
**Thomas P. DiNapoli
COMPTROLLER**



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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**METROPOLITAN
TRANSPORTATION
AUTHORITY - NEW YORK
CITY TRANSIT**

**COMPLIANCE WITH
FREEDOM OF INFORMATION
LAW REQUIREMENTS**

Report 2006-S-109

AUDIT OBJECTIVE

Our objective was to determine whether the Metropolitan Transportation Authority (MTA) - New York City Transit's (NYC Transit) 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 NYC Transit 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 acknowledgement letter must include the approximate date when such request will be granted or denied. If NYC Transit determines to grant a request in whole or in part, and if circumstances prevent disclosure within 20 additional business days, NYC Transit must provide an explanation and a date certain within which it will grant the request in whole or in part.

We found NYC Transit was significantly late in responding to FOIL requests. For 85 of the 168 (50 percent) requests we reviewed, NYC Transit's determination took longer than promised. Seventy-nine determinations were significantly late (i.e., more than ten days late). At the time of our review, NYC Transit had provided a response to 35 of the 85 requests. On average, these 35 responses took 33 days beyond the initially-specified time frames. The remaining 50 requests, which were still open at the time of our field visit, were each already late by more than ten days. Overall, NYC Transit had already taken, on average, 136 days to respond to these 50 open requests.

Any person denied access to records may, within 30 days, appeal in writing. 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. The MTA handles all FOIL request appeals on behalf of its constituent agencies, including NYC Transit. The MTA received 29 appeals during our audit period for its various constituent agencies, 7 of which were related to NYC Transit. The average time MTA took to make a decision regarding the 29 appeals was 22 business days, or 12 days beyond the FOIL requirement. In fact, 22 of the appeals exceeded FOIL's 10-day requirement, ranging from 11 to 66 days late.

Our report contains eight recommendations to help correct the problems identified during our audit. MTA officials disagreed with the way we judged timeliness in certain cases, but generally agreed with our recommendations and agreed to take steps to implement them.

This report, dated October 10, 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

The Metropolitan Transportation Authority (MTA) is a public benefit corporation providing transportation services in and around the New York City metropolitan area. The MTA consists of various constituent agencies, each providing different transportation services. One of these constituent agencies, New York City Transit (NYC Transit), is the principal transit operator in New York City, providing rail and bus service on a 24-hour basis throughout all

five boroughs of the City. Ridership on NYC Transit is approximately seven million daily - more than two billion annually.

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.

NYC Transit currently receives approximately 800 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 processing 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. Each agency is also required to maintain a reasonably detailed current list, by subject matter (subject matter list) of all records in the agency's possession, whether or not available under FOIL.

The New York State Archives and Records Administration (SARA) specifies requirements for FOIL record retention. Generally, an agency should maintain all correspondence documenting its FOIL

requests for six months after resolution of a request.

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 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. NYC Transit officials provided us with their internal policies and procedures related to FOIL. Our review found that these policies and procedures were equivalent to FOIL's requirements.

In addition, FOIL requires that agencies maintain a subject matter list of all records in the possession of the agency, whether or not they are available under FOIL. This list is to be provided to the public upon request. We determined that NYC Transit maintains an appropriate 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 FOIL request and could result in unnecessary appeal proceedings for the agency.

FOIL requires an agency to grant, deny or acknowledge in writing, within five business days, the receipt of a written request for a record. We reviewed NYC Transit's compliance with this five-day requirement.

The number of business days between receipt and NYC Transit's initial action on each FOIL request was calculated using NYC Transit's date received stamp through the date of the initial correspondence with the requester; in most cases, an acknowledgment letter. When no date received stamp was on the request, we used the date of the FOIL request to begin our calculation.

NYC Transit received 410 FOIL requests from January 1, 2006 through August 31, 2006. We reviewed 176 (43 percent) of those requests to determine if NYC Transit responded to those timely, in accordance with FOIL. We found for 65 of the 176 requests (37 percent), NYC Transit's initial action exceeded the five business day requirement and took, on average, ten business days.

In responding to our audit, NYC Transit officials stated that some acknowledgments were delayed because the requester failed to appropriately address and/or identify the nature of the letter. We noted some date-received stamps were from the Legal Department, while most others were from the FOIL Office. NYC Transit officials maintain that the appropriate date for beginning the calculation of the five-day acknowledgment period is the date of receipt by the FOIL Office, rather than the date received by NYC Transit. However, according to COOG's interpretation of this FOIL requirement, the beginning of the calculation of the five-day period begins when an "entity" is in receipt of a request. Therefore, the calculation should begin when an agency's mailroom receives the request.

