
**Thomas P. DiNapoli
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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**LONG ISLAND POWER
AUTHORITY**

**COMPLIANCE WITH
FREEDOM OF
INFORMATION LAW
REQUIREMENTS**

Report 2006-S-108

AUDIT OBJECTIVE

Our objective was to determine whether the Long Island Power Authority's (LIPA) efforts to manage and monitor Freedom of Information Law (FOIL) requests result in a timely release of information consistent with FOIL requirements.

AUDIT RESULTS - SUMMARY

When LIPA receives a written request for records from the public under FOIL, it has five business days to grant or deny access, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include the approximate date when such request will be granted or denied. If LIPA determines to grant a request in whole or in part, and if circumstances prevent disclosure within 20 additional business days, it must provide an explanation and a date certain within which it will grant the request in whole or in part. Generally, LIPA acknowledged the receipt of FOIL requests in a timely manner. However,

we found LIPA was significantly late in providing records for 17 of the 54 FOIL requests we reviewed. For 12 of these, records were provided more than ten business days beyond the date originally specified by LIPA. On average, LIPA took 42 days longer than it originally indicated for these 12 requests.

Our report contains four recommendations to correct this and other problems identified during our audit. LIPA officials generally agreed with our recommendations and are taking steps to implement changes.

This report, dated June 26, 2007, is available on our website at: <http://www.osc.state.ny.us>. Add or update your mailing list address by contacting us at: (518) 474-3271 or Office of the State Comptroller
Division of State Government Accountability
110 State Street, 11th Floor
Albany, NY 12236

BACKGROUND

In May 1998, the Long Island Power Authority (LIPA) became Long Island's primary electric service provider. LIPA is the nation's third largest public power utility in terms of customers served.

Article 6 of the New York State Public Officers Law provides for public access to government records. The statute, generally referred to as the Freedom of Information Law (FOIL), applies to any State agency, public authority and local government entity, with the exception of the Judiciary and the State Legislature. Under FOIL, each agency, including public authorities, is required to make all eligible records available for public inspection or copying. Such records include, but are not limited to, reports, statements, opinions, folders, files, microfilms, and computer tapes or discs.

LIPA receives approximately 30 FOIL requests each year. FOIL specifies a timetable on how requests are to be processed, and how an agency should respond when granting or denying access to requested records. However, agencies may develop their own more stringent internal policies and procedures for the processing of FOIL requests. If a denied request is appealed, the agency must send copies of the appeal and subsequent determination to the Committee on Open Government (COOG). Among other things, COOG issues advisory opinions, and makes recommendations to the Legislature, on matters relating to FOIL.

AUDIT FINDINGS AND RECOMMENDATIONS

Internal Policies and Procedures

We found that LIPA's practices are sometimes inconsistent with its internal policies and procedures. While LIPA's acknowledgement letters state a determination on access to requested records will be made within approximately 20 days, LIPA's internal policies and procedures call for the determination to be made within ten days.

Each agency is required to maintain a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not they are available under FOIL. We found LIPA maintains an updated subject matter list.

Compliance with FOIL-Specified Time Frames

FOIL specifies time frames for the processing of FOIL requests by agencies. Agency compliance is important because delays in responding to FOIL requests equate to a denial of the FOIL request and could result in unnecessary appeal proceedings for the agency. We found the need for improvements in this area.

When LIPA receives a written request for records from the public under FOIL, it has five business days to grant or deny access, or if more time is needed, to acknowledge the receipt of the request in writing. We reviewed LIPA's compliance with this requirement for 54 FOIL requests LIPA received from January 1, 2005 through October 3, 2006. We found that LIPA provided the requested records for 3 of the 54 requests within five business days, and took an average of four business days to

acknowledge receipt of the other 51 FOIL requests. However, 4 of the 51 requests were acknowledged beyond five days, ranging from 1 to 31 days late.

