
**Thomas P. DiNapoli
COMPTROLLER**



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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**NEW YORK POWER
AUTHORITY**

**COMPLIANCE WITH
FREEDOM OF
INFORMATION LAW
REQUIREMENTS**

Report 2007-S-42

AUDIT OBJECTIVE

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

AUDIT RESULTS - SUMMARY

FOIL specifies time frames for the processing of FOIL requests by agencies. Agencies, however, may develop more stringent internal policies and procedures. NYPA's internal FOIL procedures in some areas are more stringent than FOIL. We therefore evaluated NYPA's performance against its stricter internal policies and found some areas where improvement is needed.

We found that NYPA was late in acknowledging the receipt of a FOIL request only 3 percent of the time. However, NYPA was late 23 percent of the time in providing a determination on access to requested records. NYPA took on average four days longer than originally specified to respond to 42 requests.

If an agency denies a person access to a record, FOIL allows that person to appeal the agency's decision. Within ten business days of the receipt of an appeal, NYPA must explain in writing the reason for further denial or provide access to the records sought. We found that NYPA fully denied 27 FOIL requests and partially denied 15 others. Six denials were appealed. NYPA responded seven days late to one of the appeals.

Our report contains three recommendations to correct the problems we identified during our audit. NYPA officials generally agreed with our recommendations and are taking steps to implement changes.

This report, dated July 16, 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

Created in 1931, NYPA is the largest state-owned utility in the United States. NYPA provides about one-quarter of the electricity used in the State by operating 17 power generating facilities located throughout the State and more than 1,400 circuit miles of transmission lines. NYPA provides electricity to power various State and local government operations, including trains, subways, office buildings and public housing. NYPA also administers programs promoting economic development, energy efficiency, and the development of new electro-technologies.

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.

NYPA receives approximately 100 FOIL requests each year. FOIL specifies time frames for the processing of FOIL requests by agencies 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, FOIL specifies 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

Under FOIL, agencies are required to make all eligible records available for public inspection or copying and to promulgate rules and regulations including: the times and places such records are available; the persons from whom such records may be obtained; and the fees for copies of records which generally may not exceed 25 cents per page. We found NYPA has developed its own written policies and procedures, which are consistent with, and in some cases more stringent than, the provisions set forth in the FOIL statute.

FOIL also requires each agency to maintain a reasonably detailed current list by subject matter (subject matter list) of all records in the possession of the agency, whether or not they are available under FOIL. We determined that NYPA maintains an appropriate subject matter list as required by FOIL.

Compliance with FOIL-Specified Time Frames

FOIL specifies time frames for processing requests. 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 identified some areas where improvement is needed.

When NYPA 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 NYPA's compliance with this requirement and found only 6 of the 185 requests (3 percent) were acknowledged late - between 6 and 12 business days after receipt.

FOIL further specifies an acknowledgment letter must indicate the approximate date when the request will be granted or denied. Where an agency determines to grant a request in whole or in part, disclosure in most instances cannot exceed 20 additional business days, from the date of the acknowledgment letter. For 126 requests, NYPA's acknowledgment letters stated that a determination would be made within ten business days, as required by NYPA's internal FOIL policy. The acknowledgment letters for the remaining requests did not specify a time frame for making a determination, but we also evaluated these requests against NYPA's ten-day policy. We found NYPA met the ten-day time frame 77 percent of the time. For the 42 requests which did not meet NYPA's ten-day requirement, records were provided on average four days late.

NYPA officials disagreed with our analyses and stated that, if timeliness were gauged against compliance with FOIL's 20-day maximum requirement, there would be few exceptions - the determinations for only 4 of the 42 requests were made in excess of 20 days. However, NYPA's internal policy clearly states that, "If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of

receipt of request, the request may be construed as a denial of access that may be appealed.” Further, NYPA’s acknowledgment letters generally promise the requester a determination within ten days. We therefore evaluated performance to NYPA’s own requirements.

Our review of NYPA’s FOIL records also did not find documentation of additional communications with the requesters when information was provided late. NYPA officials told us the delayed responses were likely caused by the need for additional time to produce documents and that they did not contact requesters in writing because they only needed a few extra days. However, FOIL requires that any delays in providing records are to be communicated in writing to the requestor.

Denial of FOIL Requests

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. Within ten business days of the receipt of the appeal, NYPA must explain in writing the reason for further denial or provide access to the records sought. NYPA must also send copies of all appeals and subsequent determinations to COOG.

NYPA fully denied 27 of the 185 FOIL requests we reviewed and partially denied 15 others. We found that in all instances, the reasons NYPA cited for the denials were consistent with exemptions provided under the law. Six of the 42 denials were appealed. NYPA responded to five appeals within the ten days. The sixth appeal was responded to 16 days after receipt. NYPA stated that the late appeal response was due to a scheduling error.

We also visited COOG and reviewed its files to determine whether NYPA had sent in copies of the six appeals, as required. We found two of the six appeals were not on file at COOG as required by FOIL. NYPA officials stated their records indicated that all of the appeals had been forward to COOG shortly after each decision was made.

Recommendations

1. Acknowledge and respond to FOIL requests within the required time frames. If circumstances prevent a determination on access to records by the date promised in the acknowledgment letter, communicate the reason for the delay to the requester in writing, explaining why and providing a new time frame.
2. Monitor due dates for appeal decisions to ensure timeliness requirements are met.
3. Send COOG copies of the two appeals and subsequent determinations not on file there.