NYC Transit officials also disagreed with our use of the date of the FOIL request to calculate response times when the document was not date stamped for receipt, indicating that an allowance of five days should have been made for mailing time. However, only 8

of the 65 responses that we considered late were based on the date of the request letter, and only two of these would be considered timely if another five days were allowed.

FOIL also specifies an acknowledgment letter must indicate an estimated date when a determination on the accessibility to the requested records will be provided. If, based on the nature of the request, NYC Transit officials know that it will take longer than 20 additional business days to make a determination, FOIL requires that they explain so in the acknowledgment letter and provide a reasonable determination date. NYC Transit included a response date in the acknowledgment letters for 168 of the 176 requests in our sample. The remaining eight requests were appropriately referred to other MTA constituent agencies, or to other State agencies, and therefore were not included in our analysis.

We found that NYC Transit's determination for 85 of the 168 requests took longer than promised. Seventy-nine of them were significantly late (i.e., by more than ten days). At the time of our review, NYC Transit had provided a response to 35 of the 85 requests. On average, these 35 responses took 33 business days beyond the initially-specified time frames. The remaining 50 requests, which were still open at the time of our field visit, were each already late by more than ten business days. NYC Transit had already taken, on average, 136 business days to respond to these 50 open requests.

We also found three requests that lacked documentation to support their disposition, although NYC Transit officials indicated that they had responded to them between June and August 2006. According to SARA, documentation supporting the disposition of FOIL requests should remain on file for six months after their resolution. Our site visit to

NYC Transit was within SARA's six month requirement. Without proper documentation, there is no assurance that these three FOIL requests were properly processed or responded to in a timely manner.

In responding to our audit findings, NYC Transit officials stated that FOIL officers often experience delays in receiving information from pertinent NYC Transit departments, consequently, the response dates they include in the acknowledgment letters are probably too optimistic. 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. NYC Transit officials were not able to provide us with such correspondence for any of the 85 late responses.

NYC Transit officials also stated they have limited staff to ensure FOIL time frames are achieved, to follow up on outstanding requests with other departments, and to ensure documentation is properly maintained. At the time of our audit, NYC Transit had the equivalent of one full-time employee assigned to process about 500 FOIL requests a year. NYC Transit should evaluate the need to assign more resources to process FOIL requests to ensure the timely release of information consistent with FOIL.

Denial of FOIL Requests

FOIL specifies that authorities may deny information requests for specific reasons, such as a request which would constitute an unwarranted invasion of personal privacy or when disclosure could endanger the life or safety of a person. Any person denied access to records may appeal that 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. The MTA centrally processes appeals for all of its constituent agencies. Therefore, we reviewed how timely the MTA responded to the 29 appeals it received for all its constituent agencies during our audit period, seven of which were related to NYC Transit. The number of business days the MTA took to respond to appeals was calculated using MTA's date-received stamp through the date of MTA's response letter.

When the MTA receives an appeal, it initially responds with an acknowledgment letter. The appeal acknowledgment letter is sent, on average, two days after receipt of the appeal. Subsequently, the MTA makes a determination on the appeal. The average time the MTA took to make a decision was 22 business days or 12 business days beyond the FOIL requirement. In fact, 22 of the 29 appeals we examined exceeded FOIL's ten-day requirement, ranging from 11 to 66 days. In addition, the appeal decision was still pending for one case at the time of our site visit, even though the appeal was received 30 days earlier.

MTA officials stated they could not make appeal decisions without obtaining and reviewing the original requests on file at the constituent agency, and it is difficult to gather and review these items within ten days. However, MTA officials reported they have issued a memorandum to the general counsels of all of the constituent agencies reminding them of the importance of dedicating necessary resources to enable prompt response to FOIL appeals.

FOIL also requires an agency to send copies of all appeals and subsequent determinations to COOG. We reviewed COOG appeal files and found three of the appeals received by the MTA were not in COOG's file. MTA

officials maintained one of these three appeals was submitted to COOG, but could not provide documentation. A second appeal was treated by the MTA as a first-time request, even though the appeal letter referenced a prior request that was not responded to. The third appeal was for a request originally denied by the MTA with a response of "record does not exist." MTA officials did not consider this second request as an appeal, but did respond a second time to the appealed without forwarding any information to COOG. MTA officials stated that they would take action to transmit all appeals to COOG.

