personal privacy if released.
- Exemption 7(C) protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

I am the deciding official with regard to this adverse determination. You have the right to appeal my decision within 90 calendar days from the date of this letter to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

You may file your appeal by completing the online Appeal form located at https://www.sec.gov/forms/request_appeal, or mail your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2465, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact Jason Luetkenhaus of my staff at luetkenhausj@sec.gov or (202) 551-8352. You may also contact me at foiapa@sec.gov or (202) 551-7900.

Sincerely,



Ray J. McInerney
FOIA Branch Chief

Enclosures