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, NYPA, and covers the period January 1, 2005 through September 29, 2006.

To accomplish our objective at NYPA, we examined NYPA’s FOIL request files and internal policies and procedures and interviewed NYPA officials. NYPA reported it received 194 FOIL requests during our audit period. We reviewed 185 of them. Eight 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. One request was withdrawn by the requestor. We reviewed NYPA's appeal decisions and evaluated the timeliness of communications between NYPA, the individuals requesting information and COOG. We also verified NYPA's appeal records to information on file at COOG.

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. 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 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

Draft copies of this report were provided to NYPA 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 New York 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, Lisa Rooney, Kelly Engel, W Sage Hopmeier and Richard Podagrosi.

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
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/Bridges and Tunnels

APPENDIX A - AUDITEE RESPONSE

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Timothy S. Carey
President and
Chief Executive Officer

June 15, 2007

Mr. Frank J. Houston
Audit Director
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Division State Services
State Audit Bureau
123 William Street – 21st Floor
New York, New York 10038

Re: Report 2007-S-42
Freedom of Information Law Audit Response

Dear Mr. Houston:

The following constitutes the response of the New York Power Authority (“NYPA”) to your letter received on May 16, 2007 containing the draft final audit report of NYPA’s compliance with the Freedom of Information Law (“FOIL”).

Corrections to the Audit Report

Before commenting on the specifics of the draft final audit report, it must be stated that NYPA has been and will continue to be committed to complying with FOIL. To that end, and as you are aware, NYPA has enacted its own regulations that provide for more stringent timeframes than those set forth in the FOIL statute and it is against those timeframes that NYPA was measured.

NYPA appreciates that OSC has addressed many of its concerns raised in its response to the preliminary audit report of November 27, 2006. However, upon review of the amended audit report, which review was based on NYPA’s stricter regulations, NYPA is compelled to restate its corrections to erroneous data that remain uncorrected.

1. NYPA records indicate an untimely secondary response letter for only 17% of the 185 requests received during the specified time period, rather than 23% of the time as stated throughout the audit report.
2. NYPA took on average four days longer than originally specified to send the secondary response letter to only 31, not 42, requests, as stated on page two of the audit report.
3. NYPA records indicate a timely response on the secondary response letter 83% of the time rather than 77% of the time, with an average late response time of only 3, not 4, days, as stated on page four of the audit report.
4. Only one out of all the appeals to NYPA had a late response and the response was sent 16, not 17, days after receipt, as stated on page four of the audit report.

*
Comment
1

*
Comment
2

*See State Comptroller’s Comments, page 9

5. NYPA sent every appeal response to the Committee on Open Government (“COOG”), as required. The suggestion that NYPA is responsible for the failure of COOG to properly file NYPA’s appeals is unreasonable.

*
Comment
3

Further, the point needs to be stressed that the mere recitation in percentages of late responses fails to take into account the volume and complexity of many of the FOIL requests that NYPA receives. Thus, viewed in context, we submit that NYPA is substantially in compliance with FOIL and NYPA’s regulations.

OSC Recommendations

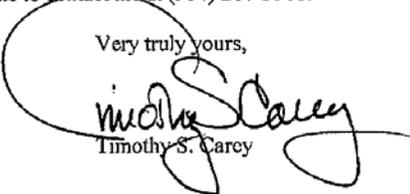
NYPA continually reviews its procedures and has already begun to implement the recommendations contained in the OSC audit report, as follows.

- NYPA has enhanced its tracking system for FOIL requests and responses and has begun the State Administrative Procedure Act process for updating its regulations to be consistent with the response times set forth in FOIL, which are not as stringent as the response times in NYPA’s current regulations.
- NYPA has also enhanced its FOIL appeal tracking system to mitigate the possibility of untimely responses.
- As a result of COOG being unable to locate appeals and appeal responses that NYPA has sent to COOG, NYPA will send them by overnight courier or registered mail, return receipt requested, and by facsimile to ensure and document COOG’s receipt of all appeals and appeal responses sent by NYPA.

We look forward to reporting to OSC on the status of our ongoing efforts to improve our FOIL process 90 days after the audit report has been issued. NYPA appreciates OSC’s recognition of the cooperation and courtesies extended by NYPA to OSC’s auditors during the audit.

If you have any questions, please do not hesitate to contact me at (914) 287-3501.

Very truly yours,



Timothy S. Carey

*See State Comptroller’s Comments, page 9

APPENDIX B - STATE COMPTROLLER COMMENTS

1. The minor differences cited in items 1 through 3 of NYPA's acknowledgement letters did not specify a time frame for making a determination as required by FOIL. As stated in our report, we evaluated these cases against NYPA's ten-day response policy, which was consistently cited by the authority in each of the acknowledgement letters that did provide the statutorily required information.
2. NYPA officials are correct; their response to this appeal was one day less late than originally cited. We have modified the report to reflect this.
3. Our report simply indicates that COOG's appeal files are incomplete. It does not ascribe blame to NYPA and, in fact, acknowledges that NYPA records indicate copies of all appeals were forwarded to COOG. Accordingly, our recommendation simply asks that NYPA provide COOG with the information needed to ensure that these important records are complete.