Recommendations

1. Take action to help ensure that all FOIL requests are immediately forwarded by the mailroom to the FOIL officer to enable initial, formal action within five days.
2. Ensure that FOIL requests are date stamped when received.
3. Grant or deny access to FOIL requests within five business days, or if more time is needed, acknowledge the receipt of the request in writing, indicating the approximate date when the request will be granted or denied.
4. Maintain all correspondence documenting FOIL requests for six months after resolution of the request.
5. Correspond in writing to the requester when FOIL requests cannot be fulfilled within specified time frames, explaining why and providing a new time frame.
6. Allocate sufficient resources to ensure compliance with FOIL requirements, including timely responses.

7. Implement a system for MTA appeal officers to obtain information needed to make an appeal decision within FOIL-specified time frames.
8. Ensure that all appeal decisions and related correspondence are submitted to the Committee on Open Government as required by FOIL.

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, the MTA's NYC Transit, and covers the period January 1, 2005 through September 22, 2006. A complete listing of all 22 reports is included in Exhibit A.

To accomplish our objectives, we reviewed NYC Transit's internal policies and procedures pertinent to FOIL to determine compliance with FOIL, and we spoke with NYC Transit officials. NYC Transit received 410 FOIL requests for the period January 1, 2006 through August 31, 2006. We judgmentally selected 181 of those FOIL requests to be reviewed. Five of the 181 requests were withdrawn by the requesters. Therefore, our report evaluated NYC Transit's response to 176 FOIL requests. We reviewed the steps NYC Transit took to process the FOIL requests and evaluated their timeliness. We also reviewed the requested records to determine if the information requested was exempt under FOIL. We also reviewed the MTA's compliance with FOIL's requirement to respond to appeals within ten days and reviewed files at COOG to determine if the MTA properly reported appeal activity to COOG consistent with FOIL requirements.

NYC Transit provided us with a hard copy report of its database of FOIL requests. The report was listed by dates and names of the requesters from its database. NYC Transit also provided folders which included documentation of correspondence related to the FOIL requests. We compared the information on NYC Transit's database to the corresponding documentation in the FOIL folders. Our review found discrepancies between the dates in the FOIL folders and the dates recorded in NYC Transit's database. We concluded that the database was unreliable for our evaluation of NYC Transit's compliance with FOIL-specified time frames. Therefore, our evaluation of timeliness was calculated using NYC Transit's date-received stamp on the FOIL request. When no date stamp was found on the request, we used the date on the FOIL request letter to begin our calculation.

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.

REPORTING REQUIREMENTS

Draft copies of this report were provided to MTA and NYC Transit officials for their review and comments. Their comments were considered in preparing this report, and are included as Appendix A. Appendix B contains State Comptroller comments which address certain matters included in NYC Transit'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 Metropolitan Transportation 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, Dave Louie, W Sage Hopmeier, 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
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
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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Chairman



Metropolitan Transportation Authority

State of New York

August 31, 2007

Mr. Frank J. Houston
Audit Director
Office of the State Comptroller
Division of State Government Accountability
123 William Street – 21st Floor
New York, New York 10038

**Re: Report #2006-S-109 Metropolitan Transportation Authority – New York City
Transit Compliance with Freedom of Information Law Requirements**

Dear Mr. Houston:

This is in reply to your letter requesting a response to the above-referenced draft audit report.

I have attached for your information the comments of Mr. Howard H. Roberts, Jr., President, MTA New York City Transit and Mr. James B. Henly, General Counsel, MTA, which address this report.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard H. Roberts, Jr."

Attachment

The agencies of the MTA
MTA New York City Transit
MTA Long Island Rail Road

MTA Long Island Bus
MTA Metro-North Railroad

MTA Bridges and Tunnels
MTA Capital Construction



 New York City Transit

Memorandum

The following is in response to the audit report prepared by the Office of the State Comptroller ("Audit") and will address its various findings and recommendations. In late 2006, an Audit was commenced to review NYCT's compliance with the then-recent amendments to the Freedom of Information Law. The Audit, as it related to NYCT, focused on two relevant timetables: acknowledgment of receipt of a FOIL request within five business days and completion of a FOIL request within the time initially anticipated for production.¹ With respect to these two findings, NYCT takes issue with the finding that the five-day requirement for acknowledgment was exceeded, and disagrees with the underlying method of calculating that time period. The second finding—that FOIL responses were provided beyond the promised date in approximately 50% of the instances observed—is factually correct. In connection with this issue, NYCT is considering the extent to which the implications of recent amendments to FOIL compel the allocation of additional resources to this function.