In addition, FOIL specifies that the acknowledgment letter must indicate an approximate date as to when the requested records will be provided. When an agency determines it appropriate to grant a request, disclosure in most instances cannot exceed 20 additional business days from the date of the acknowledgment letter. LIPA's acknowledgment letters specified the records would be provided within approximately 20 days. However, we found LIPA failed to meet the specified time frame for 17 (33 percent) of the 51 requests. Records for these 17 requests were provided between 2 and 147 days late. Twelve of the 17 late responses were provided more than ten business days beyond the date originally specified. On average, LIPA took 42 days longer than originally indicated for these 12 requests.

LIPA officials responded that they dedicate a large amount of their limited resources to complying with FOIL requests. LIPA officials further stated that many requests are very broad, often requesting sensitive information that may not be available under FOIL. In these instances, LIPA officials stated their response may take longer in order to review the records requested. LIPA officials also stated it is often difficult to reasonably estimate the time needed to respond to certain FOIL requests, particularly given the nature and size of LIPA's operations, the volume of materials managed by LIPA, and the complicated nature of the information requested.

If LIPA officials know that, based on the nature of the request, it will take longer than 20 days to make a determination, they should explain so in the acknowledgment letter and

provide a reasonable determination date. In addition, when time frames specified in the acknowledgment letters cannot be met, FOIL requires an agency to correspond in writing with the requester, notifying them of the delays and the anticipated release date of the records. LIPA officials were not able to provide us with such correspondence for any of the 17 late responses.

Processing of Appeals

FOIL permits an agency to deny public access to records under certain circumstances. Any person denied access to records, may appeal in writing within 30 days. An agency must then explain in writing the reason for further denial or provide access to the records sought within ten business days of the receipt of the appeal. An agency must also send copies of all appeals and subsequent determinations to COOG. LIPA's internal policies state that it will respond to appeals within seven business days. We therefore evaluated LIPA's compliance with its internal policy.

LIPA received appeals of two partially-denied requests during our audit period. One of two appeals was further denied in ten business days (three business days beyond LIPA's policy). The other appeal had not been determined as of our site visit on October 3, 2006. However, LIPA was already five business days beyond the FOIL-specified time frame and eight days beyond LIPA's specified time frame for providing a determination on this appeal. LIPA's failure to respond to appeals in the specified time frames constitutes a further denial of the appeal and could lead to an additional proceeding.

We also reviewed COOG's file to determine whether LIPA had sent a copy of the one resolved appeal to COOG. We found that LIPA complied with this requirement.

Recommendations

1. Ensure LIPA's internal policies and procedures and practices are consistent and adhere to FOIL requirements.

(Officials indicated they would update LIPA's internal policies to reflect the current status of the law and LIPA's current practices.)

2. Acknowledge and respond to FOIL requests within time frames required by law.
3. Correspond in writing to the requester when FOIL requests cannot be fulfilled within specified time frames, explaining why and providing a new time frame.
4. Take action to ensure that appeals are responded to within FOIL-specified time frames.

(Regarding recommendations 2 through 4, officials replied they make every effort to respond in a timely fashion to all FOIL requests from inception through appeal. However, they will strive for greater accuracy in this regard, including devoting additional resources, as necessary.)

AUDIT SCOPE AND METHODOLOGY

We conducted our performance audit in conformance with generally accepted government auditing standards. We audited the efforts by 22 selected public authorities to manage and monitor FOIL requests. This report includes details of our audit of one of these 22 authorities, LIPA, and covers the period January 1, 2005 through October 3, 2006. A complete listing of all 22 reports is included in Exhibit A.

