
**Thomas P. DiNapoli
COMPTROLLER**



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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**NEW YORK STATE
THRUWAY AUTHORITY**

**COMPLIANCE WITH
FREEDOM OF
INFORMATION LAW
REQUIREMENTS**

Report 2006-S-107

AUDIT OBJECTIVE

Our objective was to determine whether the New York State Thruway Authority's (NYSTA) 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

When NYSTA 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 an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure within 20 additional business days, NYSTA must provide an explanation and a date certain within which it will grant the request in whole or in part.

We found NYSTA was significantly late in providing a determination on access to requested records for 50 of the 176 FOIL requests we reviewed. For 39 of the 50, responses were more than ten business days beyond the date originally specified by NYSTA. On average, NYSTA took 62 days longer than it originally indicated for these 39 requests.

Our report contains two recommendations to help correct the problems identified during our audit. NYSTA officials generally agreed with our recommendations and are taking steps to implement them.

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

NYSTA was established in 1950 by the Public Authorities Law to build, operate and maintain the New York State Thruway system. NYSTA is managed by an Executive Director and governed by a seven-member Board of Trustees.

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.

NYSTA receives approximately 200 FOIL requests per 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

NYSTA has internal policies and procedures related to FOIL. We examined these policies and procedures and found they are consistent with FOIL requirements.

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 NYSTA maintains an updated subject matter list.

Compliance with FOIL-Specified Time Frames

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

When NYSTA 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 176 FOIL requests NYSTA received from January 1, 2005 through September 1, 2006 for compliance with this five-day requirement. We found that NYSTA took an average of three business days to first act on the 176 requests. However, 20 of the 176 requests were acted upon late. The 20 late acknowledgments exceeded the five-day requirement by 1 to 29 days.

In addition, FOIL specifies the acknowledgment letter must include the approximate date when such request will be granted or denied. If an agency 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. Two of the 139 requests were withdrawn by the requester after an acknowledgment letter was sent. Therefore, we reviewed the remaining 137 requests for compliance and found the need for improvement here, as well.

For these 137 requests, NYSTA's acknowledgment letters stated that a determination about the records' accessibility would be made within 20 days. At the time of our review, this 20-day period was still pending for three of these requests. For the remaining 134 requests, we found NYSTA met the time frame for 84 requests. However, for 50 of the 134 requests (37 percent), NYSTA did not meet the required time frame, as follows:

- In 39 cases, the records were ultimately provided to the requesters, but between one and 64 days later than the date originally specified.
- In 11 cases, the records had yet to be provided to the requesters and were between 3 and 133 days late at the time of our review.

We noted that 39 of the 50 late responses were more than ten business days late and, on average, these 39 late responses were 62 days late.

NYSTA officials offered several explanations for the late responses. At the time of our visit, officials told us that their FOIL Officer has other responsibilities in addition to

responding to FOIL requests and there is not always another individual assigned to address requests when the FOIL Officer is unavailable. We recommend sufficient resources be allocated to FOIL requests to enable compliance with the law.

In responding to our draft report, officials also told us that NYSTA could not reply to many requests timely because the information being sought related to requests for proposals and contract awards that were still underway and therefore excluded from disclosure. However, FOIL specifically requires timely, written communication with all requesters, regardless of whether the agency plans to grant or deny the request and no matter what the reason for the decision.

When the 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. However, NYSTA officials were not able to provide us with such correspondence for any of the 50 late responses. NYSTA officials indicated that verbal contact was made with the requesters rather than written contact, because they were unaware of the requirement for written contact.

Denial of FOIL Requests

FOIL permits an agency to deny the public access to records under certain circumstances. Of the 176 FOIL requests that we reviewed, NYSTA fully denied 22 requests and partially denied another seven. We found the reasons for the denials in all cases were in accordance with FOIL requirements. For example, 20 requests were denied because the requested records did not exist at NYSTA.

Processing of Appeals

Under FOIL, 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. Since NYSTA reported no FOIL appeals during the period January 1, 2005 through September 1, 2006, our audit did not address this aspect of the authority's compliance with FOIL requirements.

Recommendations

1. Acknowledge and respond to FOIL requests within the time frames required by law, and allocate sufficient resources to FOIL requests to enable compliance with these time frames.
2. Correspond in writing to the requester when FOIL requests cannot be fulfilled within the specified time frames, explaining why and providing a new time frame.

(NYSTA officials agreed with our recommendations. They stated that they have assigned additional resources to more timely respond to FOIL requests. Also, communications with requesters are now being documented with letters when 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, NYSTA, and covers the period January 1, 2005 through September 1, 2006. A complete listing of all 22 reports is included in Exhibit A.

To accomplish our objective at NYSTA, we examined NYSTA's FOIL request files and internal policies and procedures. We also interviewed NYSTA officials. NYSTA reported that it received 316 FOIL requests during our audit period. We randomly selected 176 of the 316 requests for review.

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

Draft copies of this report were provided to NYSTA officials for their review and comment. Their comments were considered

in preparing this report, and are included as Appendix A. Appendix B contains the State Comptroller's comment which addresses certain matters included in NYSTA's response.

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 State Thruway 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, Rick Podagrosi, Kelly Engel and Sarah Purcell.

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



John L. Buono
Chairman

New York State Thruway Authority New York State Canal Corporation

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June 7, 2007



Michael R. Fleischer
Executive Director
TDD/TTY 1-800-253-6244

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

Dear Mr. Houston:

The Thruway Authority (Authority) has reviewed the Office of the State Comptroller's (OSC's) May 8th Draft Report 2006-S-107 concerning the Authority's compliance with the Freedom of Information Law (FOIL). The Authority offers the following comments to the Draft Report:

- The Authority agrees with the two recommendations in the Draft Report which paraphrased are to: 1) allocate additional staff resources to more timely acknowledge and respond to FOIL requests; and 2) correspond in writing when a FOIL request cannot be fulfilled within the specified time frame. Additional resources have been so assigned to more timely and consistently respond to FOIL requests. Communications with requesters, which were previously performed by telephone in many cases for expedience and economy, are now being documented with letters when necessary.
- The Authority disagrees with many of the instances of non-compliance tabulated and the results or conclusions reported by OSC. For example, Authority staff explained to the OSC auditors that in many instances the information requested was related to contract awards or requests for proposals that could not be provided to the requester until the conclusion of the procurement process, an exception allowable under Public Officers Law § 87(2)(c). The fact that the Authority could not reply within the specified time frame was not considered by OSC.

*
Comment

The Authority has addressed the opportunities for improvement noted in the Draft Report. If you need additional information, please contact Mr. Michael Flynn, Director of Audit and Management Services at 518-471-5853.

Sincerely,


Michael R. Fleischer
Executive Director

cc: John L. Buono, NYSTA Chairman
Michael Flynn, Director of Audit and Mgmt. Services
Lisa Ng, DOB

* See State Comptroller's Comment, Page 9

APPENDIX B - STATE COMPTROLLER'S COMMENT

The fact that NYSTA may not be able to immediately provide all requested information does not relieve it of its duty to communicate with the requester timely. FOIL specifically requires timely, written communication with all requesters, regardless of whether the agency plans to grant or deny the request and no matter what the reason for

the decision. Further, if agencies fail to meet promised dates, FOIL requires additional written communications to explain delays and provide new deadlines for requests to be resolved. For each case cited in our report, NYSTA was unable to demonstrate that required communications were conducted.