2005 and 2006 Amendments To FOIL

In 2005 and 2006, several amendments to FOIL were enacted to ease the ability of the public to make FOIL requests, requiring both that agencies accept such requests electronically and that agencies project timetables for production of the documents if records could not be produced within a short time frame. In imposing requirements that would inevitably increase the volume of requests while simultaneously seeking a decrease in response times, these amendments have served to significantly impact the ability of large public agencies such as NYCT to cope with the mandates of FOIL.

¹ The Audit also reviewed MTA's compliance with FOIL appeals, the response to which is being drafted by MTA legal staff.

Volume Of Requests

Thus, while the Audit indicates that NYCT receives approximately 500 FOIL requests per year, a figure that was largely accurate prior to 2005, we have witnessed a substantial increase in requests in the face of the recent amendments. In the first six months of 2007, NYCT received 411 FOIL requests (of which 110 were received electronically), reflecting an annualized rate of more than 800 requests, a 60 percent increase over just two years ago.

**
See
Below

NYCT Disputes the Audit Finding of Late Acknowledgment of FOIL Requests

The Audit found that NYCT exceeded the five business day requirement for acknowledgement letters in connection with 37% of the FOIL requests reviewed. NYCT disputes this finding and believes its records reflect virtually 100% compliance with this requirement. This Audit finding is flawed because it is based upon a computation method utilizing the date upon which the requester's *letter is dated* or when it was *initially date stamped received*, whether in NYCT's mailroom or elsewhere. Neither is a reliable nor appropriate basis for measuring the start date for receipt of a FOIL request.

*
Comment
1

The date of the FOIL letter clearly provides no reliable information in connection with when the letter was mailed, much less received. Had the Audit relied on a postmarked date with an additional time allowance for receipt, its computations may have been more defensible.²

*
Comment
2

With respect to the initial agency date stamp, It is not unusual for FOIL requests to be incorrectly addressed by the sender, or otherwise not properly identified as FOIL requests, errors which inevitably cause a delay in the time between when a letter is initially received by NYCT's mailroom and when the FOIL Unit ultimately receives it. The New York Code of Rules and Regulations Chapter 21, Part 1001.3 governing Public Access to Records, indicates that an application to inspect or copy agency records is to be made to the agency secretary or his designee – at NYCT, that is the FOIL Unit within the Office of the Vice President, General Counsel and Secretary. NYCT does not insist on literal compliance with this directive, namely, that a FOIL request be properly addressed to the agency secretary. Rather, it strives to respond to the spirit of FOIL, by reviewing otherwise ambiguous letters to determine whether they are actually seeking "records" and, if so, re-routing the letters to the FOIL Unit, where they are then logged in and processed. Thus, the Audit's calculation of the start date of the five-day period is not in accordance with the requirements of the FOIL statute or NYCT's published rules describing how a FOIL request is to be made.

*
Comment
3

² In this connection, the New York Civil Practice Laws and Rules § 2103 (b) (2), addresses the issue of mailing and adds a five day period in which to calculate receipt. Whether by application of statute or of common sense, the mailing of documents requires additional days to be added to any date-related calculation of receipt.

NYCT will continue to measure the date of receipt by the FOIL Unit as the operative commencement date for calculation of the five-day acknowledgement period. Applying this formulation, only 6 of the 176 acknowledgement letters reviewed in the Audit were sent beyond the mandated five-day period.

*
Comment 3

Production of Records in the Anticipated Timeframe

The Audit reflects that, in 83 of the 168 requests audited, records were produced in the timeframe projected. At the time of the Audit, NYCT was still in the early stages of implementing the then-new amendments, which required the agency to project dates by which documents would be produced. It is, thus, hardly surprising that projections of response times would prove to be overly optimistic, even if the volume of requests had remained static.

*
Comment 4

FOIL requests place a significant administrative burden not only on personnel within the FOIL Unit (one full-time equivalent position was allocated to FOIL at the time of the Audit), but also upon administrative support personnel in the various operating and administrative departments who must research, locate, copy and produce records for this ever-expanding volume of requests, without a ready means of devoting additional staff resources to this task. Prior to release of the material, there is also a need for a thorough review of records by the FOIL unit to prevent the inadvertent disclosure of confidential, privileged, security-sensitive or similar material, which is statutorily exempt from disclosure. Prior to receipt of the Audit report, NYCT had undertaken to increase its resources allocated to the FOIL function through the creation of an additional position within the FOIL unit. In light of the continuing increase in FOIL requests, our own monitoring of the process and the results of the Audit, NYCT will be further evaluating the extent to which additional resources should be applied to the FOIL function.