To accomplish our objective at LIPA, we examined LIPA's FOIL request files and internal policies and procedures. We also interviewed LIPA officials. LIPA reported it received 57 FOIL requests during our audit period. We reviewed 54 of them. Three requests were not included in our review, because they had recently been received and no action was due on them at the time of our audit. We reviewed LIPA's appeal decisions and evaluated the timeliness of communication of the appeal decisions with the requester and COOG. We also compared LIPA appeal files at COOG to the appeals on file at LIPA.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State, several of which are performed by the Office of Operations. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

AUTHORITY

The audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

REPORTING REQUIREMENTS

A draft copy of this report was provided to LIPA officials for their review and comments. Their comments were considered in preparing this report, and are included as Appendix A.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Long Island Power Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained

herein, and where recommendations were not implemented, the reasons therefor.

CONTRIBUTORS TO THE REPORT

Major contributors to this report include Frank Houston, John Buyce, Christine Rush, Myron Goldmeer, Lisa Rooney, David Louie, Kelly Engel, Jean-Renel Estime, and Paul Bachman.

EXHIBIT A

Reports on Public Authority Compliance with FOIL Requirements

<u>Report Number</u>	<u>Public Authority</u>
2006-S-107	New York State Thruway Authority
2006-S-108	Long Island Power Authority
2006-S-109	MTA/New York City Transit Authority
2006-S-110	Empire State Development Corporation
2007-S-33	Battery Park City Authority
2007-S-34	New York State Bridge Authority
2007-S-35	Central New York Regional Transportation Authority
2007-S-36	Convention Center Operating Corporation, NYC
2007-S-37	Development Authority of the North Country
2007-S-38	Dormitory Authority of the State of New York
2007-S-39	Environmental Facilities Corporation
2007-S-40	Housing Finance Agency
2007-S-41	Hudson River/Black River Regulating District Authority
2007-S-42	New York Power Authority
2007-S-43	Niagara Frontier Transportation Authority
2007-S-44	Ogdensburg Bridge and Port Authority
2007-S-45	Olympic Regional Development Authority
2007-S-46	Port of Oswego Authority
2007-S-47	Rochester-Genesee Regional Transportation Authority
2007-S-48	Roosevelt Island Operating Corporation
2007-S-49	Thousand Islands Bridge Authority
2007-S-50	MTA/Triborough Bridge and Tunnel Authority

APPENDIX A - AUDITEE RESPONSE



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May 21, 2007

VIA EMAIL & FEDERAL EXPRESS

Mr. Frank Houston
Audit Director
Office of the State Comptroller
State Audit Bureau
110 State Street, 11th Floor
Albany, NY 12236

Dear Mr. Houston:

In connection with your audit of the Long Island Power Authority's ("LIPA") handling of Freedom of Information Law requests, enclosed please find LIPA's response to your draft audit report.

If you have any questions regarding LIPA's response, please do not hesitate to contact me at either (516) 719-9847 or lnicolino@lipower.org.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lynda Nicolino", is written over a horizontal line.

Lynda Nicolino
Acting General Counsel

cc: Richard M. Kessel, Chairman
Kevin Law, Chairman
Kenneth Kane, Controller



Response of the Long Island Power Authority ("LIPA")
to
Compliance with Freedom of Information Law Requirements
Report 2006-S-108
(the "Report")
Office of the State Comptroller ("OSC")
April 2007

General Observations/Comments

LIPA has carefully reviewed the Report, and notes that the Report does not identify any significant flaws in LIPA's Freedom of Information Law ("FOIL") practices. Instead, the Report reflects that with limited exception, LIPA complies with its obligations under FOIL. The Report provides a few recommendations to LIPA to enhance its FOIL practices, which LIPA has specifically commented on below. LIPA will, as always, continue to strive to meet all of its obligations under FOIL by dedicating sufficient resources to allow for the timely production of records.

OSC Recommendation

1. Ensure LIPA's internal policies and procedures and practices are consistent and adhere to FOIL requirements.

LIPA Response:

LIPA's FOIL practices are consistent with the current FOIL requirements found at Article 6 of the Public Officers Law. Presently, LIPA's internal policies are more stringent than the current law with respect to the timeframes for responding to FOIL requests, which is undesirable and unnecessary. Accordingly, LIPA is in the process of updating its regulations to reflect the current status of the law and LIPA's current practices.