With respect to the specific Audit recommendations:

Recommendations and Responses

Recommendation 1. Take action to ensure that all FOIL requests are immediately forwarded by the mailroom to the FOIL officer to enable initial, formal action within five days.

Response: NYCT concurs that all denominated FOIL requests must be immediately forwarded to the FOIL office. As noted, however, FOIL requests are often initially misdirected as a result of the failure of the requester either to appropriately address and/or identify the nature of the letter. The mailroom at 130 Livingston Street (the facility where the FOIL Unit is located) receives approximately 3,000 pieces of mail daily. Nevertheless, NYCT personnel will continue to make all reasonable efforts to route mislabeled mail or ambiguous letters to the FOIL unit as appropriate.

Recommendation 2. Ensure that FOIL requests are date stamped when received.

Response: While the FOIL database currently reflects the date a request is received by the FOIL Unit, NYCT will implement this suggestion in order to further ensure the accuracy of its records in this regard.

Recommendation 3. Grant or deny access to FOIL requests within five business days, or if more time is needed, acknowledge the receipt of the request in writing, indicating the approximate date when the request will be granted or denied.

Response: As noted, NYCT currently acknowledges close to 100% of all FOIL requests within five business days of receipt by the FOIL unit and provides an anticipated response date, as well as an explanation of the reasons why a particular response date has been chosen to address the requests.

*
Comment 5

Recommendation 4. Maintain all correspondence documenting FOIL requests for six months after resolution of the request.

Response: NYCT currently exceeds the retention period of this recommendation. Pursuant to the NYCT Record Retention Schedule, all FOIL files are retained for two years after resolution of the request.

*
Comment 6

Recommendation 5. Respond in writing to the requester when FOIL requests cannot be fulfilled within specified time frames, explaining why and providing a new time frame.

Response: NYCT's FOIL unit is continuing to review methods to enhance its compliance in light of the increase in volume of requests occasioned by the 2005 and 2006 amendments. It is currently exploring the use of a computer-generated report to flag when proposed response dates are approaching, which may assist in enabling notification to the requester.

Recommendation 6. Allocate sufficient resources to ensure compliance with FOIL requirements including a timely response.

Response: NYCT recognizes the underlying goals of FOIL in promoting the openness of government and enabling public access to documents. It strives to meet those objectives within the confines of what are well-publicized and ongoing budgetary constraints. As stated above, NYCT has allocated an additional FTE resource to the unit responsible for administering the FOIL function, and it anticipates that the additional position will prove of some benefit in acceleration of NYCT's ability to respond to the increased number of FOIL requests received. NYCT will also explore the feasibility of devoting additional resources to this function, both at the FOIL unit level and in the support and operating departments that must research, retrieve and produce records.

Memorandum



Metropolitan Transportation Authority

State of New York

Date August 10, 2007

To Peter Kalikow, Chairman

From James B. Henly, General Counsel *JBH*

Re Office of the State Comptroller Draft Audit of MTA New York City Transit FOIL Compliance Report 2006-S-109

The following is in response to above-referenced draft audit report by the Office of the State Comptroller (“Audit”) with regard to MTA New York City Transit’s (“NYCT”) responses to Freedom of Information Law (“FOIL”) requests. This memorandum responds to the portion of the Audit entitled “Denial of FOIL Requests,” which addresses the Metropolitan Transportation Authority’s (“MTA”) responses to FOIL appeals and to draft recommendations 7 and 8, which relate to the subject matter of FOIL appeals.

With respect to FOIL appeals, the Audit covered the period January 1, 2005 through September 22, 2006, involving a total sample of 29 FOIL appeals. The Audit states that the MTA’s responses to FOIL appeals during the period exceeded the FOIL ten-day requirement in 22 of 29 appeals, and that the MTA’s average time to make a decision was 12 days beyond the FOIL requirement.

As the cause of delay, the Audit notes “MTA officials stated they could not make appeal decisions without obtaining and reviewing the original requests on file at the constituent agency, and it is difficult to gather and review these items within ten days.” The audit’s draft recommendation #7 is to “[i]mplement a system for MTA appeal officers to obtain information needed to make an appeal decision within the FOIL-specified time frames.”

Catherine Rinaldi, the former General Counsel of the MTA, noted in her letter to the Office of the State Comptroller dated November 22, 2006, in response to a preliminary report dated November 17, 2006 on this subject (the “Response”), that MTA takes its legal obligations with respect to FOIL compliance very seriously and makes every effort to comply within the statutory period. As Ms. Rinaldi also noted in that Response, in order to decide an appeal properly, the MTA FOIL Appeals Officer must not only review the initial FOIL request from which an appeal is taken, but also the underlying agency documents which were determined at the agency level not to be subject to disclosure under the Freedom of Information Law. Only then can a proper determination of an appeal be made. In most appeals, the documents at issue are located at MTA’s affiliates and subsidiaries, and some appeals involve voluminous sets of documents. It may take a number of days, or even weeks, for the agencies to assemble the documents for

transmission to MTA Headquarters. In an effort to speed agency submission to MTA's FOIL Appeals Officer of the necessary underlying documents that are the subject of the FOIL appeals in question, Ms. Rinaldi sent a memorandum on November 22, 2006 to the general counsels of the agencies and affiliates, reminding them of the importance of responding promptly to document requests in connection with FOIL appeals. In addition, MTA's FOIL Appeals Officer will over the next several quarters track in connection with each FOIL appeal the date of receipt of the documents that are the subject of a FOIL appeal from MTA affiliates and subsidiaries, so that MTA can assess the sufficiency of our efforts to facilitate the making of appeal decisions within the FOIL-specified time frames.

The Audit further notes that FOIL requires an agency to send copies of all appeals and subsequent determinations to the Committee on Open Government ("COOG"). The Audit states that the State Comptroller's representatives reviewed COOG appeal files and noted that three of the appeals received by the MTA were not in the COOG files. As Catherine Rinaldi stated in the Response, one of the three appeals was mailed to COOG. As further stated in the Response, the MTA did not consider the other two letters to be FOIL appeals, since they were not appeals from denials of documents. In one instance, the MTA did not receive the initial request, and in the other instance, the MTA responded to the initial requester that it did not have any responsive documents.

The Audit's draft recommendation #8 states, "Ensure that all appeal decisions and related correspondence are submitted to the Committee on Open Government as required by FOIL." Since receipt of the initial preliminary report of audit findings (Audit Number 2006-S-74, dated November 17, 2006), the MTA has transmitted its correspondence related to all appeals to COOG by certified mail, return receipt requested, and it has transmitted all letters designated as "appeals" to COOG in order to avoid any confusion.

*
Comment
7

* See State Comptroller's Comments, page 16

APPENDIX B - STATE COMPTROLLER'S COMMENTS

1. As indicated in our Audit Scope and Methodology, our tests found that the information in NYC Transit's FOIL database, upon which officials base their assertion of virtually 100-percent compliance, is unreliable. In fact, we found an average difference of eight days between the time a request was actually date-stamped and the received date recorded in the database.
2. Only 8 of the 65 responses we considered as late were based on the date of the request letter and only 2 of these would be considered timely if another 5 days were allowed for mailing. Even if all eight items were eliminated from our sample, NYC Transit would still have failed to respond timely to more than one-third of the requests reviewed.
3. According to the Committee on Open Government, which is charged with interpreting the requirements of the FOIL Law, the five-day acknowledgement period begins when the entity receives the request. The Law makes no provision for additional time due to the complexity of the organization or the inefficiency of its internal mail delivery system. Therefore, the calculation should begin when an agency's mailroom receives the request, rather than when received by the FOIL office.
4. We are concerned that officials would indicate that, at the time of our audit in October 2006, they were still in what they term to be the early stages of implementing the legislative changes requiring them to project response dates when acknowledging FOIL requests.

These changes became effective in May 2005 and the earliest FOIL request included in our review was not received until at least eight months later. This statement is a further indication that greater attention and emphasis needs to be directed to timely compliance with FOIL requirements.

5. As discussed in our report and in Comment 1, NYC Transit's assertion of full compliance is based on erroneous data. In fact, our audit shows that NYC Transit is late in acknowledging FOIL requests at least one-third of the time.
6. NYC Transit's policies may require records to be retained; but our audit shows that, in practice, these policies are not being complied with or enforced. NYC Transit officials were unable to locate documentation for the disposition of three FOIL requests that had been received by them less than three months prior to our site visit. If these policies were in effect, these records should have been on file.
7. Officials reiterate that they did not consider two of the three requests cited in our report to be appeals. However, FOIL states that any person who is denied access to records may appeal that decision in writing. Both of these requests referenced prior FOIL requests, with one request referencing a prior denial. These two requests therefore constitute appeals and should have been processed as such, with their determinations forwarded to COOG, as required by FOIL.