OSC Recommendation

2. Acknowledge and respond to FOIL requests within the time frames required by law.

LIPA Response:

LIPA makes every attempt to acknowledge and respond to its FOIL requests as quickly as reasonably possible, considering both the nature and extent of the request. In most cases, LIPA acknowledges its requests and responds well before the approximated timeframe for a response has elapsed. Thus, there are only limited instances when LIPA does not fully comply with certain of its requirements in this regard. Even in those instances, there are usually compelling reasons why LIPA is unable to respond within a certain period of time, such as when the requests involve the review of sensitive and/or extensive information.

LIPA devotes an enormous amount of its limited internal resources to complying with FOIL requests, and generally complies with its requests in a timely manner. From time to time, however, LIPA receives very broad FOIL requests, and/or those that seek the production of commercially sensitive information, or information that is otherwise exempt under FOIL. In these limited instances, LIPA's response time may be somewhat extended due to the time-consuming nature of the review required. Since no blanket exemption exists under FOIL, LIPA must review thousands of documents, on a page-by-page basis, to determine whether or not a requested record may contain information that is exempt and, thus, not required to be produced. It is important to note that in virtually every instance involving a broad and/or sensitive request requiring an extensive review process, LIPA provides responsive records to the requestor on a continuing basis, while the review is being conducted.

Additionally, LIPA is often asked to produce commercially sensitive, trade secret information related to its power purchase agreements and competitive solicitations for the development of generation, transmission and other power projects. In these cases, LIPA is required (either statutorily or otherwise) to confer with either the companies it contracts with or those that submit responses to LIPA's solicitations, to assist it in determining what information in the responsive records is commercially sensitive, trade secret information that if disclosed, would cause substantial competitive injury to that company. LIPA's failure to confer with such companies and/or protect such commercially sensitive, trade secret information, could result in litigation against LIPA. LIPA must also make an assessment as to the commercial sensitivity of information on its own behalf, as a participant in the highly competitive electric marketplace.

OSC Recommendation

3. Correspond in writing to the requestor when FOIL requests cannot be fulfilled within specified time frames, explaining why and providing a new time frame.

LIPA Response:

LIPA does its best to set a realistic timeline for the production of documents, and typically communicates its intentions to the requestor either verbally and/or in writing. In most cases, LIPA informs the requestor of the approximate processing time for the request by indicating that the request "will be granted or denied (in whole or in part) within approximately 20 days," as required under current law.

It is often very difficult, however, to make a reasonable estimate of time to respond to certain FOIL requests, particularly given the nature and size of LIPA's operations, the volume of materials managed by LIPA, the complicated nature of the information requested and LIPA's limited internal resources. Certain FOIL requests involve the collection and review of information in LIPA's databases that while available, is not arranged in a single "record" for production. In those instances, LIPA must undertake the detailed process of reviewing the database and retrieving the appropriate, non-exempt information and then compiling it in a format that is considered responsive. This process needs to be done manually and can sometimes take a considerable amount of time, particularly if the request is broad in nature and scope. LIPA takes its responsibilities under FOIL very seriously and makes every effort to set an appropriate timeline for the production of these types of documents. LIPA will, however, look for ways to improve its written communication with requestors in order to better demonstrate its compliance with the law.

OSC Recommendation

4. Take action to ensure that appeals are responded to within FOIL-specified time frames.

LIPA Response:

As noted above, LIPA makes every effort to respond to all of its FOIL requests in a timely fashion, from inception through appeal. In most instances, LIPA complies fully with its appeal response timeframe, and if it is unable to do so, notifies the requestor accordingly. LIPA will continue to strive for greater accuracy in this regard, including devoting additional resources to its FOIL matters, as necessary.